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The ECHR Preamble vs. the European Arrest Warrant: balancing Human Rights protection and the principle of mutual trust in EU Criminal Law?

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Abstract: As stated in the European Convention on Human Rights Preamble, the aim of the Council of Europe is the achievement of *greater unity between its members* through the *maintenance and realisation of Human Rights and Fundamental Freedoms*. Nowadays, the European Union includes the majority of the ECHR signatories (27 of 47) and incorporates the key legal instrument of judicial cooperation in criminal matters, namely the European Arrest Warrant Framework Decision. Nevertheless, the possible effects of the EAWFD on the practice of the European Court of Human Rights remain understudied – despite the crucial need to properly balance the enforcement of the principle of mutual recognition and Human Rights protection in the European Union. Since the first attempts to approach the EAWFD, the Strasbourg Court preferred to find the applications inadmissible (*Pianese, Monedero Angora*, *Stapleton*) or to establish a very high threshold for establishing a Convention violation within this context (*Pirozzi*). It will be argued that the newly developing Strasbourg Court's case-law on the EAWFD (*Castano, Bivolaru/Moldovan, Alosa*) could potentially mark a new step in the judicial dialogue between two European Courts. In the *Castano and Bivolaru/Moldovan* rulings, the ECtHR – for the first time – found that the EU Member States had breached their obligations under Arts. 2 (*´right to life´*) and 3 (*´prohibition of torture´*) ECHR

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within the European Arrest Warrant context (murder/trafficking in human beings charges). At the same time, this interpretation opens the floor for discussion on potential applicability of other Convention provisions (Arts. 4, 5, 8, 13) to other offences listed in Art. 2(2) of the EAWFD (such as, for instance, corruption, fraud, computer-related crime etc.). Even though the Strasbourg Court has transposed the CJEU's benchmarks of the EAW refusals legality assessment – i.e. a risk of *inhuman or degrading treatment* in the requesting State (*Aranyosi/Căldăraru)*, the EU Member States´ courts are now forced – *de facto* – to consider an additional (ECHR-based) criterion for assessing the legality of refusals to execute the European Arrest Warrants. This can arguably pose further questions upon the entry into force of Protocol No. 15 ECHR which aims at the most effective realisation of the *´subsidiarity´* principle in the European Convention system.

1. Introduction

Art. 31 «*General rule of interpretation*» of the Vienna Convention on the Law of Treaties prominently proclaims that a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context. Hence, the text of the legal act including its preamble and annexes is the starting point for determining the object and purpose of treaty drafting and implementation.[1] By underlining the aims of the treaty, the preambles could be of both *contextual* and *teleological* significance,[2] as it has been demonstrated in the early decisions of the European Commission of Human Rights.[3] In *Austria v. Italy*, the analysis of the European Convention on Human Rights (Convention, ECHR) Preamble allowed

1 Vienna Convention on the Law of Treaties adopted on 23 May 1969, U.N.T.S. 331, 1155 (1969).

2 Oliver Dörr, "Article 31: General rule of interpretation," in *Vienna Convention on the Law of Treaties: A Commentary*, ed. Oliver Dörr and Kirsten Schmalenbach, 2nd ed. (Berlin/Heidelberg: Springer, 2018), 583.

3 William Schabas, "Preamble," in *The European Convention on Human Rights: A Commentary,* ed. William Schabas, 1st ed. (Oxford: Oxford University Press, 2015), 54.

to conclude that «*the purpose of the High Contracting parties in concluding the Convention was not to concede to each other reciprocal rights and obligations in pursuance of their individual national interests but to realise the aims and ideals of the Council of Europe, as expressed in its Statute, and to establish a common public order of the free democracies of Europe with the object of safeguarding their common heritage of political traditions, ideals, freedom and the rule of law*».[4]

Indeed, as stated in the Convention Preamble, the aim of the Council of Europe (CoE) is the achievement of greater unity between its members through the maintenance and realisation of Human Rights and Fundamental Freedoms.[5] This premise is of great importance for the development of effective transnational cooperation in criminal matters which – by its nature – is aimed at the effective protection of Human Rights.[6] Nowadays, the European Union includes the majority of the ECHR signatories (27 of 47) and incorporates the key legal instrument of judicial cooperation in criminal matters, namely the European Arrest Warrant Framework Decision (EAWFD).[7] Nevertheless, the possible effects of the EAWFD on the practice of the European Court of Human Rights (Strasbourg Court, ECtHR) remain understudied – despite the crucial need to properly balance the application of the principle of mutual recognition and Human Rights protection in the European Union. Importantly, the development of the EU/Member States' liability doctrine for the alleged ECHR violations led to the formation of the so-called *presumption of equivalent protection* – or the «*Bosphorus*» *doctrine* (2005) – which allowed the ECtHR to exercise full judicial review only if the protection under EU Law has proved

4 Commission's decision on the admissibility of 11 January 1961, Case *Austria v. Italy*, application no. 788/60, hudoc.int, 18.

5 Council of Europe, European Convention on Human Rights and Fundamental Freedoms, Rome, 4 November 1950, as amended by Protocols Nos. 11 and 14 supplemented by Protocols Nos. 1, 4, 6, 7, 12, 13 and 16, ETS No. 5: ETS No. 009, 4: ETS No. 046, 6: ETS No. 114, 7: ETS No. 117, 12: ETS No. 177 (European Convention on Human Rights).

6 Koen Lenaerts, "The Contribution of the European Court of Justice to the Area of Freedom, Security and Justice," *International and Comparative Law Quarterly* 59, no. 2 (2010): 255, 268, 298–301.

7 Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, as amended by Council Framework Decision 2009/299/JHA, OJ L 81.

in the case before it to be «*manifestly deficient*».[8] Hence, the practice of the Strasbourg Court on the European Arrest Warrant always remained comparably scarce, presumably demonstrating the lack of intention to undermine the interpretative authority of the Court of Justice of the European Union (Luxembourg Court, CJEU). Since the first attempts to approach the EAWFD, the Strasbourg Court preferred to find the applications inadmissible (*Monedero Angora*,[9] *Stapleton*,[10] *Pianese*).[11] The new challenges for the development of the judicial dialogue between the two European Courts in the «*mutual trust*» area were brought by the CJEU's *Opinion 2/13 precluding the EU from the accession to the European Convention*[12] – with the corresponding developments in the ECtHR's *Bosphorus* doctrine (*Avotins*).[13] The *Avotins* case demonstrated the «*viability*» of the *presumption of equivalent protection* and the Strasbourg Court's intention to retain a very high threshold for the rebuttal.[14] In light of the active development of the CJEU's case-law on the EAW Framework Decision with the strong Charter of Fundamental Rights of the European Union component

8 ECtHR Judgement of 30 June 2005, Case *Bosphorus Hava Yollari Turizm Ve Ticaret Anonim Sirketi v. Ireland,* application no. 45036/98, hudoc.int. In this sense, see for example Tawhida Ahmed, "The EU's Protection of ECHR Standards: More Protective than the Bosphorus Legacy?," in *Adjudicating International Human Rights Essays in Honour of Sandy Ghandhi,* ed. James Green and Christopher Waters (Leiden: Brill Nijhoff, 2014), 99–118; Paul Gragl, "An Olive Branch from Strasbourg: Interpreting the European Court of Human Rights' Resurrection of Bosphorus and Reaction to *Opinion 2/13* in the Avotins Case: ECtHR 23 May 2016, Case No. 17502/07, Avotins v. Latvia," *European Constitutional Law Review* 13, no. 3 (2017): 551–567.

9 ECtHR Decision on the admissibility of 07 October 2008, Case *Monedero Angora v. Spain*, application no. 41138/05, hudoc.int.

10 ECtHR Decision on the admissibility of 4 May 2010, Case *Stapleton* v *Ireland,* application no. 56588/07, hudoc.int.

11 ECtHR Decision on the admissibility of 27 September 2011, Case *Pianese v Italy and the Netherlands,* application no. 14929/08, hudoc.int.

12 CJEU Opinion of 18 December 2014, Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms, Case Opinion 2/13 *(Opinion 2/13)*, ECLI:EU:C:2014:2454.

13 ECtHR Judgement of 23 May 2016, Case *Avotiņš v. Latvia*, application no. 17502/07, hudoc.int.

14 Giacomo Biagioni, "Avotins v. Latvia. The Uneasy Balance Between Mutual Recognition of Judgments and Protection of Fundamental Rights," *European Papers* 1, no. 2 (2016): 584–585.

