MUTUAL RECOGNITION AND INDIVIDUAL RIGHTS

Did the Court get it Right?

Wouter Van Ballegooij* and Petra Bárd**

ABSTRACT***

This article focuses on the case-law of the Court of Justice and the dialogue it conducted with national apex courts when seeking to reconcile the 'free movement of judicial decisions', as facilitated by mutual recognition, and individual rights in its interpretation of the Framework Decision on the European Arrest Warrant. The present analysis shall concentrate on the recent judgment in Aranyosi and Căldăraru.

The article concludes that for the sake of legal certainty, more guidance should be provided under EU legislation to make sure that judicial cooperation does not lead to disproportionate intrusions on individual rights or even violations of absolute rights. This should be accompanied by a permanent mechanism for monitoring and addressing Member State compliance with democracy, the rule of law and fundamental rights.

Ultimately, however, the courts will have to play a crucial role in carving out and applying fundamental rights exceptions. In providing guidance to national courts, the Court of Justice needs to further clarify that the application of mutual recognition and fundamental rights exceptions are not in conflict and show proper deference to the norms developed by the European Court of Human Rights and national (constitutional) courts.

Keywords: European Arrest Warrant; fundamental rights; mutual recognition; mutual trust; primacy of EU law; proportionality

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1. INTRODUCTION[1]

The present article discusses the mutual recognition of judicial decisions in criminal matters from an individual rights perspective[2] with the aim of answering the question: what are its consequences for individuals, in light of their rights under primary and secondary EU law? It focuses on the judgments of the Court of Justice in which it has sought to reconcile the free movement of judicial decisions, as supported by mutual recognition, with individual rights by interpreting the Framework Decision on the European Arrest Warrant (FD EAW).[3] Particular emphasis shall be put on the recent judgments in *Aranyosi* and *Căldăraru*.[4] Has the Court found the right approach from a doctrinal perspective?[5]

2. MUTUAL RECOGNITION AND INDIVIDUAL RIGHTS

The principle of mutual recognition as laid down in Article 82(1) TFEU[6], was introduced by the European Council in 1999 as a 'cornerstone' of judicial cooperation contributing to the Union becoming an area of freedom, security and justice.[7] In 2000 the Commission further defined the concept as meaning that a judicial decision once taken in one Member State should automatically be accepted in all other Member States, and have the same or at least similar effects there.[8] Under the FD EAW, mutual recognition is applied to extradition procedures between the Member States. This resulted in the establishment of a surrender procedure based on a standard form (European Arrest

1 The authors would like to thank James MacGuill and Peter McNamee for their insightful comments from a practice oriented perspective.

2 For a more general discussion of mutual recognition in European Law see Wouter van Ballegooij, *The Nature of Mutual Recognition in European Law, Re-examining the notion from an individual rights perspective with a view to its further development in the criminal justice area*, Intersentia Antwerp: 2015.

3 Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, O. J. L 190, 18/07/2002, pp. 1–20.

4 Judgment of the Court (Grand Chamber) of 5 April 2016, *Pál Aranyosi and Robert Căldăraru v Generalstaatsanwaltschaft Bremen*, Requests for a preliminary ruling from the H*anseatisches Oberlandesgericht in Bremen*, Joined Cases C-404/15 and C-659/15 PPU, not yet published.

5 A variation on the question is whether the Council got it wrong in extending mutual recognition to the criminal justice area without requiring the comparability of the underlying national law. See S. Peers, 'Mutual recognition and criminal law in the European Union: Has the Council got it wrong?', in *Common Market Law Review* Vol. 41, pp. 5–36, 2004.

6 Article 82(1) TFEU: '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 in the areas referred to in paragraph 2 and in Article 83.'

7 Presidency Conclusions-Tampere European Council, 15–16/10–1999, Bull. 10/1999, point 33.

8 Communication from the Commission to the Council and the European Parliament-Mutual recognition of Final Decisions in criminal matters, COM (2000) 0495 final, p. 2.

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Warrant),[9] with a limited number of grounds for non-execution listed in Articles 3 and 4 of the FD EAW and the conditions for execution laid down in Article 5.

In accordance with Article 1(2) FD EAW, judicial authorities must 'execute any European Arrest Warrant on the basis of the principle of mutual recognition and in accordance with the provisions of' the FD EAW. In this context the Court of Justice interpreted the principle of mutual recognition as meaning that 'the Member States are in principle obliged to give effect to a European Arrest Warrant.'[10]

The application of the principle of mutual recognition to intra-EU extradition procedures also resulted in a deviation from the traditional allocation of (Member) States' responsibilities in protecting the fundamental rights of the individual concerned.[11] Applying European Court of Human Rights case law, which barred extradition in cases where extradition threatens to result in a 'flagrant breach of the European Convention on Human Rights, without an effective remedy in the requesting State',[12] was no longer deemed appropriate. Instead, the FD EAW mandates that trust be put in the decisions of the issuing judicial authority, vindicated by reference to the joint obligation of Member States to comply with fundamental rights obligations referred to under Article 6 TEU.[13] The Commission furthermore argued that EU citizens enjoying free movement should also face prosecution and sentencing wherever they have committed an offence within the territory of the European Union.[14] As a result, the 'free movement of judicial decisions' as subsequently referred to in recital 5 of the FD EAW[15] often gives rise to the forced movement of suspects and convicts.[16]

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9 Article 1(1) FD EAW describes it as 'a judicial decision issued by a Member State with a view to the arrest and surrender by another Member State of a requested person for the purposes of conducting a criminal prosecution or executing a custodial sentence or detention order.'

10 Case C-237/15 PPU, *Lanigan*, [2015] ECR 474, para. 36; Judgment in *Aranyosi*, para. 79.

11 On this point see M. Thunberg Schunke, *Whose responsibility? A Study of Transnational Defence Rights and Mutual Recognition of Judicial Decisions within the EU*, Antwerp: Intersentia 2013.

12 ECtHR of 26.06.1989, Case No. 1/1989/161/217, *Soering v UK*, barring extradition in case extradition threatens to result in a flagrant breach of the European Convention on Human Rights, without an effective remedy in the requesting State.

13 FD EAW, recital 10: 'The mechanism of the European arrest warrant is based on a high level of confidence between Member States. Its implementation may be suspended only in the event of a serious and persistent breach by one of the Member States of the principles set out in Article 6(1) of the Treaty on European Union, determined by the Council pursuant to Article 7(1) of the said Treaty with the consequences set out in Article 7(2) thereof.'; Article 1(2) FD EAW: 'Member States shall execute any European arrest warrant on the basis of the principle of mutual recognition and in accordance with the provisions of this Framework Decision.'

14 Explanatory memorandum to the Proposal for the Framework Decision on the European Arrest Warrant, COM (2002) 0173 final.

15 FD EAW, recital 5: 'Traditional cooperation relations which have prevailed up till now between Member States should be replaced by a system of *free movement of judicial decisions* in criminal matters, covering both pre-sentence and final decisions, within an area of freedom, security and justice.' (emphasis added).

16 W. van Ballegooij, *The Nature of Mutual Recognition in European Law, Re-examining the notion from an individual rights perspective with a view to its further development in the criminal justice area*, Intersentia Antwerp: 2015, p. 42.

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The implementation of the FD EAW may only be suspended in the event a Member State seriously and persistently breaches the principles set out in Article 2 TEU and sanctioned by the Council pursuant to Article 7 TEU with the consequences set out in that provision.[17] This is consequential, since judicial cooperation in criminal matters, where fundamental rights are directly at stake, cannot operate smoothly where there are serious concerns regarding, for instance, the independence of judicial authorities. At the same time Article 1(3) FD EAW states that it '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.' Backed up by a number of recitals,[18] the wording of this provision is nevertheless far from clear. Is it meant to be an implicit condition for the execution of a European Arrest Warrant, or is it merely a confirmation of Member States' obligations under the Treaties, violations of which must be addressed by infringement procedures or ultimately the procedure enshrined in Article 7 TEU? This uncertainty is confirmed by the diverging implementation of Article 1(3) FD EAW by the Member States, with a number of Member States explicitly implementing it as a ground for non-execution.[19]

Perceived tensions between the application of mutual recognition to extradition procedures and the protection of individual rights were pointed to from the moment of the adoption of the FD EAW.[20] Scholarly literature has since sought to determine

17 FD EAW, recital 10.

18 FD EAW, recital 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. Nothing in this Framework Decision may be interpreted as prohibiting refusal to surrender a person for whom a European arrest warrant has been issued when there are reasons to believe, on the basis of objective elements, that the said arrest warrant has been issued for the purpose of prosecuting or punishing a person on the grounds of his or her sex, race, religion, ethnic origin, nationality, language, political opinions or sexual orientation, or that that person's position may be prejudiced for any of these reasons. This Framework Decision does not prevent a Member State from applying its constitutional rules relating to due process, freedom of association, freedom of the press and freedom of expression in other media.'; recital 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.'