(*Aranyosi*/*Caldararu*),[15] this statement gave rise to discussion on the further limitation of the scope of the Strasbourg Court's review in this area,[16] and enhancing the risk of competition with the CJEU exercising its jurisdiction in the form of preliminary rulings.[17]

The aim of this paper is to shed light on the way these premises influenced the development of the Strasbourg Court's jurisprudence with the European Arrest Warrant element, given the spirit and premises of the European Convention Preamble. The main argument presented is that the newly developing ECtHR case-law on the EAWFD (*Castano,*[18]

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15 CJEU Judgment of 5 April 2016, Pál Aranyosi and Robert Căldăraru v Generalstaatsanwaltschaft Bremen, Joined Cases C-404/15 and C-659/15 PPU, ECLI:EU:C:2016:198. In this sense, see for example Szilárd Gáspár-Szilágyi, "Joined Cases Aranyosi and Căldăraru: Converging Human Rights Standards, Mutual Trust and a New Ground for Postponing a European Arrest Warrant," *European Journal of Crime, Criminal Law and Criminal Justice 24*, no. 2 (2016): 197–219; Koen Bovend'Eerdt, "The Joined Cases *Aranyosi* and *Căldăraru*: A New Limit to the Mutual Trust Presumption in the Area of Freedom, Security, and Justice?," *Utrecht Journal of International and European Law* 32, no. 83 (2016):112–121; Fisnik Korenica and Doli Dren, "No more unconditional 'mutual trust' between the Member States: an analysis of the landmark decision of the CJEU in *Aranyosi* and *Caldararu*," *European Human Rights Law Review* 5 (2016): 542–555; Grainne de Burca, "After the EU Charter of Fundamental Rights: The Court of Justice as a Human Rights Adjudicator?," *Maastricht Journal of European and Comparative Law* 20, no. 2 (2013): 168–170; Niilo Jaaskinen, "The Place of the EU Charter within the Tradition of Fundamental and Human Rights," in *Fundamental Rights in the EU: A Matter for Two Courts*, ed. Sonia *Morano-Foadi* and Lucy *Vickers* (Oxford: Hart Publishing, 2015), 12.

16 Martin Kuijer, "The challenging relationship between the European Convention on Human Rights and the EU legal order: consequences of a delayed accession," *The International Journal of Human Rights* 24, no. 7 (2020): 1001–1003.

17 Noreen O'Meara, "Lisbon, via Stockholm, Strasbourg and Opinion 2/13: Prospects for citizen-centred protection of fundamental rights?," in *The Human Face of the European Union: Are EU Law and Policy Humane Enough?,* ed. *Nuno Ferreira* and Dora *Kostakopoulou* (Cambridge: Cambridge University Press, 2016), 75–80; Jannika Jahn, "Normative Guidance from Strasbourg Through Advisory Opinions: Deprivation or Relocation of the Convention's Core?," *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 74, no. 4 (2014):826, 844; Cathryn Costello, *The Human Rights of Migrants in European Law* (Oxford: Oxford University Press, 2016) 325–326.

18 ECtHR Judgement of 9 July 2019, Case *Romeo Castaño v. Belgium*, application no. 8351/17, hudoc.int.

Bivolaru/Moldovan)[19] could potentially mark a new step in the judicial dialogue between two European Courts. In the *Romeo Castano* ruling (9 July 2019), the ECtHR – for the first time – found unanimously that Belgium had breached its obligations under Art. 2 ECHR («*right to life*», procedural limb). The *Bivolaru/Moldovan* judgment continued and nuanced the *Castano* approach, which allowed a violation of Art. 3 («*Prohibition of torture*») of the European Convention within the European Arrest Warrant context. By adopting this approach, the European Court of Human Rights developed a doctrine of positive obligations – proposing an interpretation of Arts. 2 and 3 ECHR which is binding for the European Union Convention signatories due to the *res interpretata* legal force of the ECtHR´s judgments,[20] hence potentially limiting their discretion in the European Arrest Warrant matters and questioning the rationales of the *subsidiarity* principle incorporation in the amended Convention Preamble (Protocol No. 15).

To illustrate these developments, the earlier Strasbourg case-law the European Arrest Warrant is analysed in view of its origins, namely the strong impact of the *Soering* jurisprudence. This paper then probes the reasoning adopted by the European Court of Human Rights in the *Castano*. The concluding part of the paper contains the author's final remarks on the deriving challenges for the legal systems of the (non-) EU Convention signatories. The author does not, in this paper, pretend to investigate fully the simultaneously developing body of CJEU with the European Arrest Warrant component, but rather focuses on the possible impact of the EAW Framework Decision and pertinent CJEU practice on the ECtHR's «*subsidiarity*» and «*margin of appreciation*» doctrines – to demonstrate if and how this EU Law instrument may be reflected within the future jurisprudence of the Strasbourg Court.

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19 ECtHR Judgement of 25 March 2021, Case *Bivolaru and Moldovan v. France*, applications nos. 40324/16 and 12623/17, hudoc.int.

20 In this sense, see for example Oddný Mjöll Arnardóttir, "Res Interpretata, Erga Omnes Effect and the Role of the Margin of Appreciation in Giving Domestic Effect to the Judgments of the European Court of Human Rights," *The European Journal of International Law* 28, no. 3 (2017): 819–843.

2. The Strasbourg Court vs. EAW before Castano: a 'non-interference' strategy?

Since the CJEU's judgment in *Cassis de Dijon*, mutual recognition in the European Union has been described as the «*core*» of the CJEU's strategy of achieving market integration.[21] This principle later served as a basis to achieve the recognition and enforcement of judicial decisions by the authorities of different EU Member States, hence contributing significantly to the procedural unification in Europe. Mutual recognition is based on the principle of mutual trust,[22] stemming from the assumption that all EU Member States keep an equal level of common values, based on their communal culture of rights, but more importantly in the *protection thereof by the European Convention of Human Rights*.[23]

Reflecting the premises brought by the Amsterdam/Nice Treaty Preambles, namely the intention to facilitate the free movement of people, *by establishing an area of freedom, security and justice,* the European Arrest Warrant Framework Decision was adopted on 13 June 2002, and entered into force on 1 January 2004 after the transposition into national law.[24] Art. 1(3) (sometimes referred to as the «*European ordre public*» clause),[25] read together with Recs. 12 and 13 of the EAW FD Preamble, clarify that Human Rights – as guaranteed by Art. 6 TEU and by the EU Charter of Fundamental Rights – should be respected in course of the EAW execution. However, the «*pro-free movement*» objectives of the Framework Decision

21 Julian Ghosh, "Tax Law and the Internal Market: A Critique of the Principle of Mutual Recognition," *Cambridge Yearbook of European Legal Studies* 16 (2014): 190.

22 Valsamis Mitsilegas, "The Symbiotic Relationship Between Mutual Trust and Fundamental Rights in Europe's Area of Criminal Justice," *New Journal of European Criminal Law* 4 (2015): 457.

23 Programme of measures to implement the principle of mutual recognition of decisions in criminal matters (2001), OJ C12/10.

24 Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, as amended by Council Framework Decision 2009/299/JHA (2002), OJ L 81.

25 Martin Bose, "Human Rights Violations and Mutual Trust: Recent Case Law on the European Arrest Warrant," in *Human Rights in European Criminal Law: New Developments in European Legislation and Case Law after the Lisbon Treaty,* ed. Stefano Ruggeri (Heidelberg: Springer, 2015), 144.

become evident from Rec. 10 of the EAW FD Preamble which states that the European Arrest Warrant mechanism is based on a *high level of confidence* between the EU Member States, stemming from the «*mutual trust*» in each other's compliance with common international obligations.[26] For these reasons, the compulsory/optional refusal grounds are limited to those listed in Arts. 3, 4 and 4(a) of the Framework Decision; these provisions do not contain any provision on non-execution on the basis of a breach of the requested EU Individual's Human Rights in the issuing EU Member State (except for *in absentia* trials).[27]

In light of these considerations, it comes as no surprise that the CJEU´s EAW case-law with the Human Rights component remained rather scarce for quite a while after the Framework Decision adoption due to the lack of political will to invade into this sensitive area – closely intertwined with the application of national Criminal Law.[28] In the seminal *Advocaten voor de Wereld* case, the CJEU prominently confirmed the validity of the instrument in light of the principles of legality and non-discrimination. The judges stated that the European Arrest Warrant system did not seek to harmonise the criminal offences in question, hence aiming at preventing the double criminality check by its nature. Hence, only the law of the Warrant issuing EU Member State shall be taken into account while defining the offences and penalties in course of the Warrant execution.[29]

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[26] Programme of measures to implement the principle of mutual recognition of decisions in criminal matters (2001), OJ C12/10.

[27] The mandatory grounds for non-execution comprise amnesty, *ne bis in idem*, not reaching the age of criminal responsibility (Art. 3), while the grounds for optional non-execution are the lack of double criminality, prosecution pending in the executing Member State, prosecution for the same offence precluded in the executing Member State, prosecution or punishment statute-barred, final judgment in a third State, the executing Member State undertakes the execution of the sentence, extraterritoriality (Art. 4), or *in absentia* trials (Art. 4a).

[28] In this sense, see for example Samuli Miettinen, *Criminal Law and Policy in the European Union* (London: Routledge, 2013), 145–147; Ton Van den Brink, "The Impact of EU Legislation on National Legal Systems: Towards a New Approach to EU – Member State Relations," *Cambridge Yearbook of European Legal Studies* 19 (2017): 212–215.

[29] CJEU Judgment of 3 May 2007, *Advocaten voor de Wereld VZW. v. Leden van de Ministerraad*, Case C-303/ 05, ECLI:EU:C:2007:261, paras. 45–61.

Even though the *Advocaten voor de Wereld* statement fuelled the discussion on the potential inconsistency of this approach with the ECHR guarantees,[30] the Strasbourg Court seems to have «*mirrored*» the Luxembourg jurisprudence, finding the first EAW-related applications inadmissible – and hence avoiding a direct scrutiny of the EAW Framework Decision provisions, or the related national practices.[31] It could be seen as a predictable manoeuvre, considering the development of the *presumption of equivalent protection* (or the «*Bosphorus*» doctrine), which *de facto* guaranteed the CJEU's independence from the Strasbourg system interferences. In accordance with this doctrine, if the EU Member State has had no margin of discretion in the implementation of the EU Law provision in question, a rebuttable presumption of equivalent protection applies, allowing the ECtHR to exercise full judicial review *only* if the protection under European Law has proved to be «*manifestly deficient*» in the individual case.[32]

Another reason for this choice could be the proportionality test developed in the famous *Soering* judgment. In this case, the ECtHR ruled that, firstly, the extradition could in principle violate Art. 3 («*Prohibition of torture*»), and, secondly, Art. 6 («*Right to a fair trial*») of the European Convention – if the requested person «*has suffered or risks suffering a flagrant denial of a fair trial in the requesting country*».[33] By linking Human Rights and extradition – in particular by the «*flagrant denial of justice*» test – the ECtHR has *de facto* created a possibility for the assessment of

30 In this sense, see for instance Libor Klimek, *European Arrest Warrant* (Heidelberg: Springer 2014), 59; Andrew Sanger, "Force of Circumstance: The European Arrest Warrant and Human Rights," *Democracy and Security 6*, no. 1 (2010): 43; Nina Marlene Schallmoser, "The European Arrest Warrant and Fundamental: Risks of Violation of Fundamental Rights through the EU Framework Decision in Light of the ECHR," *European Journal of Crime, Criminal Law and Criminal Justice* 22, no. 2 (2014): 143–145.

31 In this sense, see for example ECtHR Decision on the admissibility of 07 October 2008, Case *Monedero Angora v. Spain*, application no. 41138/05, hudoc.int; ECtHR Decision on the admissibility of 4 May 2010, Case *Stapleton* v *Ireland,* application no. 56588/07, hudoc.int; ECtHR Decision on the admissibility of 27 September 2011, Case *Pianese v Italy and the Netherlands,* application no. 14929/08, hudoc.int.

32 ECtHR Judgement of 30 June 2005, Case *Bosphorus Hava Yollari Turizm Ve Ticaret Anonim Sirketi v. Ireland,* application no. 45036/98, hudoc.int, paras. 150–156.

33 ECtHR Judgement of *07 July 1989*, Case *Soering v. The United Kingdom,* application no. *14038/88,* hudoc.int, para 113.

the (potential) violation which could take place *outside* the jurisdiction of the state processing the extradition request (i.e. in the territory of the requesting state)[34] – a premise which could be considered rather problematic within the «*pro-free movement*» European Arrest Warrant context.

For instance, the ECtHR has had the first occasion to examine a complaint relating to the EAW Framework Decision in *Monedero Angora v. Spain*. In this case, the Court was asked to rule on the European Arrest Warrant issued by the French judicial authorities against Monedero Angora, a Spanish national, for executing a custodial sentence (five years' imprisonment) for a drug-related offence. Firstly, the applicant relied on Art. 5 of the Convention, claiming that he had been deprived of his liberty during the procedure for surrendering him under the European Arrest Warrant. Secondly, he alleged a violation of the principle of legality (Art. 7), as well as one of the presumption of innocence and of his right to a fair trial before an independent and impartial court within a reasonable time (Art. 6 ECHR).[35] In the eyes of the ECtHR judges, the substance of the EAW Framework decision could be considered similar to one of the extradition treaties: the European Arrest Warrant serves the same purpose, having no impact on individual criminal liability, but is designed to facilitate the execution of a decision taken in respect of the convicted person.

It was underlined that – just like the extradition – the implementation of the EAW Framework decision «*does not concern the determination of a criminal charge*» and «*the surrender of the applicant to the [competent] authorities [is] not a penalty inflicted on him for committing an offence, but a procedure intended to permit the execution of a judgment*».[36] In light of these considerations, the application of Mr. Monedero Angora was declared inadmissible *ratione materiae* (Art. 35 ECHR), because the procedure did not concern the determination of a criminal charge within the meaning of national law provisions (Arts. 6–7 ECHR), also mentioning that Art. 5

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34 Battjes Hemme, "The Soering Threshold: Why Only Fundamental Values Prohibit Refoulement in ECHR Case Law," *European Journal of Migration and Law* 11, no. 3 (2009): 205–207.

35 ECtHR Decision on the admissibility of 07 October 2008, Case *Monedero Angora v. Spain*, application no. 41138/05, hudoc.int, Section A '*The circumstances of the case*'.

36 ECtHR Decision on the admissibility of 07 October 2008, Case *Monedero Angora v. Spain*, application no. 41138/05, hudoc.int, Section B '*Relevant domestic law*'.

(«*Right to liberty and security*») would not necessarily apply to a related hearing in the executing State. Hence, it could be stated that the ECtHR has carefully avoided discussion on the «*flagrant denial of justice*» test application within this context, mentioning that the execution of the European Arrest Warrant is practically automatic, with the executing authority not engaging in a new examination of the Warrant to verify its conformity with its own national law.[37]

It could be submitted here that the EAW jurisprudence of both European Courts shall be seen in light of evolving legal context. Mirroring an intention «*to complete the process started by the Treaty of Amsterdam and by the Treaty of Nice with a view to enhancing the efficiency and democratic legitimacy of the Union*» in its Preamble,[38] the Treaty of Lisbon became one of the milestones in the history of the AFSJ development. The amended text – with its two complementary achievements of a legally binding character of the Charter of Fundamental Rights of the European Union (and in particular Arts. 47–50 CFREU) and a commitment by the EU to accede to the European Convention – had an immediate impact on the CJEU's perception of the ECHR procedural rights, resulting *in a significant decrease* in the number of CJEU references to the European Convention corresponding provisions.[39]

Besides that, the implementation of the EAW Framework Decision proved to be not as simple as expected, due to the intention of some of the EU Member States to insert additional grounds for the Warrant refusal in national legislation, and the need to coordinate the application of the corresponding Human Rights provisions of the national Constitutions,

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37 Siofra O'Leary, "Courts, Charters and Conventions: Making Sense of Fundamental Rights in the EU," *Irish Jurist* 56 (2016): 35.

38 Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community (2007), *OJ C 306*.

39 In this sense, see for instance Sionaidh Douglas-Scott, "The Relationship between the EU and the ECHR Five Years on from the Treaty of Lisbon," in *The EU Charter of Fundamental Rights as a Binding Instrument: Five Years Old and Growing*, ed. Sybe *de Vries*, Ulf *Bernitz*, Stephen *Weatherill* (London: Hart Publishing, 2015), 42; Fisnik Korenica, *The EU Accession to the ECHR: Between Luxembourg's Search for Autonomy and Strasbourg's Credibility on Human Rights Protection* (Heidelberg: Springer, 2015), 63; Grainne de Burca, "After the EU Charter of Fundamental Rights: The Court of Justice as a Human Rights Adjudicator?" *Maastricht Journal of European and Comparative Law* 20, no.2 (2013): 169.