19 This was originally condemned by the Commission. However, its third implementation report strikes a different tone. See Report from the Commission to the European Parliament and the Council on the implementation since 2007 of the Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States {SEC(2011) 430 final} COM (2011) 175, p. 7: 'It is clear that the Council Framework Decision on the EAW (which provides in Article 1(3) that Member States must respect fundamental rights and fundamental legal principles, including Article 3 of the European Convention on Human Rights) does not mandate surrender where an executing judicial authority is satisfied, taking into account all the circumstances of the case, that such surrender would result in a breach of the requested person's fundamental rights arising from unacceptable detention conditions.'

20 S. Alegre and M. Leaf, *European Arrest Warrant, A Solution Ahead of its Time?*, London: Justice 2003.

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the exact implications of mutual recognition, and attempts have been made to formulate conditions for – or limits to – its application in order to alleviate its perceived impact on individuals and Member States. The dilemma has been described as a need to avoid as far as possible double checks and controls, but also blind trust and the 'deresponsibilisation' of competent executing authorities.[21] A number of academics have argued that the application of mutual recognition has gone too far in the absence of equivalent standards, practices and national judicial systems more generally.[22] A *Manifesto on European Criminal Procedure Law* produced by scholars from ten Member States in 2013 called for 'limitations' of mutual recognition by means of a proportionality test where the criminal proceedings could risk violating the legitimate interests of either the individual or the Member State concerned.[23] The underlying issue is whether a single legal area actually existed or not. If it did not, but EU legislators nevertheless pretended otherwise, another branch, namely the judiciary must remedy the problems arising from such a misconception. Indeed, national apex courts, such as the German Federal Constitutional Court (GFCC), consistently and continuously insisted on their power to subject pieces of EU law to constitutional scrutiny,[24] most recently in the form of identity control.[25]

The Court of Justice has insisted on mutual recognition based on mutual trust in the criminal justice area.[26] In the area of asylum, however, it held that the obligation to return asylum seekers to the Member State of first entry may not be based on the 'conclusive presumption' that fundamental rights will be observed (mutual trust), particularly in view of the Member States' obligation under Article 4 of the Charter of Fundamental Rights of the European Union (Charter) to prevent inhuman or

21 A. Weyembergh, 'Transverse Report on Judicial Control in Cooperation in Criminal Matters: The Evolution from Traditional Judicial Cooperation to Mutual Recognition', in K. Ligeti (Ed.), *Toward a Prosecutor for the European Union, A Comparative Analysis (Volume 1)*, Oxford: Hart Publishing 2013, pp. 945–985 at p. 972.

22 Peers, *op. cit. (Mutual recognition)*; E. Guild (Ed), *Constitutional Challenges to the European Arrest Warrant*, Nijmegen: Wolf, 2006; V. Hatzopoulos, 'With or Without You: Judging Politically in the Area of Freedom, Security and Justice, 33 *European Law Review*, 2008, p. 44–65; V. Mitsilegas 'The Limits of Mutual Trust on Europe's Freedom, Security and Justice', 31 *Yearbook of European Law*, p. 319–372.; E. Guild, L. Marin (Eds), Still not resolved?: Constitutional Issues of the European Arrest Warrant, Nijmegen: Wolf, 2009.

23 European Criminal Policy Initiative, *Manifesto on European Criminal Procedure Law*, ZIS 2013, 430, available at: www.zisonline.com.

24 GFCC, BVerfGE 113, 273, 2 BvR 2236/04, Judgment of 18 July 2005; BVerfGE 123, 267, 2 BvE 2/08, Judgment of 30 June 2009.

25 GFCC, Order of 15 December 2015, 2 BvR 2735/14.

26 Case C-303/05, *Advocaten voor de Wereld*, para. 57; Court of Justice Case C-396/11, *Radu* [2013] ECR 39, para. 34: 'Framework Decision 2002/584 thus seeks, by the establishment of a simplified and more effective system for the surrender of persons convicted or suspected of having infringed criminal law, to facilitate and accelerate judicial cooperation with a view to contributing to the objective for the Union to become an area of freedom, security and justice by basing itself on the high degree of confidence which should exist between Member States.'

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degrading treatment or punishment.[27] The ECtHR went one step further in ruling that in a particular case (concerning a family): rather than requiring evidence of a systemic deficiency, the suspension of a transfer could be justified, in the absence of prior individualised guarantees regarding the specific facility of destination.[28]

With reference to ECtHR decisions regarding detention conditions in certain Member States, UK and German courts have already applied this approach to judicial cooperation in criminal matters by demanding assurances in relation to the detention conditions in certain issuing Member States and refusing surrender in cases where they were not satisfied with the specific guarantees provided.[29] The Court of Justice however did not take up Advocate General Sharpston's invitation in *Radu* to interpret Article 1(3) FD EAW in a manner that would allow the executing judicial authority to refuse surrender 'where it is shown that the human rights of the person whose surrender is requested have been infringed, or will be infringed, as part of or following the surrender process.'[30]

European co-legislators have since introduced a proportionality check, a consultation process between the executing and issuing judicial authority and explicit grounds for non-execution based on fundamental rights in the 2014 Directive on the European Investigation Order,[31] and in the same year the European Parliament, in a

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27 Joined cases C-411/10, *NS v. Secretary of State for the Home Department* and case C-493/10, *M.E. and Others v. Refugee Applications Commissioner, Minister for Justice and Law Reform* [2011] ECR 13905; ECtHR of 21 January 2011, Application No. 30696/09, *MSS v Belgium and Greece*.

28 ECtHR of 4 November 2014, Application No. 29217/12, *Tarakhel v Switzerland*. Valsamis Mitsilegas showed how this decision is at odds with Opinion 2/13, which grants lower protection to individuals. V. Mitsilegas, 'The Symbiotic Relationship Between Mutual Trust and Fundamental Rights in Europe's Area of Criminal Justice,' in New Journal of European Criminal Law Vol. 6, Issue 4, 2015, pp. 457–480, pp. 473–474.

29 High Court of Justice in Northern Ireland Queen's Bench Division decision of 16 January 2013, *Lithuania v Liam Campbell* [2013] NIQB 19, based on ECtHR of 18 November 2008 Application No. 871/02, *Savenkovas v Lithuania*; High Court of England and Wales, Queens Bench Division decision of 11 March 2014, *Badre v Italy* [2014] EWHC 614 (Admin), based on ECtHR of 8 January 2013, Application No. 43517/09, *Torregiani and others v Italy*; High Court of England and Wales Queens Bench Division of 30 July 2014, *Razvan-Flaviu Florea v Romania* [2014] EWJC 2528 (Admin), *Vasilev v Bulgaria*, App 10302/05, *Ilia v Greece* [2015] EWHC 547 (Admin) See also *GS & Ors v Central District of Pest Hungary & Ors*, Court of Appeal – Administrative Court, 21 January 2016, [2016] EWHC 64 (Admin), based on ECtHR of 10 March 2015 in Case Nrs. 14097/12, 45135/12, 73712/12, 34001/13, 44055/13 and 64586/13, *Varga and others vs Hungary*. In this case lawyers of the convicts together with Fair Trials, are attempting to determine if assurances given by the Hungarian authorities with regard to the amount of space afforded to each detainee are being enforced; OLG Stuttgart, Beschl. V. 21 April 2016–1 Ausl. 321/15, BeckRS 2016, 08585, OLG Dusseldorf, Beschl. V. 14 December 2015, Az. III-3 AR 15/15.

30 Opinion of AG Sharpston in case C-396/11, *Radu*, para. 97; The Court limited its approach to formulating an answer to the question whether the fact that the issuing authority did not hear the requested person before issuing the European arrest warrant posed a violation of its fair trial rights, see Case C-396/11, *Radu* [2013] ECR 39, paras. 28–31.

31 Directive 2014/41/EU of 3 April 2014 regarding the European Investigation Order in criminal matters, O.J. (L 130) 1 of 1 May 2014.