CFREU and the ECHR within this specific context.[40] The cumulation of these factors has led to an increasing number of individual applications to the Strasbourg Court, as all EU Member States were simultaneously Convention signatories.[41] This made the post-Lisbon wave of the ECtHR´s EAW-related jurisprudence surprisingly profound, and fuelled a discussion on the need to reconsider the previously established *Monedero Angora* «*exclusionary*» approach.[42]

In the subsequent *Stapleton* case the application concerning the European Arrest Warrant surrender following fraud charges was considered inadmissible (Arts. 5, 6, 8 and Art. 2 of Protocol No. 4 to the Convention).[43] The reasoning of the decision however is quite different from the one chosen in *Monedero Angora*: the Court preferred to make a sharp distinction between the European Convention signatories and third states. It was emphasised that the compliance with Art. 6 ECHR in the United Kingdom (as an ECHR signatory and not a third state) is already partly guaranteed by the Convention transposition of the Human Rights Act.[44] So, the executing state shall not go beyond the *Soering* «*flagrant denial*» requirement, moving into the deeper analysis of an unfairness in the criminal proceedings in

40 In this sense, see for example Valsamis Mitsilegas, *EU Criminal Law after Lisbon: Rights, Trust and the Transformation of Justice in Europe* (London: Hart Publishing, 2016), 154; Jacob Öberg, "Legal Diversity, Subsidiarity and Harmonization of EU Regulatory Criminal Law," in *EU Criminal Justice and the Challenges of Diversity: Legal Cultures in the Area of Freedom, Security and Justice,* ed. Renaud Colson, Stewart Field (Cambridge: Cambridge University Press, 2016), 119; Martin Bose, "Human Rights Violations and Mutual Trust: Recent Case Law on the European Arrest Warrant," in *Human Rights in European Criminal Law: New Developments in European Legislation and Case Law after the Lisbon Treaty*, ed. Stefano Ruggeri (Heidelberg: Springer, 2015), 144.

41 Lorena Bachmaier Winter, "New Developments in EU Law in the Field of *In Absentia* National Proceedings. The Directive 2016/343/EU in the Light of the ECtHR Case Law," 641–667 or Stefano Ruggeri, "Participatory Rights in Criminal Proceedings. A Comparative-Law Analysis from a Human Rights Perspective," 671–742 in *Personal Participation in Criminal Proceedings: A Comparative Study of Participatory Safeguards and in absentia Trials in Europe*, ed. Serena Quattrocolo, Stefano Ruggeri (Heidelberg: Springer, 2019).

42 O'Leary, "Courts," 35–38.

43 ECtHR Decision on the admissibility of 4 May 2010, Case *Stapleton* v *Ireland,* application no. 56588/07, hudoc.int*, paras. 1–16.*

44 ECtHR Decision on the admissibility of 4 May 2010, Case *Stapleton* v *Ireland,* application no. 56588/07, hudoc.int*,* paras. 21–33.

the EAW issuing state.[45] The subsequent *Mann* admissibility decision allows for the applicability of the «*flagrant denial of justice*» test in case of the EAW surrender between the EU-ECHR signatories (Arts. 5, 6, 13 ECHR) in a similar manner.[46] An attempt was also made by the applicant to transpose the *Soering* approach to the Art. 5 («*Right to liberty and security*») interpretation in *Pianese* – the application was however considered inadmissible as well – being out of time and manifestly ill-founded.[47]

The issue of the *detention conditions* in course of the EAW execution was discussed in *Ciobanu* – leading to finding the violation of Arts. 3 and 5 ECHR within this context, even though the Strasbourg Court preferred to skip the extradition issue, focusing on the Art. 3 ECHR *´severity´* threshold.[48] The *Ignaoua* case was related to the return of Tunisians to Italy under the European Arrest Warrant where they would be at risk of being returned to Tunisia: the ECtHR skipped the analysis of Arts. 3 and 13 within this context, having stated that «*the mutual trust and confidence underpinning measures of police and judicial cooperation among EU Member States*» in itself supports «*the Court's own general assumption*» that the EU-ECHR signatories already respect their international law obligations, including ones stemming from the European Convention.[49] In *E.B.*, the claimant tried to invoke Art. 8 ECHR («*Right to respect for private and family life*») as a ground for the refusal to execute the Warrant issued against a Polish citizen residing in the United Kingdom – as she was a mother of five children, four of whom were minors. However, since the case evidence demonstrated that the minors were subject to a care order by the local authorities for reasons unrelated to the EAW execution,

45 Vincent Glerum, Klaas Rozemond and Elies van Sliedregt, "Lessons of the European Arrest Warrant," in *Counter-Terrorism Strategies in a Fragmented International Legal Order: Meeting the Challenge*, ed. Larissa van den *Herik* and Nico *Schrijver* (Cambridge: Cambridge University Press, 2013), 205–206.

46 ECtHR Decision on the admissibility of *1 February 2011*, Case *Mann v. United Kingdom* and *Portugal*, application no. *360/10*, hudoc.int.

47 ECtHR Decision on the admissibility of 27 September 2011, Case *Pianese v Italy and the Netherlands,* application no. 14929/08, hudoc.int.

48 ECtHR Judgment of 9 July 2013, Case *Ciobanu v. Romania and Italy,* application no. 4509/08, hudoc.int.

49 ECtHR Decision on the admissibility of 18 March 2014, Case *Habib Ignaoua and Others v United Kingdom*, application no. 46706/08, hudoc.int.

and that the eldest child was independent, the application was considered manifestly unfounded and discontinued.[50]

Finally, the *Gray* case concerned the scope of the positive obligation to investigate the medical negligence of a German doctor that resulted in the death of a patient in the United Kingdom – followed by the European Arrest Warrant proceedings initiated by the UK courts. The family of the deceased (two British nationals) complained, under the substantive aspect of Art. 2 ECHR («*Right to life*»), the shortcomings in the British healthcare system had led to their father's death, and the investigations conducted both in the United Kingdom and in Germany had not complied with the procedural requirements inherent in Art. 2 («*an obligation to investigate*») of the Convention.[51] The Strasbourg Court rejected the complaint relating to Art. 2 ECHR, while – *de facto* – incidentally (1) recognising the existence of extraterritorial Human Rights obligations[52] and (2) shifting the issue of participation in criminal proceedings to individuals other than the accused (such as the family members) within this specific context.[53]

3. Romeo Castano: questioning the spirit of the amended ECHR Preamble?

Simultaneously, the so-called «*Interlaken process*» was initiated within the Strasbourg system of Human Rights protection, in order to address the issue of the growing number of individual applications to the European Court of Human Rights,[54] which – as mentioned above – originated from the cases appearing in the EU «*mutual trust*» area as well. The subsidiarity concept was seen as one of the key tools to address these challenges,

50 ECtHR Decision on the admissibility of 20 May 2014, Case *E.B. v UK,* application no. 63019/10, hudoc.int.

51 ECtHR Judgment of 22 May 2014, Case *Gray v Germany,* application no. 49278/09, hudoc.int.

52 Ibrahim Kanalan, "Extraterritorial State Obligations Beyond the Concept of Jurisdiction," *German Law Journal* 19, no. 1 (2018): 44, 47.

53 Stefano Ruggeri, "*Inaudito reo* Proceedings, Defence Rights, and Harmonisation Goals in the EU: Responses of the European Courts and New Perspectives of EU Law," *The European Criminal Law Associations Forum* 1 (2016): 49.

54 Marija Pejčinović Burić, *The Interlaken process: measures taken from 2010 to 2019 to secure the effective implementation of the European Convention on Human Rights* (Strasbourg: *Council of Europe Publishing,* 2020), 22–23.

as the structural and systemic issues appearing in the CoE´s national legal systems required the proper and well-balanced allocation of the tasks between the national and international institutions.[55] The ongoing reform of the Strasbourg Court was hence likely to mark a new step in the development of the judicial dialogue between two European Courts, and culminated in the adoption of Protocols No. 15 (*incorporating the principle of subsidiarity into the Convention Preamble*) and 16 (*allowing national courts to ask advisory opinions to the Strasbourg Court*).[56] The particularly sensitive nature of the changes brought by Protocol No. 15 ECHR caused significant delay with its entry into force.[57] On 21 April 2021, Italy – as the last State Party – finally deposited its instrument of ratification, thereby bringing Protocol No. 15 ECHR into force for all Council of Europe Member States with effect from 1 August 2021.[58]

At the same time, the Strasbourg Court´s perception of the European Arrest Warrant shall presumably be seen in light of the parallel developments in the Luxembourg Court´s jurisprudence. The delivery of *Opinion 2/13* precluding the EU from accession to the European Convention has reopened the debate on «*mutual trust*» within the context of the EAW enforcement.[59] The CJEU described the principle of mutual trust as the EU´s «*raison d'être*» and suggested that the EU Member States were obliged to safeguard the effectiveness of the EAW Framework Decision, even at

55 Andreas Follesdal, "The Principle of Subsidiarity as a Constitutional Principle in International Law," *Global Constitutionalism* 2 (2013): 62.

56 In this sense, see for example David Milner, "Protocols no. 15 and 16 to the European Convention on Human Rights in the context of the perennial process of reform: a long and winding road," *Zeitschrift für europarechtliche Studien* 17, no. 1 (2014): 19–51.

57 Stefania Ardito, "Protocollo n. 15 alla Convenzione europea dei diritti dell'uomo," Unionedirittiumani, accessed September 20, 2021, https://www.unionedirittiumani.it/protocollo-n-15-alla-convenzione-europea-dei-diritti-delluomo.

58 Chart of signatures and ratifications of Treaty 213, Protocol No. 15 amending the Convention for the Protection of Human Rights and Fundamental Freedoms, Council of Europe, accessed September 20, 2021, https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/213/signatures?p_auth=ckgLoEXn.

59 Eduardo Gill-Pedro and Xavier Groussot, "The Duty of Mutual Trust in EU Law and the Duty to Secure Human Rights: Can the EU's Accession to the ECHR Ease the Tension?," *Nordic Journal of Human Rights* 35, no. 3 (2017): 260.

the cost of protecting Fundamental Rights.[60] As this strong statement – predictably – attracted a lot of critique in academia and among practitioners, the CJEU was forced to respond to the concerns revolving around the Fundamental Rights-related grounds for non-execution of the European Arrest Warrant[61] in the joined cases of *Aranyosi and Caldararu*[62] – rather soon after the CJEU *Opinion 2/13* release. In this judgment, the CJEU ruled that the mutual trust principle may be – in principle – reviewable both when executing the Warrant for prosecution or custodial sentence purposes and, as a result, an execution of an EAW may be postponed/abandoned in an exceptional case – thus recognising that the «*mutual trust (in the EU) must not be confused with blind trust*».[63]

In both cases, the CJEU was asked to clarify whether the national judicial authority may or shall refuse *tout court* execution where there is solid evidence that detention conditions in the issuing EU Member State are incompatible with fundamental rights, in particular with Art. 4 («*prohibition of inhuman or degrading treatment*») in conjunction with Arts. 6 («*right to liberty and security*») and 48 («*presumption of innocence and rights of defence*») CFREU. The CJEU heavily relied on the abovementioned EU Charter provisions to conclude that if an *executing* judicial authority has evidence which demonstrates that there is a *real risk* that detention conditions

60 CJEU Opinion of 18 December 2014, Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms, Case Opinion 2/13 *(Opinion 2/13)*, ECLI:EU:C:2014:2454, paras. 166–172, 191–195.

61 In this sense, see for example Alex Tinsley, "The Reference in Case C-396/11 *Radu:* When does the Protection of Fundamental Rights Require Non-execution of a European Arrest Warrant?," *European Criminal Law Review* 2 (2012): 338– 352; Emily Smith, "Running Before We Can Walk? Mutual Recognition at the Expense of Fair Trials in Europe's Area of Freedom, Justice and Security," *New Journal of European Criminal Law* 1 (2013): 82–98; Tomasz Ostropolski, "The CJEU as Defender of Mutual Trust," *New Journal of European Criminal Law* 2 (2015): 166–178.

62 CJEU Judgment of 5 April 2016, Pál Aranyosi and Robert Căldăraru v Generalstaatsanwaltschaft Bremen, Joined Cases C-404/15 and C-659/15 PPU, ECLI:EU:C:2016:198.

63 Koen Lenaerts, "The Principle of Mutual Recognition in the EU's Area of Freedom, Security and Justice: The fourth annual lecture in honour of Sir Jeremy Lever, 30 January 2015," accessed September 20, 2021, https://www.law.ox.ac.uk/news/2015–02–18-principle-mutual-recognition-eus-area-freedom-security-and-justice-judge-lenaerts, 29.

in the *issuing* Member State infringe Art. 4 of the Charter, the *executing* judicial authority must assess that risk using a two-stage test.[64]

Firstly, the executing judicial authority must assess whether *general* detention circumstances in the issuing Member State constitute a real risk of an Art. 4 CFREU violation;[65] such an assessment in itself is not sufficient to render surrender impermissible.[66] Several sources can be used, *such as the decisions of the ECtHR*, the decisions of courts of the issuing Member State or *reports drawn up by the organs of the Council of Europe* or the UN.[67] *Secondly*, the executing judicial authority judges whether there are substantial grounds for believing that *the requested person in question* will be subjected to a real risk of Art. 4 CFREU violations.[68] If, after its two-stage assessment, the executing judicial authority finds that there is *a real risk* of an Art. 4 CFREU violation for the requested person once surrendered, the executing judicial authority is in principle enabled to decide whether or not to postpone/terminate the EAW procedure.[69]

It could be said that the *Aranyosi and Căldăraru* judgment is one of «*reconciliation*» between various competing values and interests as well as a step towards thawing the relationship between the CJEU and the ECtHR, following *Opinion 2/13,* however aimed at strengthening the EU Charter position within the EU legal order architecture. The judgment presumably

64 CJEU Judgment of 5 April 2016, Pál Aranyosi and Robert Căldăraru v Generalstaatsanwaltschaft Bremen, Joined Cases C-404/15 and C-659/15 PPU, ECLI:EU:C:2016:198, para. 88.

65 CJEU Judgment of 5 April 2016, Pál Aranyosi and Robert Căldăraru v Generalstaatsanwaltschaft Bremen, Joined Cases C-404/15 and C-659/15 PPU, ECLI:EU:C:2016:198, para. 89.

66 CJEU Judgment of 5 April 2016, Pál Aranyosi and Robert Căldăraru v Generalstaatsanwaltschaft Bremen, Joined Cases C-404/15 and C-659/15 PPU, ECLI:EU:C:2016:198, paras. 91, 93.

67 CJEU Judgment of 5 April 2016, Pál Aranyosi and Robert Căldăraru v Generalstaatsanwaltschaft Bremen, Joined Cases C-404/15 and C-659/15 PPU, ECLI:EU:C:2016:198, paras. 88–89.

68 CJEU Judgment of 5 April 2016, Pál Aranyosi and Robert Căldăraru v Generalstaatsanwaltschaft Bremen, Joined Cases C-404/15 and C-659/15 PPU, ECLI:EU:C:2016:198, para. 92.

69 CJEU Judgment of 5 April 2016, Pál Aranyosi and Robert Căldăraru v Generalstaatsanwaltschaft Bremen, Joined Cases C-404/15 and C-659/15 PPU, ECLI:EU:C:2016:198, para. 104.

revealed the intention of the CJEU to bring its case-law on Art. 4 of the EU Charter in line with the ECtHR's jurisprudence on Art. 3 ECHR in accordance with Art. 52(3) of the Charter. It could be stated however that the EU Court of Justice also nuanced the meaning of *mutual trust* on the basis of Arts. 4, 6 and 48 CFREU, as it had done before in EU Asylum Law (*N.S.* line of reasoning)[70] and opted for an *alternative* interpretation in which Fundamental Rights violations (can) constitute an exception to this trust.[71]

Moreover, the parallel response to *Opinion 2/13* «*mutual trust*» concerns was given by the European Court of Human Rights in the *Avotins* case – which originated in an application by a Latvian national complaining about the violation of Art. 6 of the European Convention on Human Which, allegedly occurred in the course of proceedings for the declaration of enforceability of a Cypriot judicial decision before Latvian courts.[72] The *Avotins* judgment reiterated the *Bosphorus* orthodoxy, mentioning that the two criteria shall still be considered for the possibility of the Strasbourg intervention: (1) the «*absence of any margin of manoeuvre*» on the part of the domestic authorities implementing the EU Law obligation, and (2) the «*deployment of the full potential of the supervisory mechanism*» provided for under EU Law.[73] While reaffirming its commitment to the needs of European cooperation, the European Court of Human Rights expressed its general concern about the compatibility of mutual recognition mechanisms established under EU Law with the European Convention, insofar as they are to be «*applied automatically and mechanically*».[74]

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70 CJEU Judgment of 21 December 2011, *N. S. v. Secretary of State for the Home Department. and M. E. and Others v. Refugee Applications Commissioner and Minister for Justice, Equality and Law Reform*, Joined Cases C-411/10 and C-493/10, ECLI:EU:C:2011:865.

71 In this sense, see for example Fisnik Korenica and Doli Dren, "No more unconditional 'mutual trust' between the Member States: an analysis of the landmark decision of the CJEU in *Aranyosi* and *Caldararu*," *European Human Rights Law Review* 5 (2016): 542; Koen Bovend'Eerdt, "The Joined Cases *Aranyosi* and *Căldăraru*: A New Limit to the Mutual Trust Presumption in the Area of Freedom, Security, and Justice?," *Utrecht Journal of International and European Law* 32, no. 83 (2016): 112.