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resolution based on a 'legislative initiative report'[32], called for similar grounds to be introduced in the FD EAW and more generally, in respect of other measures implementing mutual recognition in the area of judicial cooperation in criminal matters.[33] The European Parliament requested that the Commission submit legislative proposals for *inter alia*:

- a proportionality check when issuing mutual recognition decisions, based on all the relevant factors and circumstances such as the seriousness of the offence, whether the case is trial-ready, the impact on the rights of the requested person, including the protection of private and family life, the cost implications and the availability of an appropriate less intrusive alternative measure;
- a standardised consultation procedure whereby the competent authorities in the issuing and executing Member State can exchange information regarding the execution of judicial decisions such as on the assessment of proportionality[34] and specifically in regard to the European Arrest Warrant to ascertain trial-readiness; and
- a mandatory refusal ground where there are substantial grounds to believe that the execution of the measure would be incompatible with the executing Member State's obligations in accordance with Article 6 TEU and the Charter, notably Article 52(1) thereof with its reference to the principle of proportionality.[35]

The European Parliament also called on the Commission to explore the legal and financial means available at Union level to improve standards of detention, including legislative proposals on the conditions of pre-trial detention.[36] So far, the Commission or a group of Member States (which also have the possibility to propose laws in this area) have not proposed EU legislation in line with the EP's demands. The Commission did not see the need to introduce an explicit exception given its position

32 Article 225 TFEU: 'The European Parliament may, acting by a majority of its component Members, request the Commission to submit any appropriate proposal on matters on which it considers that a Union act is required for the purpose of implementing the Treaties. If the Commission does not submit a proposal, it shall inform the European Parliament of the reasons.'

33 European Parliament resolution of 27 February 2014 with recommendations to the Commission on the review of the European Arrest Warrant (2013/2109 (INL)), P7_TA-PROV(2014)0174; M. del Monte, *Revising the European Arrest Warrant, European Added Value Assessment accompanying the European Parliament's Legislative-own-initiative report (rapporteur: Baroness Ludford MEP)*, PE 510.979; Annex I, A. Weyembergh with the assistance of I. Armada and C. Brière, *Critical Assessment of the Existing European Arrest Warrant Framework Decision*; Annex II A. Doobay, *Assessing the Need for Intervention at EU level to Revise the European Arrest Warrant Framework Decision*.

34 Cf. Directive 2014/41 on the European Investigation Order, Article 6(3): 'Where the executing authority has reason to believe that the condition referred to in paragraph 1 have not been met, it may consult the issuing authority on the importance of executing the EIO; After that consultation the issuing authority may decide to withdraw the EIO; W. van Ballegooij, 'Better regulation in European Criminal Law-assessing the contribution of the European Parliament', in EUCRIM, 04/2014, p. 107.

35 Para. 7.

36 Para. 17.

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that the primacy of fundamental rights is already underlined in Article 1(3) FD EAW.[37]

In its subsequent Opinion 2/13 on the draft accession agreement of the EU to the European Convention on Human Rights (ECHR), the Court of Justice highlighted the principle of mutual trust between Member States, which forms the cornerstone of the area of freedom, security and justice. The Court of Justice interpreted this as meaning that a Member State shall presume all other Member States to be in compliance with EU law including the respect for fundamental rights. To be fair, it shall be noted that the Court of Justice also referred to 'exceptional circumstances', which would warrant deviating from the mutual trust principle.[38] The level of scrutiny should certainly be lower than a 'thorough and individualised examination' of the fundamental rights situation of the person concerned as demanded by the ECtHR,[39] since one of the reasons for finding against the compatibility of the accession agreement with the Treaties was that requiring the same test to be applied by Member States vis-à-vis other Member States and third countries undermined both mutual trust and the autonomy of EU law.[40] The exact nature of these 'exceptional circumstances' however was left open by Opinion 2/13. In *Aranyosi* and *Căldăraru* the Court of Justice had an opportunity to clarify what those exceptional circumstances might be and what they would entail for the role of the judicial authorities, and the individual subject to a surrender procedure.

3. THE COURT OF JUSTICE IN *ARANYOSI* AND *CĂLDĂRARU*

Mr. Aranyosi is a Hungarian citizen. German authorities received two European Arrest Warrants for his prosecution in relation to two offences of forced entry and

37 COM (2011) 175, p. 7; The (general) response by the European Commission, adopted by the Commission on 28 May 2014, and confirmed by Justice Commissioner Věra Jourová during the hearing procedure by the European Parliament in October 2014 was that proposing legislative change would be premature in the light of the increased enforcement power of the Commission after the end of the transitional period; the development of other mutual recognition instruments; and the ongoing work 'to further improve respect for fundamental rights by providing common minimum standards for procedural rights of suspects and accused persons'; See Follow up to the European Parliament resolution with recommendations to the Commission on the review of the European arrest warrant adopted by the Commission on 28 May 2014, SP(2014)447 available at www.europarl.europa.eu/oeil/popups/ficheprocedure.do?reference=2013/2109(INL)&l=en#tab-0.

38 Court of Justice of the European Union, Opinion 2/13 of 18 December 2014, not yet published. Opinion pursuant to Article 218(11) TFEU – draft international agreement – Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms – Compatibility of the draft agreement with the EU and FEU Treaties, para. 192.

39 ECtHR of 4 November 2014, Application No. 29217/12, *Tarakhel v Switzerland*, para. 104.

40 Opinion 2/13, para. 194.

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theft.[41] Mr. Căldăraru is a Romanian citizen. German authorities received a European Arrest Warrant for the execution of a sentence of 1 year and 8 months imposed on him for driving without a licence.[42] The public prosecutors' office of Bremen asked where Mr. Aranyosi and Mr. Căldăraru would be detained if surrendered, pointing to the fact that certain Hungarian and Romanian detention facilities fail to meet European minimum standards.[43] As neither of the issuing judicial authorities provided binding assurances that the detention conditions would be compliant with European standards, the Higher Regional Court of Bremen wondered whether surrender should be permissible in accordance with paragraph 73 of the German Law on international mutual legal assistance in criminal matters[44] and Article 1(3) FD EAW.[45] The Higher Regional Court of Bremen requested that the reference in the *Căldăraru* case be dealt with under the urgent preliminary ruling procedure. Given their connection, the *Aranyosi* and *Căldăraru* cases were joined. The Higher Regional Court of Bremen referred the following questions for a preliminary ruling (as combined in the AG opinion):

1) Is Article 1(3) of the Council Framework Decision of 13 June 2002 on the European Arrest Warrant and the surrender procedures between Member States (2002/584/JHA) to be interpreted as meaning that extradition for the purposes of prosecution (case C-404/15) or surrender for execution of a sentence (case C-659/15 PPU) is impermissible where there are strong indications that detention conditions in the issuing Member State infringe the fundamental rights of the person concerned and the fundamental legal principles as enshrined in Article 6 of the Treaty on European Union, or is it to be interpreted as meaning that, in such circumstances, the executing Member State can or must make the decision on the permissibility of extradition conditional upon an assurance that detention conditions are compliant? To that end, can or must the executing Member State lay down specific minimum requirements applicable to the detention conditions in respect of which an assurance is sought?
2) Are Articles 5 and 6(1) of the Council Framework Decision of 13 June 2002 on the European Arrest Warrant and the surrender procedures between Member States (2002/584/JHA) to be interpreted as meaning that the issuing judicial authority is also

41 Judgment in *Aranyosi*, para. 29–31.

42 *Id* at para. 48.

43 *Id* at para. 34, 43, 60; ECtHR of 10 March 2015 in Case Nrs. 14097/12, 45135/12, 73712/12, 34001/13, 44055/13 and 64586/13, *Varga and others vs Hungary*; ECtHR of 24 July 2012 in Case Nr. 35972/05, *Stanciu v Romania*.

44 Judgment in *Aranyosi*, para. 27, 42, 45, 5 and 62 referring to para. 73 of the German Law on international mutual legal assistance in criminal matters: 'In the absence of a request to that effect, mutual legal assistance and the transmission of information shall be unlawful if contrary to the essential principles of the German legal system. In the event of a request under Parts VIII, IX and X, mutual legal assistance shall be unlawful if contrary to the principles stated in Article 6 TEU.'

45 FD EAW 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.'; Judgment in *Aranyosi* paras. 46, 63.

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entitled to give assurances that detention conditions are compliant, or do assurances in this regard remain subject to the domestic rules of competence in the issuing Member State?[46]

3.1. OPINION ADVOCATE GENERAL YVES BOT OF 3 MARCH 2016

According to Advocate General Bot Article 1(3) FD EAW has to be interpreted as not constituting a ground for non-execution of a European Arrest Warrant based on the risk of an infringement, in the issuing Member State, of the fundamental rights of the surrendered person.[47]

In his view, Article 1 FD EAW merely confirms the principle of mutual trust as underlined by the Court in Opinion 2/13.[48] Hence, Article 1(3) FD EAW should not be read as an exception to the general rule of execution of the European Arrest Warrant laid down in Article 1(2) FD EAW.[49] AG Bot recalled that the introduction of the principle of mutual recognition, as now laid down in Article 82 TFEU was meant to achieve an area of freedom, security and justice without insisting on prior harmonisation. By necessity mutual recognition requires that 'the Member States have mutual trust in their criminal justice systems and that each of them recognises the criminal law in force in the other Member States, even when the outcome would be different if its own national law were applied.'[50] The Advocate General recalled that in Opinion 2/13 the Court defined mutual trust as requiring each of the Member States to consider, save in exceptional circumstances, that all other States comply with Union law, and particularly with the fundamental rights recognised by such law. Accordingly, it precluded Member States from checking whether another Member State has actually complied, in a specific case, with the fundamental rights safeguarded by the Union, because that '[would upset] the underlying balance of the EU'.[51]

According to AG Bot interpreting Article 1(3) FD EAW otherwise would create an extra ground for non-execution besides the situation in which there would be a serious and persistent breach of the principles set out in Article 6(1) TEU by one of the Member States. Such a determination and consequent potential suspension of the European Arrest Warrant mechanism should ultimately be made in accordance with the procedure foreseen under Article 7 TEU, not by the executing judicial authority in

46 *Id* at para. 46, 63; Conclusion of Advocate General Y. Bot of 3 March 2016 in the joined cases C-404/15 and C-659/15 PPU, *Pál Aranyosi* (C-404/15) *and Robert Căldăraru* (C-659/15 PPU), para. 37.