72 ECtHR Judgement of 23 May 2016, Case *Avotiņš v. Latvia*, application no. 17502/07, hudoc.int.

73 ECtHR Judgement of 23 May 2016, Case *Avotiņš v. Latvia*, application no. 17502/07, hudoc.int, para. 105.

74 ECtHR Judgement of 23 May 2016, Case *Avotiņš v. Latvia*, application no. 17502/07, hudoc.int, para. 116.

However, the specific circumstances – and in particular the applicant's inactivity – defined the conclusion that the protection of Human Rights by the Latvian judges *was not manifestly incomplete*.[75] Consequently, the *Bosphorus* presumption was not rebutted and, therefore, no violation of Art. 6 ECHR was established against the defendant State.[76] This statement – presumably – reflects the spirit of the ECHR Preamble as amended by Protocol No. 15 text, limiting the scope of the Strasbourg Court's review in respect to the EU Member States ('*subsidiarity*'). This may be justified since the EU ensures, independently, at the judicial level, the protection of the rights guaranteed by the ECHR; in general, it is reasonable to assume that fundamental rights, including the right to a fair trial guaranteed by Art. 6 of the European Convention within the EU-specific «*mutual trust*» legal context, are respected.[77]

It could be submitted that these premises created a background for the Strasbourg Court´s intervention in the most sensitive area indicated by *Opinion 2/13* and the «*cornerstone*» of the EU's judicial cooperation in criminal matters, namely the European Arrest Warrant Framework Decision. In *Pirozzi,* the claimant raised an issue of the standard of protection to be afforded by Art. 6 ECHR in course of the EAW execution in case of the *in absentia* trials.[78] The Strasbourg Court took this opportunity to respond to the concerns expressed by *Opinion 2/13,* and – at least partly – to the questions raised by the post-*Monedero Angora* case-law *(*such as *Stapleton, Mann* or *Pianese),* by developing further the proportionality test for assessing violations within this context. The *Pirozzi* case concerned the applicant's detention by the Belgian authorities and his surrender to

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75 ECtHR Judgement of 23 May 2016, Case *Avotiņš v. Latvia*, application no. 17502/07, hudoc.int, paras. 124–125.

76 ECtHR Judgement of 23 May 2016, Case *Avotiņš v. Latvia*, application no. 17502/07, hudoc.int, paras. 126–127.

77 In this sense, see for example Dissenting Opinion of Judge Andras Sajò, ECtHR Judgement of 23 May 2016, Case *Avotiņš v. Latvia*, application no. 17502/07, hudoc.int, para. 7: *´It is indeed reasonable to assume that where States transfer their sovereignty to an international organisation that recognises the fundamental rights of the Convention. As provided for in the directly applicable Charter of Fundamental Rights (Art. 52(3)), the rights will be protected´*.

78 ECtHR Judgment of 17 April 2018, Case *Pirozzi v Bélgium*, application no. 21055/11, hudoc.int.

the Italian authorities under a European Arrest Warrant with a view to enforcing a conviction for drug-related crimes.[79]

The applicant complained that the Belgian authorities had failed to review the EAW legality, although it had been based on a conviction resulting from a trial during which he had not been present, even though being notified properly of the trial in question, and his position was represented by defence counsel. The Strasbourg Court recognised that arrest for the purposes of extradition, such as the EAW proceedings, is in principle covered by Art. 5,[80] the judges seemed to have given weight to the abovementioned arguments, hence finding no violation of Arts. 5 and 6 of the European Convention.[81] Having referred to the *Soering* lines of reasoning, the ECtHR has also held that the surrender of the plaintiff under the case facts cannot be considered a «*flagrant denial of justice*» – and the EAW execution by the Belgian courts had not been manifestly deficient – at least within the meaning of the *Bosphorus* presumption of equivalent protection.[82] In so doing, the Court has confirmed that – in principle – the domestic courts are enabled to review the risk of Fundamental Rights violations in the requesting State in course of the EAW Framework Decision implementation.[83]

Finally, in the prominent *Castaño* case,[84] the Strasbourg Court was requested to check compliance of the refusal to enforce a European Arrest Warrant with the procedural obligations stemming from Arts. 2 («*Right to life*») and 6 («*Right* to a *fair trial*») ECHR. The application originated

79 ECtHR Judgment of 17 April 2018, Case *Pirozzi v Bélgium*, application no. 21055/11, hudoc.int, paras. 1–23.

80 ECtHR Judgment of 17 April 2018, Case *Pirozzi v Bélgium*, application no. 21055/11, hudoc.int, para. 45.

81 Jan Wouters, Michal Ovádek, *The European Union and Human Rights: Analysis, Cases, and Materials* (Oxford: Oxford University Press, 2021), 264.

82 ECtHR Judgment of 17 April 2018, Case *Pirozzi v Bélgium*, application no. 21055/11, hudoc.int, paras. 57–72.

83 In this sense, see for instance Johan Callewaert, "Do we still need Article 6(2) TEU? Considerations on the absence of EU accession to the ECHR and its consequences," *Common Market Law Review* 55, no. 6 (2018): 1705 or Florentino-Gregorio Ruiz Yamuza, "LM case, a new horizon in shielding fundamental rights within cooperation based on mutual recognition. Flying in the coffin corner," *ERA Forum* 20 (2020): 388–392.

84 ECtHR Judgement of 9 July 2019, Case *Romeo Castaño v. Belgium*, application no. 8351/17, hudoc.int.

in the Belgian authorities' refusal to execute a European Arrest Warrant issued by Spain for the purposes of prosecution of a Spanish national who was residing in Belgium. The applicants - Spanish nationals residing in Spain – complained that their right to an effective investigation under Art. 2 ECHR («*Right to life*») had been breached as a result of the Belgian authorities' refusal to execute the European Arrest Warrants issued by Spain in 2004 and 2005 in respect of an individual (referred to in the judgment as 'N.J.E.') suspected of shooting their father in 1981 by a commando unit claiming to belong to the terrorist organisation ETA (or «*Euskadi Ta Askatasuna*», a Basque separatist group).

Moreover, relying on Art. 6 of the Convention, the applicants also see in this situation a problem of access to the Belgian courts. All other members of the commando unit were already sentenced in Spain in 2007, while N.J.E. had fled to Mexico and then moved to Belgium. Referring to a report by the European Committee for the Prevention of Torture (CPT) concerning the latter's periodic visit to Spain, the Belgian courts refused the surrender as there were serious grounds for believing that the execution of the European Arrest Warrant would have the effect of infringing the applicant´s Fundamental Rights under Art. 6 TEU, presumably amounting to the breach of Art. 3 («*The prohibition of torture*») ECHR.[85]

The Strasbourg Court prominently preferred to discuss the case facts from the perspective of Art. 2 («*Right to life*»), namely that the Belgian authorities' refusal to execute the EAW made impossible the prosecution of their father's alleged murderer.[86] It was suggested to consider *Castano* in light of the recent *Güzelyurtlu* judgment concerning criminal investigations with a transnational dimension, entailing an obligation on States to cooperate effectively.[87] The factors which arguably convinced the judges to choose this strategy could be the similarities in the factual

[85] ECtHR Judgement of 9 July 2019, Case *Romeo Castaño v. Belgium*, application no. 8351/17, hudoc.int, paras. 1–22.

[86] Mattia Pinto, "Romeo Castaño: ‹meticulously elaborated interpretations› for the sake of prosecution," Strasbourgobservers, accessed September 20, 2021, https://strasbourgobservers.com/2019/09/10/romeo-castano-meticulously-elaborated-interpretations-for-the-sake-of-prosecution.

[87] ECtHR Judgement of 29 January 2019, Case *Güzelyurtlu and others v. Cyprus and Turkey,* application no. 36925/07, hudoc.int, paras. 232–233.

circumstances of these cases: in *Güzelyurtlu,* the applicants were the relatives of the deceased victims, who complained that both the Cypriot and Turkish authorities have failed to co-operate and conduct an effective investigation into the killing of their family members.[88] Moreover, the ECtHR could be willing to avoid the discussion on the potential applicability of the *Soering*/*Bosphorus* formulae within the European Arrest Warrant context (which seemed possible in light of the *Avotins*/*Pirozzi* outcomes).