47 AG Opinion in *Aranyosi* paras. 68–93, 183.

48 *Id* at para. 75.

49 *Id* at para. 78.

50 *Id* at para. 98.

51 *Id* at para. 108, 109; Opinion 2/13, paras 191, 194.

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an individual case.[52] His reading also excluded the possibility of this authority relying on provisions of national law, including constitutional provisions, which would provide a higher level of protection of fundamental rights than that deriving from the FD EAW.[53]

However, AG Bot sees no obligation to execute the European Arrest Warrant where doing so would lead to disproportionate results.[54] In 'exceptional circumstances', the executing authority can 'weigh up the rights of the surrendered person against the requirements of the protection of the rights and freedoms of others'.[55] This requires an individual assessment. Prison conditions may be disproportionate in light of the need to achieve social rehabilitation and avoid excessive punishment. In the case of suspects, one should add the presumption of innocence as a further factor.[56] Although left unmentioned in the FD EAW, according to the Advocate General, the proportionality principle applies since it is a general principle of Union law.[57] A proportionality assessment by the issuing judicial authority is also foreseen in the European Handbook on how to issue a European Arrest Warrant[58] and called for in the European Parliament's Resolution with recommendations addressed to the Commission on the review of the European Arrest Warrant.[59]

In the event that the executing authority has reliable factual information of structurally deficient detention conditions it should be able to assess, in light of the specific circumstances of the case, whether the surrender of the requested person is likely to expose him to disproportionate detention conditions.[60] According to AG Bot this could be done via the competent national authorities. For execution of the punishment should not be more severe than the execution of the sentence under normal circumstances. Prosecution should be proportionate to the need to ensure that the requested person does not evade the course of justice.[61] In doubt preliminary questions must to be referred to the Court of Justice.[62] AG Bot realised that this would *de facto* turn the CJEU into a human rights court, but he pointed out that this was also due to the 'damaging failure to act, on the part of both of the Member States and of the Union institutions'.[63] The Advocate General reiterated that it 'should be

52 Conclusion of Advocate General Y. Bot of 3 March 2016 in the joined cases C-404/15 and C-659/15 PPU, *Pál Aranyosi* (C-404/15) *and Robert Căldăraru* (C-659/15 PPU), para. 87.

53 *Id* at paras. 117–119.

54 *Id* at paras. 131–132.

55 *Id* at para. 135.

56 *Id* at paras. 137–146.

57 *Id* at paras. 137–146.

58 Contained in Council doc. 17195/1/10 of 17 December 2010.

59 *Id* at paras. 151–152.

60 *Id* at paras. 168–170.

61 *Id* at para. 167.

62 *Id* at para. 167.

63 *Id* at paras. 175–176.

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unnecessary to point out that each of the Member States is required to ensure respect for fundamental rights under Article 6 TEU' in accordance with the principles of mutual trust and sincere cooperation.[64] Member States need to take all necessary measures, including necessary reforms of criminal policy. EU institutions have to take the necessary steps to 'reinforce the mechanism of the European Arrest Warrant', notably by improving detention conditions based on Article 82 TFEU.[65]

3.2. JUDGMENT OF THE COURT (GRAND CHAMBER) OF 5 APRIL 2016

The Court did not follow AG Bot's interpretation of Article 1(3) FD EAW. It reiterated that both the principle of mutual trust between the Member States and the principle of mutual recognition are, in EU law, of fundamental importance given that they allow an area without internal borders to be created and maintained. More specifically, the principle of mutual trust requires, particularly with regard to the area of freedom, security and justice, each of the states, save in exceptional circumstances, to consider all the other Member States to be compliant with EU law and particularly with the fundamental rights recognised by EU law.[66] The Court referred to its earlier case-law in accordance with which the principle of mutual recognition as referred to in recital 6 and Article 1(2) FD EAW, is defined as meaning that Member States are 'in principle obliged to give effect to a European Arrest Warrant.'[67]

The executing judicial authority may refuse to execute such a warrant only in the cases of mandatory non-execution, exhaustively listed in Article 3 FD EAW, or in cases of optional non-execution, laid down in Articles 4 and 4a FD EAW. Moreover, the execution of the European Arrest Warrant may be made subject to one of the conditions spelled out in Article 5 FD EAW.[68] The Court furthermore acknowledged the need to address systemic violations of fundamental rights through the Article 7 TEU procedure,[69] but also pointed to 'exceptional circumstances' limiting mutual recognition and mutual trust as already referred to in its Opinion 2/13.[70]

Article 1(3) FD EAW states that the FD does not affect the obligation to respect fundamental rights and principles as laid down in the Charter.[71] The Court recalled that Article 51(1) of the Charter demands that Member States respect the Charter when implementing EU law, including Article 4 regarding the prohibition of inhuman

64 *Id* at para. 177.

65 *Id* at paras. 181–182.

66 Judgment in *Aranyosi*, paras. 46, 63; AG Opinion in *Aranyosi*, para. 78.

67 Judgment in *Aranyosi*, para. 79.

68 *Id* at para. 80.

69 *Id*. at para. 81.

70 *Id*. at para. 82.

71 *Id*. at para. 83.

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or degrading treatment or punishment.[72] Article 4 of the Charter concerns an absolute right corresponding to Article 3 ECHR, closely connected with human dignity, being a fundamental value of the Union and its Member States.[73]

The Court established a two-prong-test for checking the fundamental rights situation in and the potential risks of human rights violations by the issuing Member State. As a first step, the executing judicial authority must assess whether there are deficiencies in general. When doing so it must consider objective, reliable, specific and properly updated information with respect to detention conditions in the issuing Member State that demonstrates that there are deficiencies, which may be systemic or generalised, or which may affect certain groups of people, or which may affect certain places of detention.[74] Such pieces of information may be obtained from various sources, including judgments of international courts, judgments of national courts, documents issued by the Council of Europe or UN bodies.[75] Once a risk of fundamental rights violation is established, as a second step the executing judicial authority must determine, specifically and precisely, whether there are substantial grounds to believe that the person concerned by a European Arrest Warrant, issued for the purposes of conducting a criminal prosecution or executing a custodial sentence, will be exposed, because of the conditions of his or her detention in the issuing Member State, to a real risk of inhuman or degrading treatment or punishment, within the meaning of Article 4 of the Charter, in the event of his surrender to that Member State.[76]

To that end, the executing judicial authority must request that the issuing judicial authority provide supplementary information. The issuing judicial authority, after seeking, if necessary, the assistance of the central authority or one of the central authorities of the issuing Member State, under Article 7 FD EAW, must send that information within the time limit specified in the request.[77] The executing authority may further rely on any other information available.[78, 79]

Applying the two-prong-test, the risk of a human rights violation in general and in the specific case may be established. If it is, the execution of the warrant must be postponed, however, it cannot be abandoned.[80] Eurojust should be informed of this decision. In addition, a Member State that has experienced repeated delays in getting

72 *Id.* at para. 84.

73 *Id.* at paras. 85–87.

74 *Id.* at para. 89. The judgment was praised for its individualistic approach, which can even be traced in the fact that it places a lesser emphasis on the first prong of the test, and stresses the potentiality of individual harm. D. Halberstam, *The Judicial Battle over Mutual Trust in the EU: Recent Cracks in the Façade, VerfBlog,* 9 June 2016, http://verfassungsblog.de/the-judicial-battle-over-mutual-trust-in-the-eu-recent-cracks-in-the-facade/.

75 *Id.* at para. 89.

76 *Id.* at para. 92.

77 *Id.* at paras. 95–98.

78 *Id.* at para. 92.

79 *Id.* at paras. 95–97.

80 *Id.* at para. 98.

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its EAWs executed should inform the Council with a view to an evaluation of the implementation of the FD EAW at Member State level.[81] Neither the state nor the individual concerned may abuse the postponement of surrender. The executing judicial authority may decide to hold the person in custody, but only in so far as the detention is not excessive. It must also take into account the presumption of innocence vis-à-vis persons requested for prosecution, and the principle of proportionality in respect of Charter rights.[82] Should the executing authority decide on the basis of the above to bring the detention to an end, it has to make sure that such a decision cannot be abused by the individual concerned: it has to take measures to prevent that the individual absconds or surrender is jeopardised until a final decision on surrender is taken.[83] If the existence of a risk cannot be discounted within a reasonable time, the executing judicial authority must decide whether the surrender procedure should be brought to an end.[84] If the real risk of a human rights violation can be discounted, the executing judicial authority must adopt a decision on executing the European Arrest Warrant. Such a decision is without prejudice to the opportunity of the individual concerned to have recourse after surrender to legal remedies in the issuing Member State to challenge his or her detention conditions.[85]

4. DID THE COURT GET IT RIGHT?

Taking into account the Court's case law and notably its judgment in *Aranyosi* and *Căldăraru* we will now first seek to define mutual recognition, mutual trust and their relationship with fundamental rights protection within the Union as an area of freedom, security and justice. What role does mutual recognition play in reconciling free movement (of judicial decisions) and individual rights in the area of EU criminal law? What is the basis for mutual trust and what are its limits? Subsequently, conclusions will be presented regarding the way forward in reconciling free movement of judicial decisions and individual rights.

4.1. MUTUAL RECOGNITION

The application of mutual recognition as developed in the context of the internal market by analogy to the area of freedom, security and justice took place upon a UK initiative. A soft language to identify the scope for possible mutual recognition of court decisions found its way into the 1998 Cardiff Conclusions, while famously the

81 *Id.* at para. 99.

82 *Id.* at paras. 100–101.

83 *Id.* at para. 102.

84 *Id.* at para. 104.

85 *Id.* at para. 103.

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1999 Tampere Conclusions expressly endorsed mutual recognition, which became the basis of two dozen measures taken in the field of criminal justice.[86] The Commission defined mutual recognition of judicial decisions in criminal matters as meaning that once a judicial decision is taken in one Member State, it should automatically be accepted in all other Member States and have the same or at least similar effects there.[87] In this context, the Court of Justice interpreted the principle of mutual recognition as meaning that 'the Member States are in principle obliged to give effect to a European Arrest Warrant.'[88]

These definitions are very close to the aim of free movement and the integration method of home state control, meaning that once the requirements of the home state have been met, the (judicial) product or the person should benefit from free movement. One should however clearly distinguish aims and integration methods from legal obligations. The definition proposed by the Commission (and broadly followed by the Court) fails to capture the essence of mutual recognition, which is the ambition to create a single legal area within which free movement should be achieved, with the overarching goals being the substantive aims of the area concerned. In other words, one should take into account the interests of others within the single legal area.[89]

This particular single legal area, the area of freedom, security and justice, however, has not been defined anywhere in the Treaties, beyond the fact that it is an area without internal frontiers,[90] nor was the relationship between its components 'freedom', 'security' and 'justice' determined. This gave rise to various approaches including attempts to 'balance' freedom and security interests without properly considering the Union's fundamental rights framework.[91]

Seeing mutual recognition as an obligation to be other-regarding within a single legal area also militates against the idea of imposing limitations on it. However, because – unlike in the context of the internal market – free movement in the area of freedom, security and justice mostly enhances Member State power to the detriment of individual rights,[92] such restrictions on fundamental rights – in line with the ECHR, but also Article 52(1) of the Charter – must be provided by law. 'Whilst the

86 V. Mitsilegas, *EU Criminal Law*, Oxford: Hart, 2009, pp. 116–117.

87 COM (2000) 0495, p. 2.

88 Case C-237/15 PPU, *Lanigan*, [2015] ECR 474, para. 36; Judgment in *Aranyosi*, para. 79.

89 Van Ballegooij, *op. cit.* (*The Nature of Mutual Recognition*), p. 332; M. Maduro, 'So Close and Yet so Far: the Paradoxes of Mutual Recognition', 14 (5) *Journal of European Public Policy*, 2007, pp. 814–825 at p. 820.

90 Article 3(2) TEU.

91 Notably in Case C-303/05, *Advocaten voor de Wereld* [2007] ECR 3633, para. 57; Case C-123/08, *Wolzenburg* [2009] ECR 9621 para. 58, 59; Case C-126/09, *Mantello* [2010] ECR 11477, para. 46; For criticism of the 'balance metaphor' see E. Guild, S. Carrera and T. Balzacq, 'The Changing Dynamics of Security in and Enlarged European Union', in D. Bigo, S. Carrera, E. Guild and R. Walker (Eds.), *Delivering Liberty, Europe's 21st Century Challenge*, London: Ashgate Publishing 2010, pp. 31–48.

92 Mitsilegas, *op. cit. (EU Criminal Law)*, 118; M. Möstl, 'Preconditions and Limits of Mutual Recognition' 47 Common Market Law. Review 2 (2010), pp. 405–436, p. 409.

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principle of mutual recognition in the context of the internal market is enforced by national courts through the direct effect of the relevant Treaty provisions, the operation of the same principle in the AFSJ rests on legislative acts adopted at EU level.'[93] The degree of automaticity of the free movement of judicial decisions and division of labour between the authorities of the home state and the host state depends on the negotiations of the individual instrument in which mutual recognition is applied and the level of harmonisation that may be achieved to support mutual recognition.[94] In accordance with the FD EAW, 'taking into account the interests of others' requires that a person be arrested and surrendered for prosecution or the execution of a sentence. As pointed out by the Court the FD EAW foresees a surrender procedure with a limited number of grounds for non-execution and conditions that may be imposed.[95] Those do not include a general ground for non-execution based on fundamental rights. This is where the relationship with the principle of mutual trust comes in.

4.2. MUTUAL TRUST

The principle of trust in the decisions of the issuing judicial authority is safeguarded in the FD EAW by reference to the joint obligation of Member States to comply with fundamental rights obligations referred to in Article 6 TEU. This principle is also applicable in the more traditional areas of EU law. There it is emphasised that one Member State may not take unilateral action overwriting mutual recognition to address shortcomings in the implementation of EU law by another Member State. Proper implementation should be ensured in accordance with tools provided for by the Treaties in the form of an infringement procedure initiated by either the European Commission or a Member State.[96] In the area of judicial cooperation this logic also applies, though shifting the responsibility for fundamental rights protection to the issuing judicial authority requires adequate safeguards and enforcement mechanisms. In line with the demands of the European Parliament, one could further approximate the rights of suspects, including the adoption of legislative and non-legislative measures to reduce the use of pre-trial detention and

93 K. Lenaerts, *The principle of mutual recognition in the area of freedom, security and justice,* The Fourth Annual Sir Jeremy Lever Lecture, All Souls College, University of Oxford, 30 January 2015, https://www.law.ox.ac.uk/sites/files/oxlaw/the_principle_of_mutual_recognition_in_the_area_of_freedom_judge_lenaerts.pdf, 4.

94 Case C-399/11, *Melloni* [2013] 107.

95 Judgment in *Aranyosi*, para. 80.

96 Cases C-5/94, *The Queen v. Ministry of Agriculture, Fisheries and Food, ex parte: Hedley Lomas (Ireland) Ltd.*, para. 20: 'A Member State cannot under any circumstances unilaterally adopt, on its own authority, corrective measures or measures to protect trade designed to prevent any failure on the part of another Member State to comply with the rules laid down by the Treaty.'

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improve detention conditions more generally.[97] In the context of the European Arrest Warrant, the importance of representation by defence lawyers in the issuing as well as the executing Member State, and the accompanying legal aid should also be stressed.[98]

As far as enforcement is concerned, it should be pointed out that the Commission has only been in the position to launch infringement procedures for failure to properly implement the FD EAW since the lapse in December 2014 of a five-year transitional period following the entry into force of the Lisbon Treaty.[99] There is also a gap between the proclamation of the rights and values listed in article 2 TEU and actual compliance by EU institutions and Member States also due to the high thresholds before sanctions can be imposed on non-compliant Member States in accordance with Article 7 TEU.[100] The current problems related to the rule of law and fundamental rights in the EU Member States are not limited to the monitoring and supervision by the EU of Member States which depart from being a democracy based on the rule of law and fundamental rights. Member States' compliance with United Nations and Council of Europe instruments, and the implementation of European Court of Human Rights judgments, leads to formidable challenges in EU Member States. This problematic situation has a direct effect on EU measures and judicial cooperation as they are based on the presumption of compliance with these international obligations. The Commission has now sought to address this gap by a pre-Article 7 rule of law framework,[101] which it is argued could also be expanded to a permanent monitoring mechanism aimed at *inter alia* addressing systemic problems with fundamental rights protection, including detention conditions that amount to inhuman and degrading treatment or punishment.