The reasoning of the *Castano* judgment hence presents a special interest: basing itself on *Güzelyurtlu*, the Court developed its case-law on the scope of a State's procedural obligation to cooperate with another State investigating a crime committed within the latter's jurisdiction – within the context of the European Arrest Warrant enforcement.[89] At the same time, the Court *de facto* transposed the *Aranayosi*/*Caldararu* benchmarks developed in the EU's legal order – which can be considered a further step towards a symmetry between the interpretation of the EU Charter and the ECHR rights.[90] The Strasbourg judges emphasised that *Castano* continues to follow not only the *Güzelyurtlu* but the *Pirozzi* line of reasoning as well – which however shall be interpreted in light of the parallel developments in EU Law, and in particular the CJEU´s jurisprudence. Direct reference was made to the *Aranayosi*/*Caldararu* judgment in the «*Relevant Domestic Law And Practice*» section, in order to shed light on the assessment test which the executing EU Member State had to undertake where it had evidence pointing to systemic or generalised deficiencies with regard to the conditions of detention in prisons in the EAW issuing State, in light of Art. 4 CFREU («*Prohibition of torture and inhuman or degrading treatment or punishment*») – as interpreted by the EU Court of Justice.[91] Even

88 ECtHR Judgement of 29 January 2019, Case *Güzelyurtlu and others v. Cyprus and Turkey,* application no. 36925/07, hudoc.int, paras. 10–136.

89 Matteo Zamboni, "Romeo Castaño v Belgium and the Duty to Cooperate under the ECHR," Ejiltalk, accessed September 20, 2021, https://www.ejiltalk.org/romeo-castano-v-belgium-and-the-duty-to-cooperate-under-the-echr.

90 Eva Neumann, "Europäische Einigkeit in Action: Menschenwürde im Strafvollzug: EuGH konkretisiert Mindestanforderungen für Haftbedingungen im Kontext des Europäischen Haftbefehls," Voelkerrechtsblog, accessed September 20, 2021, https://voelkerrechtsblog.org/de/europaische-einigkeit-in-action-menschenwurde-im-strafvollzug.

91 ECtHR Judgement of 9 July 2019, Case *Romeo Castaño v. Belgium*, application no. 8351/17, hudoc.int, paras. 23–24.

though the children of Colonel Romeo focused primarily on the violations of the right to a fair trial in their application (Art. 6), the Strasbourg Court prominently switched the focus on the infringement of Art. 2 («*The right to life*») of the European Convention.[92]

Importantly, the judges made a statement concerning the *ratione loci* objection raised by the Belgian Government: a *jurisdictional link* with Belgium was established, due to «*the context of the mutual undertakings given by the two States in the sphere of cooperation in criminal matters, in this instance under the European arrest warrant scheme… the Belgian authorities were subsequently informed of the Spanish authorities' intention to institute criminal proceedings against N.J.E., and were requested to arrest and surrender her*».[93] In view of these considerations, the Strasbourg Court proposed to apply the *two-stage proportionality test* in order to assess if the Belgian authorities responded properly to the Spanish request for the surrender on the basis of the EAW Framework Decision, and whether the refusal to cooperate could be considered legitimate.[94] It will be submitted that the judges – predictably – made all effort to avoid possible conflict and the clash of jurisdictions with the EU Court of Justice, referring to the *Aranyosi/Căldăraru* criteria of the assessment for the legality of the EAW refusals.[95]

Considering these criteria, the Strasbourg judges assessed if the refusal of the Belgian authorities to extradite N.J.E. was compatible with obligations

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92 Erin Lovall, "European Court of Human Rights Released Judgment in Romeo Castaño v. Belgium Case Holding Belgium Failed to Uphold Obligations Under Article 2 of the European Convention on Human Rights," ASIL, accessed September 20, 2021, https://www.asil.org/ILIB/european-court-human-rights-released-judgment-romeo-casta%C3%B1o-v-belgium-case-holding-belgium.

93 ECtHR Judgement of 9 July 2019, Case *Romeo Castaño v. Belgium*, application no. 8351/17, hudoc.int, para. 41. In this sense, see for example Hélène Tigroudja, "Procedural Developments at International Human Rights Courts and Bodies," *The Law & Practice of International Courts and Tribunals* 19, no. 2 (2020): 326.

94 ECtHR Judgement of 9 July 2019, Case *Romeo Castaño v. Belgium*, application no. 8351/17, hudoc.int, para. 82.

95 In this sense, see for instance Luc von Danwitz, "In Rights We Trust: The ECtHR's judgment in Romeo Castaño v. Belgium and the relationship between the ECHR and the principle of mutual trust in EU law," Verfassungsblog, accessed 20 September, 2021, https://verfassungsblog.de/in-rights-we-trust; Callewaert, Johan, "Judgment of the ECHR in Romeo Castaño v. Belgium," Johan Callewaert, accessed September 20, 2021, https://johan-callewaert.eu/de/judgment-of-the-echr-in-romeo-castano-v-belgium.

stemming from the procedural limb of Art. 2 of the European Convention. Firstly, the ECtHR examined whether the European Arrest Warrant request issued by Spanish courts was granted a proper response.[96] As regards the first question, the Court found that the Belgian authorities provided their Spanish counterparts with a sufficient legal reasoning – on the basis of the implementing national legislation, i.e. section 4(5) of the Belgian European Arrest Warrant Act and the observations previously made by the Human Rights Committee (HRC) in 2015 which demonstrated *the potential risk* that N.J.E. would be detained in Spain in conditions contrary to Art. 3 («*The prohibition of torture*») ECHR. The Belgian authorities' conduct was also found compliant with the requirements of the previous EAW jurisprudence (*Pirozzi*, *Avotiņš*) which underlined that the EU's mutual recognition mechanism should not be applied automatically to the detriment of fundamental rights.[97]

Secondly, the legitimacy of the grounds for such a refusal – in particular a sufficient factual basis in the case at hand – was assessed.[98] The Court stated that the Belgian courts based their decisions mainly on international reports and on the context of Spain's contemporary political history, considering the abovementioned HRC documentation. However, in the eyes of the ECtHR, the Belgian authorities failed to conduct a detailed and updated examination of the situation prevailing in 2016 and hence did not seek to identify *a real and individualised risk* of a detainee's Convention rights or any structural shortcomings with regard to conditions of detention in Spain. Moreover, it was emphasized that the N.J.E. EAW was handled differently in comparison with the previous Warrants issued by Spain in respect of suspected members of ETA: they had been executed by Belgium successfully and without identifying any risk of a violation of the Fundamental Rights of the persons being surrendered.[99] In light of

96 ECtHR Judgement of 9 July 2019, Case *Romeo Castaño v. Belgium*, application no. 8351/17, hudoc.int, para. 82.

97 ECtHR Judgement of 9 July 2019, Case *Romeo Castaño v. Belgium*, application no. 8351/17, hudoc.int, paras. 83–84.

98 ECtHR Judgement of 9 July 2019, Case *Romeo Castaño v. Belgium*, application no. 8351/17, hudoc.int, para. 82.

99 ECtHR Judgement of 9 July 2019, Case *Romeo Castaño v. Belgium*, application no. 8351/17, hudoc.int, paras. 86–88.

these concerns, the Strasbourg judges found it possible to conclude that the conduct of the Belgian authorities handling the European Arrest Warrant issued by Spain for the surrender of N.J.E. was contrary to the positive obligations stemming from the procedural limb of Art. 2 («*The Right to Life*») of the European Convention.[100]

Even though the judgment is unanimous, the Concurring Opinion of Judges Spano and Pavli presumably sheds light on the underpinning rationales of the choice made by the Strasbourg Court. Two judges underlined the pressing nature of the 27 versus 47 discourse, and the deriving need to harmonise the minimum standard of protection guaranteed by the Convention with one proposed by the Charter of Fundamental Rights of the European Union, in cases invloving the interpetation of the corresponding rights.[101] Despite the lack of the judges' intention to reconsider their well-established «*exclusionary*» approach to Art. 6 ECHR guarantees within the European Arrest Warrant context, this outcome presumably opens a possibility for extending the *Castano* approach to other categories of crimes covered by the EAW Framework Decision (Art. 2), such as for instance participation in a criminal organisation, terrorism, trafficking in human beings, counterfeiting and piracy of products, forgery of administrative documents and trafficking therein, forgery of means of payment, rape *etc*. At the same time, the pre-*Castano* Strasbourg case-law has already demonstrated the (predictable) intention of the persons being requested in course of the European Arrest Warrant proceedings to defend their rights which are potentially affected by its execution (*E.B., Mann, Ciobanu*). Since the number of the EAW-related applications to the Strasbourg Court is likely to increase significantly after *Castano*, the floor is open for the applications related, for instance the prohibition of torture (Art. 3), right to liberty and security (Art. 5), the right to respect for private and family life (Art. 8), freedom of thought, conscience and religion (Art. 9), freedom of expression (Art. 10), freedom of assembly and association (Art. 11), the right to an effective remedy (Art. 13) *etc*.

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100 ECtHR Judgement of 9 July 2019, Case *Romeo Castaño v. Belgium*, application no. 8351/17, hudoc.int, paras. 89–92.