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97 European Parliament resolution of 27 February 2014 with recommendations to the Commission on the review of the European Arrest Warrant (2013/2109 (INL)), P7_TA-PROV(2014)0174, para. 17.

98 Directive 2013/48/EU on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty, O.J. L 294/1 of 6 November 2013, article 10; Provisional legal aid for suspects or accused persons deprived of liberty and legal aid in European arrest warrant proceedings, 2013/0409(COD).

99 Protocol (No. 36) on transitional provisions, O.J. (C 83) 322 of 30 March.2010.

100 European Parliament resolution of 25 October 2016 with recommendations to the Commission on the establishment of an EU mechanism on democracy, the rule of law and fundamental rights (2015/2254(INL)), P8_TA-PROV(2016)0409; W. van Ballegooij, T. Evas, An EU Mechanism on Democracy, the Rule of Law and Fundamental Rights, Interim European Added Value Assessment accompanying the Legislative initiative report (Rapporteur Sophie in 't Veld), European Parliamentary Research Service, October 2016, PE.579.328; Annex I, L. Pech, E. Wennerström, V. Leigh, A. Markowska, L. De Keyser, A. Gómez Rojo and H. Spanikova, 'Assessing the need and possibilities for the establishment of an EU scoreboard on democracy, the rule of law and fundamental rights'; Annex II, P. Bárd, S. Carrera, E. Guild and D. Kochenov, with a thematic contribution by W. Marneffe, 'Assessing the need and possibilities for the establishment of an EU Scoreboard on democracy, the rule of law and fundamental rights'.

101 Communication from the Commission to the European Parliament and the Council, A new EU framework to strengthen the rule of law, COM (2014) 158 of 19 March 2014.

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Such a mechanism could also prevent having to rely on individual assurances and the difficulty courts face with enforcing them in practice.[102] Relying on assurances also leads to the problem that one creates two classes of EU citizens; those that are detained in adequate conditions because they were surrendered from another Member State and those that languish in inadequate conditions because they were not arrested abroad.

4.3. LIMITS TO MUTUAL TRUST

Within a single legal area, one may in principle trust the judicial decisions of other Member States. However, even after approximation and EU enforcement mechanisms are put in place, trust has its limits when there are certain indications to the contrary in individual cases. Judicial authorities need guidance on how to deal with these situations. The Court of Justice has now confirmed that under exceptional circumstances fundamental rights concerns may lead to postponement of the execution of a European Arrest Warrant[103] and bring the surrender procedure to an end.[104] The Court stressed that Article 4 of the Charter concerns an absolute right closely connected with human dignity corresponding to Article 3 ECHR and a fundamental *value* of the Union and its Member States.[105] In this context it is worth recalling the Opinion of Advocate General Mengozzi in Case C-42/11, *Lopes da Silva Jorge*, in which he stated that in light of the 'higher principle represented by the protection of human dignity, the cornerstone of the protection of fundamental rights within the European Union legal order', 'the free movement of judgments in criminal matters, must not only be guaranteed, but also, where appropriate limited.'[106] The Court's judgment is to be welcomed as 'to interpret Article 1(3) FD EAW otherwise would risk its having no meaning, otherwise, possibly, than an elegant platitude'.[107]

The Court nevertheless seems to insist on limiting the discretion of the executing judicial authority in exercising judicial control, putting the bar very high before *postponement* of surrender may even be considered. This is in line with its earlier case law, notably *Mantello*[108] in which it stressed that the executing judicial authority

102 A. Nice, 'Extradition in "disarray"?', UK Human Rights Blog, 27 April 2016, available at https://ukhumanrightsblog.com/2016/04/27/extradition-in-disarray-amelia-nice/: 'many criticisms of their use remain, notably that they are only used where serious fears of human rights breaches have already been demonstrated, are often not binding in law, and are difficult, if not impossible, to monitor.'; House of Lords, Select Committee on Extradition Law, 2nd Report of Session 2014–15, Extradition: UK law and practice, paras. 62–99.

103 Judgment in *Aranyosi*, para. 98.

104 Judgment in *Aranyosi*, para. 104.

105 Judgment in *Aranyosi*, para. 46, 63; AG Opinion in *Aranyosi*, paras. 85–87.

106 Opinion by AG Mengozzi in Case C-42/11, Lopes da Silva Jorge, para. 28.

107 Opinion of AG Sharpston in Case C-396/11 *Radu*, para. 70.

108 Case C-261/09, *Mantello* [2010] ECR 11477.

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should rely on the information provided by the issuing judicial authority as regards the question whether a person had been finally judged.[109] In that case the Court did not follow the opinion of Advocate General Bot that as an execution procedure was foreseen in the FD EAW, in which *ne bis in idem*, as an expression of a fundamental right, was included as a ground for non-execution, it was incumbent upon the executing judicial authority to verify whether this condition had been fulfilled.[110]

Limiting the discretion of executing judicial authorities, claiming it is beneficial for mutual recognition, fails to understand the difference between the need to recognise judicial decisions as opposed to enforcing them directly based on compliance with the standards of the home state.[111] As explained above, this is based on the questionable assumption that there is a conflict between mutual recognition and the safeguarding of individual rights. It should be understood that mutual recognition is a *process* of recognising and giving effect to factual and legal situations established in other Member States. That process contributes to free movement but does not guarantee it. The reason for that is that certain exceptions to free movement also find their direct origins in the aims of the European Union.

Also, the suspicion arises that the Court was attempting to tame the negative reactions in a hostile climate against Opinion 2/13,[112] in an effort to uphold supremacy of EU law. Famously the Court in *Melloni*[113] held that where a person concerned was sentenced *in absentia* in line with the amended FD EAW,[114] an executing judicial authority could not make surrender subject to retrial. This applies even though the national constitution in question entrenched the right to be present at the trial, and the Charter of Fundamental Rights in its Article 53 made clear that nothing in the

109 Case C-261/09, *Mantello* [2010] ECR 11477, para. 46.

110 Opinion of AG Bot delivered on 7 September 2010 in Case C-261/09, *Mantello*, paras. 76–78.

111 Van Ballegooij, *op. cit. (The Nature of Mutual Recognition)*, p. 356.

112 See some of the immediate reactions: S. Peers, The CJEU and the EU's accession to the ECHR: a clear and present danger to human rights protection, 18 December 2014, http://eulawanalysis.blogspot.co.uk/2014/12/the-cjeu-and-eus-accession-to-echr.html; International Commission of Jurists, EU Court Opinion a major setback for human rights in Europe, 18 December 2014, www.icj.org/eu-court-opinion-a-major-setback-for-human-rights-in-europe/; A. O'Neill: Opinion 2/13 on the EU Accession to the ECHR: the CJEU as Humpty Dumpty. After the first shock myriads of articles condemned the Opinion in greater detail. See for example the Special Section of the German Law Journal devoted to the Court's stance on EU accession to the ECHR. See the articles of Daniel Halberstam, Christoph Krenn, Stian Øby Johansen, Adam Łazowski & Ramses A. Wessel, and Steve Peers in: 16 German Law Journal No. 1 (2015)
Eutopia Law, 18 December 2014, http://eutopialaw.com/2014/12/18/opinion-213-on-euaccession-to-the-echr-the-cjeu-as-humpty-dumpty/; Editorial Comments, The EU's Accession to the ECHR – a "NO" from the ECJ!, *Common Market Law Review*, 52, 2005, 1–16, 12–13.

113 Case C-399/11, *Melloni* [2013] 107.

114 Council Framework Decision 2009/299/JHA of 26 February 2009 amending Framework Decisions 2002/584/JHA, 2005/214/JHA, 2006/783/JHA, 2008/909/JHA and 2008/947/JHA, thereby enhancing the procedural rights of persons and fostering the application of the principle of mutual recognition to decisions rendered in the absence of the person concerned at the trial, [2009] OJ L 81/24.

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Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognised by the Member States' constitutions.

Nevertheless, the Court considered due process rights as provided for by the Charter as maximum rather than minimum requirements, and did not acknowledge higher national standards that would jeopardise the primacy, unity or effectiveness of EU law, in this case the FD EAW.[115] In other words, the Court gave preference to mutual recognition embedded into a secondary legislation over fundamental rights enshrined in a primary source of EU law.

In its Opinion 2/13 the Court of Justice reiterated that the application of national – seemingly including constitutional – standards of protection of fundamental rights must not compromise the primacy, unity and effectiveness of EU law.[116] In the Court's understanding, these EU law principles shall even trump Article 53 ECHR reserving the power of the contracting states to lay down higher standards of human rights protection than those guaranteed by the Convention.[117] In the Court of Justice's interpretation this means that a Member State shall presume all other Member States to comply with EU law including the respect for fundamental rights. The consequences of this are twofold: Member States may not demand a higher level of national protection of fundamental rights from another Member State than that provided under EU law, and they may not double-check whether that other Member State has actually, in the given case, observed the fundamental rights guaranteed by the EU.

The Court of Justice was harshly criticised on many accounts, including its disregarding a number of developments in EU law, and its insistence that mutual trust applies only between Member States excluding concerns for individuals affected by this exercise of state powers under mutual recognition.[118] In *Jeremy F*[119] the Court further clarified that additional rights can be granted, as long as mutual trust is not called into question, the application of the FD EAW is not thereby hampered, and the procedure is not prolonged beyond the time limits prescribed by the FD EAW. The line of case-law triggered a dialogue with national apex courts.

The Irish Supreme Court upheld the surrender of a person sentenced to life imprisonment in the UK,[120] even though the UK system of life imprisonment would

115 *Id* at para. 60.

116 Opinion 2/13, para. 188.

117 Opinion 2/13, para. 189. Some contend that the discrepancy between Article 53 ECHR and Article 53 of the Charter stems from the fact that "The ECHR functions truly as a minimum level guarantee. In the EU, however, in fields where the EU legislator has engaged in harmonization, a uniform understanding of fundamental rights protection in the harmonized field is crucial to guarantee the primacy and uniformity of EU law." Ch. Krenn, Autonomy and Effectiveness as Common Concerns: A Path to ECHR Accession After Opinion 2/13, 16 *German Law Journal* No. 1 (2015), 147–167, 158.

118 V. Mitsilegas, *op. cit. (The Symbiotic Relationship)*, p. 471.

119 Case C-168/13 PPU, *Jeremy F* EU:C:2013:358.

120 Supreme Court of Ireland, *Michael Anthony Balmer v The Minister for Justice and Equality*, [2015] S.C. No. 29. Authors are grateful to John O'Keeffe for calling their attention to the case.

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be unconstitutional under Irish law. The Irish Supreme Court considered the role of courts as an aspect of the relationship between sovereign states. It distinguished events abroad and in Ireland and thought undesirable and inappropriate to hold foreign legal institutions to Irish constitutional standards in all cases, as long as they are not in violation of the ECHR.

The Spanish Supreme Court took a middle stance. After the *Melloni* judgment was rendered, the case went back to the Spanish Supreme Court, which complied with the Court of Justice judgment and dismissed Mr. Melloni's individual complaint, overruling previous constitutional interpretation of the right to a fair trial with regard to surrender of persons convicted *in absentia*. However the Constitutional Court changed its constitutional interpretation of the right to a fair trial without mentioning the Court of Justice's stance on Article 53 of the Charter, pretending it came to such a conclusion autonomously upon its own initiative. While not mentioning the essence of the Court of Justice's ruling, it failed to give any specific alternative reasons for changing its jurisprudence.[121] The only lesson to be learned from the Spanish decision therefore is that it is unwilling to accept its irrelevance as propagated by the Court of Justice in the preliminary ruling in *Melloni* when insisting on automatic surrenders based on mutual trust.

The GFCC took a similar stance on the matter, but followed a more sophisticated reasoning. In a December 2015 order[122] it denied surrender of a US citizen to Italy convicted back in 1992 *in absentia*, where it was unclear whether he would be granted an appeal with the re-examination of facts upon surrender. At a superficial glimpse, the case seems to be similar to *Melloni*, but there are substantial differences in the facts. Whereas Mr. Melloni was duly informed and represented by lawyers of his choice, and all procedural steps were scrupulously followed, the Italian case back in 1992 'was a mess', so that surrender could have been rejected also under the FD EAW.[123] The GFCC however took a different stance and discussed the case under the German constitution. The national constitutional court did presumably do so, so that it could reject the *Melloni* doctrine. It held that mutual trust would be undermined where there were clear indications that human dignity of the individual concerned – a right covered by the eternity clause of the German constitution – might not be respected. In view of the GFCC mutual trust had its limits, and national authorities upon relevant indications – which need to be substantiated by the convict

121 'The Court could have acknowledged the obligation to comply with the preliminary ruling and, at the same time, developed other arguments, such as the need to revise doctrine that had emerged in extradition procedures in light of the principles of mutual recognition and trust; or the disproportionate protection of the right to a fair trial vis-à-vis other interests, such as the fight against crime or the victim protection; or the fact that the previous constitutional interpretation had been contested within the Court from the very outset.' A. T. Pérez, Melloni in Three Acts: From Dialogue to Monologue. European Constitutional Law Review, 10 (2014). pp 308–331, p. 323.

122 GFCC, Order of 15 December 2015, 2 BvR 2735/14.

123 D. Sarmiento, *Awakenings*, 27 January 2016, http://verfassungsblog.de/awakenings-the-identity-control-decision-by-the-german-constitutional-court/.

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– must review whether fundamental rights and the rule of law are complied with, even if a European Arrest Warrant would formally meet the requirements of the FD EAW.[124]

The GFCC departed from its previous Solange doctrine,[125] and instead it applied a constitutional identity review, which was up until now only invoked in relation to *ultra vires* reviews. The court recalled that primacy only applied as long as sovereign rights were transferred to the Union, whereas certain rights are not open to constitutional amendment and therefore resist any conferral (*Verfassungsänderungs- und integrationsfest*). Therefore it held that the protection of fundamental rights includes review of acts determined by Union law, whenever this is necessary to protect constitutional identity. If the outcome of the review is negative, Union law may be declared inapplicable.

Despite the clear contradictions with *Melloni* and Opinion 2/13, the Karlsruhe court decided that the matter was *acte clair*, thereby signalling its stance: it will not accept a contrary reading by Luxembourg and the practice of automatic surrenders must come to an end.

Apart from the political climate surrounding Opinion 2/13, certain other features of the *Aranyosi* and *Căldăraru* case make it questionable whether it will make a strong precedent. The fact that an absolute right was at stake and that its violation was established beyond doubt makes the case a relatively easy one.

A further element that makes the case easy is that the evidence presented substantiating the general fundamental rights violations was a solid one. In March 2015 the ECtHR found Hungary to be in violation among others of Article 3 ECHR by reason of a 144% overcrowding in its prisons and general prison conditions.[126] The case was long overdue after several previous judgments of the ECtHR,[127] reports of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), numerous national court judgments where Hungarian courts found prison conditions to be in violation of human dignity, and reports by the ombudsman and human rights NGOs condemning shocking prison conditions.[128] The ECtHR therefore treated the proceedings before it as a pilot case

124 As the GFCC made it clear in its later case law, not all rights that can be derived from human dignity and that are interpreted in a dissimilar fashion by other states call adherence to mutual trust into question. See GFCC, Order of 6 September 2016, 2 BvR 890/16.

125 GFCC, Order of 22 October 1986, 2 BvR 197/83.

126 ECtHR of 10 March 2015 in Case Nrs. 14097/12, 45135/12, 73712/12, 34001/13, 44055/13 and 64586/13, *Varga and others v Hungary*. Judgment in *Aranyosi*, para. 43.

127 ECtHR of 7 June 2011 in Case Nr. 30221/06 *Szél v Hungary*, of 17 January 2012 in Case Nr. 15707/10 *István Gábor Kovács v Hungary*, of 2 October 2013 in Case Nr. 69095/10 *Fehér v Hungary*, and of 23 April 2013 in Case Nr. 52624/10 *Hagyó v Hungary*.

128 E. Kadlót, Pilot döntés a börtönök túlzsúfoltságáról [Pilot judgment about overcrowding in prisons], *Kriminológiai Közlemények*, Vol. 75, 2015, pp. 225–242., pp. 228–229, p. 231.

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after 450 similar cases against Hungary were filed.[129] What is more, in a rather exceptional move, the ECtHR decided not to adjourn the examination of similar cases pending the implementation of the relevant measures by Hungary, thereby providing a further incentive for the Respondent State to comply with the judgment.[130] Such symbolic moves were not yet taken against Romania, but in a series of decisions the ECtHR made clear that detention conditions in the country violate the ECHR.[131]

In light of the above the question again emerges whether other pieces of evidence not stemming from international or national court judgments or bodies of the Council of Europe and the UN may justify postponement of the decision to execute a European Arrest Warrant. The Court of Justice seems to be generous in allowing the executing judicial authority a broad range of evidence to determine both the general fundamental rights problem of the issuing Member State – giving a non-exhaustive list of potential sources of evidence[132] – and the potential risk of rights infringement in the specific case – by permitting *any* source of information,[133] but it shall not be overlooked that in the *Aranyosi* case the pieces of evidence were particularly strong, and therefore the Court of Justice will need to specify what is to be accepted by a national court as evidence in surrender proceedings and what not.

As mentioned, one may wonder to which extent the *Aranyosi* case will be guiding future ones where derogable rights are at stake. As regards the rights to liberty and security (Art. 6 EU Charter) and defence (Art. 48 EU Charter), AG Sharpston proposed that 'the infringement in question must be such as fundamentally to destroy the fairness of the process.'[134] She also pointed to Art. 49 (3) of the Charter according to

129 Neither the ECtHR nor the CPT the ECtHR was not persuaded by the Hungarian government's plans to balancing, i.e. transferring prisoners to ensure some equivalence in the overcrowding in each prison. See the Report to the Hungarian Government on the visit to Hungary carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 3 to 12 April 2013, CPT/Inf (2014) 13, 30 April 2014, para. 39. Both entities disagreed with the one-dimensional approach of the government proposing to build new prisons. There are several ways of remedying the problems, including decriminalisation, depenalisation, use of alternative sanctions, or any combination of these. Building new prisons may of course be one of the measures taken, but it cannot be the sole response, with special regard to the fact that See Committee of Ministers Recommendation N° R (99) 22 on prison overcrowding and prison population. Beside the fact that it is unrealistic to create sufficient quality prison cells in the near future, due to the increase in the fix costs, the daily costs of keeping a person in prison would double. See the study commissioned by the Hungarian Helsinki Committee: L. Márk and B. Váradi, A fogvatartás ára [The price of detention], December 2014, www.budapestinstitute.eu/uploads/helsinki_141218_Long_FINAL.pdf.

130 ECtHR of 10 March 2015 in Case Nrs. 14097/12, 45135/12, 73712/12, 34001/13, 44055/13 and 64586/13, *Varga and others v Hungary*. Judgment of the Court (Grand Chamber) of 5 April 2016, paras. 115–116.

131 ECtHR of 10 June 2014, in Case Nr. 22015/10 *Voicu v. Romania*, Case Nr. 13054/12 *Bujorean v. Romania*, Case Nr. 79857/12 *Mihai Laurenţiu Marin v. Romania*, and Case Nr. 51318/12 *Constantin Aurelian Burlacu v. Romania*. Judgment in *Aranyosi*, para. 60.

132 Judgment in *Aranyosi*, para. 89.

133 Judgment in *Aranyosi*, para. 98.

134 AG Sharpston in case C-396/11, *Radu*, para. 97.

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which 'the severity of penalties must not be disproportionate to the criminal offence'.[135] National legislation[136] and courts have also developed criteria to assess whether surrendering a person has a disproportionate impact on for instance its right to family life (Articles 8 ECHR, 7 EU Charter)[137] or the principle of *ordre public* more generally taking into account the person's rights to liberty and security among other factors.[138] The *Aranyosi* case is only the start of a discussion between the CJEU and national courts on the scope and application of the fundamental rights exception.[139]

5. FINAL COMMENTS

The question in the title of this contribution was 'did the Court get it right?' The real question actually is, whether it should be up to the Court in the first place to ensure proper fundamental rights safeguards in judicial cooperation. The EU legislator can act by amending mutual recognition legislation to make sure that judicial cooperation does not lead to disproportionate intrusions on individual rights or even violations of absolute rights. In line with the European Parliament's demands, a proportionality check and a ground for non-execution in case execution would be incompatible with the executing Member State's obligation in accordance with Article 6 TEU and the Charter could be introduced in the FD EAW or mutual recognition instruments more generally.[140] The Union can also adopt secondary legislation to create 'a legal landscape of earned, rather than perceived, trust in Europe's area of criminal justice.'[141]

This should be accompanied by a permanent mechanism for monitoring and addressing Member State compliance with democracy, the rule of law and fundamental

135 AG Sharpston in case C-396/11, *Radu*, para. 103.

136 UK Extradition Act, section 21a; V. Mitsilegas, *EU Criminal Law after Lisbon, Rights, Trust and the Transformation of Justice in Europe*, Hart publishing Oxford and Portland Oregon, 2016, chapter 5 at p. 146.

137 For example High Court of Ireland of 19 June 2013, The Minister for Justice & Equality v T.E., [2013] IEHC 323, pp. 110–116.
The burden to produce necessary evidence rests with the party raising Article 8 ECHR objections to surrender. In case the interests of a child so require, the court can seek further evidence of its own motion. Children's interests must be primary considerations for the court, even though they may be outweighed by other factors.

138 Higher Regional Court Stuttgart, Decision of 25 February 2010–1 Ausl. (24) 1246/09; Superior Regional Court of Munich, Order of 15 May 2013, OLG Ausl. 31 Ausl. 442/13 (119/13).

139 The Higher Regional Court of Bremen in charge of handling the Aranyosi and Căldăraru cases has asked follow up questions to the CJEU: It would like to know whether it only has to take into account the prison conditions in the first prison the suspect is to be transferred to – or whether it also has to take into account all the prisons the suspect may yet be transferred to. The case is pending at the CJEU as case C-496/16 (*Aranyosi*); The authors would like to thank Dr. Dominik Brodowski for signalling this additional information.

140 European Parliament resolution of 27 February 2014 with recommendations to the Commission on the review of the European Arrest Warrant (2013/2109 (INL)), P7_TA-PROV(2014)0174.

141 V. Mitsilegas, *op. cit. (The Symbiotic Relationship)*, p. 480.

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rights, including the right not to be subjected to inhuman or degrading treatment or punishment due to poor detention conditions. Currently there is no systemic monitoring of fundamental rights taking place that could serve as a solid basis of the refusal to execute.[142] This is so despite the fact that Article 70 TFEU allows the Council, on a proposal from the Commission, to adopt measures laying down the arrangements of objective and impartial evaluation of the implementation of the Union policies in the area of freedom, security and justice, in order to facilitate the full application of the principle of mutual recognition.

Similarly there is no democratic or rule of law scrutiny either, despite the fact that an independent and impartial judiciary is key to the presumption that lies at the heart of mutual trust. Emphasis shall be placed on the health check of the judiciary and its independence, since it is the courts that carry out the tests – whichever option is followed to ensure respect for fundamental rights. Were such a system put in place, actors in the EU field would not have to wait for external players to indicate generic problems, but could rely on their own scoreboard system and act promptly with regard to mutual trust.[143]

Ultimately however – as in all incomplete constitutional systems –, it will be the courts which play a crucial role in carving out and applying fundamental rights exceptions.[144] It will be a difficult task for the courts to come up with tests that, on the one hand, respect the duty of loyal cooperation and the presumption of trust vested in the protection offered by the issuing Member States, including possible remedies, but on the other hand to act as a human rights court[145] and fulfil the EU's collective responsibility under the ECHR and EU Charter irrespective of how intra-EU judicial cooperation is organised.

As mentioned, it would be important for the Court to distinguish between free movement, home state control and mutual recognition. Mutual recognition does not mean that there can be no exceptions to free movement based on fundamental rights.[146] There can be *prima facie* trust in the decision by the issuing judicial authority, but that trust has its limits when there are certain indications to the contrary in individual cases. A speedy but thorough procedure for resolving fundamental rights and proportionality concerns is necessary not only taking into account the

142 An ongoing project by Fair Trials entitled 'Beyond surrender' will provide insight into post-surrender treatment of people subject to indictment based on the European arrest warrant. Such a project may highlight deficiencies in the operation of the system, but cannot replace a systemic scrutiny. http://ec.europa.eu/justice/grants1/files/2014_jcco_ag/summaries_of_selected_projects.pdf, p. 7.

143 Such an attempt was made by Bárd et al., *op. cit. (An EU mechanism).*

144 A. Stone Sweet:'The Juridical Coup d'État and the Problem of Authority' German Law Journal – Special Issue on Stone Sweet 8.10 (2007), pp. 915–928, but in general see the German Law Journal – Special Issue on Coup d'État in the Courtroom 8.10 (2007): 915–1026.

145 As suggested by AG Bot in paras. 175 and 176 of his Opinion.

146 Opinion by AG Mengozzi in Case C-42/11, *Lopes da Silva Jorge*, para. 28.

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effectiveness of the EAW, but also the rights of the individuals concerned and the wider aims of the area of freedom, security and justice.

In providing guidance to national judicial authorities on the application of fundamental rights exceptions, the Court of Justice needs to be 'serious about its claim that the Union constitutes an entity with distinct constitutional features' and 'it should be prepared to translate this into a policy of deference towards external norms. (…) Under a modern, liberal reading of the concept, more autonomy vis-à-vis international law in effect might mean less autonomy.'[147] Limitations could be imposed from the top or from the bottom. From the top would mean that the *sui generis* constitutional character of EU law predestines it to the status of 'domestic law' that could potentially be reviewed by the ECtHR. The autonomy argument could be translated into higher standards than the ECHR instead of escaping external scrutiny altogether. From the bottom it would allow for scrutiny of fundamental rights by national courts.

147 J.V. van Rossem, *The Autonomy of EU Law: More is Less?, Between Autonomy and Dependence: The EU Legal Order Under the Influence of International Organisations*, The Hague: Asser Press/ Springer, 2013, pp. 39–40.

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