101 Concurring Opinion of Judge Spano joined by Judge Pavli, ECtHR Judgement of 9 July 2019, Case *Romeo Castaño v. Belgium*, application no. 8351/17, hudoc.int.

The recent case of *Bivolaru and Moldovan*[102] seems to confirm these statements, as the Strasbourg Court recognised for the first time that the EAW execution can lead to the violation of Art. 3 of the European Convention («*The prohibition of torture*»). In both cases, the applicants (Romanian nationals) claimed that the surrender from France on the basis of the Warrants would expose them to inhuman and degrading treatment in Romania.[103] Importantly, the ECtHR judges – unlike in *Castano* – decided to apply the *Bosphorus* doctrine to the European Arrest Warrant area, and thus prominently shed light on the degree of the national margin of manoeuvre in relation to the EU Law obligation for establishing a potential «*manifest deficiency*» within this context.[104] The profound references to the Luxembourg Court's jurisprudence seems to have paved the way to the *Bivolaru and Moldovan* conclusions. The *Aranayosi/Caldararu* case, as well as the more recent (and controversial) *ML*[105] and *Dorobantu*[106], that *develop the* abovementioned *two-stage test for the assessment of (possible) systemic or generalised deficiencies* in the detention conditions in the EAW issuing EU Member State, were cited in the «*Relevant Legal Framework And Practice*» section.[107] Even though the ECtHR generally transposed the *Castano* approach, the emphasis was made on the second step, namely the assessment of the *individualised risk* to which the Warrant detainee could be potentially exposed.[108]

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102 ECtHR Judgement of 25 March 2021, Case *Bivolaru and Moldovan v. France*, applications nos. 40324/16 and 12623/17, hudoc.int.

103 ECtHR Judgement of 25 March 2021, Case *Bivolaru and Moldovan v. France*, applications nos. 40324/16 and 12623/17, hudoc.int, paras. 2–39.

104 Thomas Wahl, "ECtHR: EAW Cannot be Automatically Executed," EUCRIM, accessed September 20, 2021, https://eucrim.eu/news/ecthr-eaw-cannot-be-automatically-executed.

105 CJEU Judgment of 25 July 2018, *ML (*intervener: *Generalstaatsanwaltschaft Bremen),* Case C220/18 PPU, ECLI:EU:C:2018:589.

106 CJEU Judgment of 15 October 2019, *Dorobantu*, Case C-128/18, ECLI:EU:C:2019:857.

107 ECtHR Judgement of 25 March 2021, Case *Bivolaru and Moldovan v. France*, applications nos. 40324/16 and 12623/17, hudoc.int, paras. 49–55.

108 Johan Callewaert, "Manifest deficiency in the execution of a European arrest warrant – judgment of the European Court of Human Rights in the case of Bivolaru and Moldovan v. France," Johan Callewaert, accessed September 20, 2021, https://johan-callewaert.eu/de/manifest-deficiency-in-the-execution-of-a-european-arrest-warrant-judgment-of-the-european-court-of-human-rights-in-the-case-of-bivolaru-and-moldovan-v-france.

In case of Mr. Moldovan (charged with trafficking in human beings), the Strasbourg Court ruled that the *Bosphorus* presumption was applicable as the French authorities were not afforded any margin of manoeuvre acting within the strict *Aranyosi/Căldăraru* (Art. 4 CFREU-based) framework, and the scope of protection afforded by this two-stage test was in principle equivalent to one proposed by Art. 3 ECHR.[109] However, shortcomings were established leading to the violation of Art. 3 ECHR, as the French courts failed to request and examine additional information on the Romanian detention conditions in light of the previously formed ECtHR case-law. This was considered problematic as several early Strasbourg rulings (*Stanciu, Porumb, Pop*) had already showed that some of the Romanian prisons were overcrowded and that there was a *real risk* that the applicant would be detained in a prison cell where he would have less than 3 square meters of personal space, lack of hygiene, inadequate ventilation or lighting *etc*.[110] In light of these considerations, the French courts presumably failed to investigate properly a *sufficiently reliable factual basis* – given *the personal situation* of Mr. Moldovan – which demonstrated the *existence of a real risk* that the applicant would be exposed to inhuman and degrading treatment as a result of his detention conditions in Romania.[111]

In the *Bivolaru* case (related to the accusations of sexual relations with a minor), the ECtHR concluded that the *presumption of equivalent protection* was not applicable. The Strasbourg judges emphasised that the factual circumstances posed new questions of EU Law, in particular the fact that the applicant had previously been granted asylum by Sweden prior to Romania's accession to the EU, and Romania was now seeking his surrender under the European Arrest Warrant Framework Decision. As this circumstance presumably required submitting the request for a preliminary reference to the Court of Justice of the European Union (which was not done), the *full potential in the protection of the applicant's Fundamental*

109 ECtHR Judgement of 25 March 2021, Case *Bivolaru and Moldovan v. France*, applications nos. 40324/16 and 12623/17, hudoc.int, paras. 112–116.

110 ECtHR Judgement of 25 March 2021, Case *Bivolaru and Moldovan v. France*, applications nos. 40324/16 and 12623/17, hudoc.int, paras. 111–116.

111 ECtHR Judgement of 25 March 2021, Case *Bivolaru and Moldovan v. France*, applications nos. 40324/16 and 12623/17, hudoc.int, paras. 117–126.

Rights under EU Law was hence not deployed.[112] However, no violation of Art. 3 ECHR was established in respect of Mr. Bivolaru, since the executing French judicial authorities had carried out a proper and complete investigation of the *claimant's personal situation* on the basis of information requested from the Swedish authorities.[113] Moreover, the ECtHR also noted that the applicant himself failed to explain properly which factors could potentially expose him to a degrading/inhuman treatment contrary to Art. 3 of the Convention (such as the persecution on religious grounds in Romania)[114] – which could be seen as the (indirect) shifting of the burden of proof in the European Arrest Warrant-related jurisprudence to the claimants.[115]

Moreover, the applicants in the pending *Alosa* case[116] have already requested to interpret Art. 2 («*Right to life*») and 13 («*Right to an effective remedy*») of the European Convention in light of the grounds for non-execution of the European Arrest Warrant (Art. 4(6) EAWFD), thus presumably pushing the European Court of Human Rights to further develop this new proportionality test. Apart from the unclear perspectives of the *Castano* doctrine application after the entry into force of Protocol No. 15 to the European Convention, the *Soering* approach – where the Strasbourg Court allowed the national courts to prioritise Human Rights protection over the cooperation in criminal matters only in exceptional cases – seems to be nuanced to some extent.[117]

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112 ECtHR Judgement of 25 March 2021, Case *Bivolaru and Moldovan v. France*, applications nos. 40324/16 and 12623/17, hudoc.int, paras. 130–132.

113 ECtHR Judgement of 25 March 2021, Case *Bivolaru and Moldovan v. France*, applications nos. 40324/16 and 12623/17, hudoc.int, paras. 138–140.

114 ECtHR Judgement of 25 March 2021, Case *Bivolaru and Moldovan v. France*, applications nos. 40324/16 and 12623/17, hudoc.int, paras. 142–145.

115 Jasper Krommendijk, "Bivolaru t. Frankrijk (EHRM, nr. 40324/16) – Bosphorus bijt in Bivolaru: over EHRM-toetsing tenuitvoerlegging EU-arrestatiebevelen," *EHRC,* accessed September 20, 2021, https://www.ehrc-updates.nl/commentaar/211497?skip_boomportal_auth=1.

116 ECtHR application communicated to the Italian and German Governments on 3 November 2019, Case *Alosa and Others v. Italy and Germany*, application no. 20004/18, hudoc.int.

117 In this sense, see for example Sibel Top and Paul De Hert, "Castaño avoids a clash between the ECtHR and the CJEU, but erodes Soering. Thinking human rights transnationally," *New Journal of European Criminal Law* 12, no. 1 (2021): 52–68.

One could hence ask the question of how the *Castano* judgment could influence the *Aranyosi/Caldararu* formula where the CJEU clarified that the list of the refusal grounds is exhaustive, and maintained this position in the subsequent judgments. Even though the references *to Castano* have already appeared sporadically in several CJEU acts,[118] the Luxembourg Court judges seem to avoid the profound analysis of this problematic Strasbourg judgment – the *Dorobantu*[119] judgment can be mentioned in this regard. However, regardless of the unclear future of the *Castano* formula in the ECtHR´s/CJEU´s case-law, one could definitely state that this judgment could be seen as an attempt to coordinate the CFREU/ECHR standards of protection in the European Arrest Warrant area – in order to strengthen a link between the Convention and Union Laws, and to defend the rights of the EU individual in a more coherent and efficient manner.[120]

4. Conclusion

In this paper, an attempt was made to shed some light on the proportionality tests being proposed by the European Court of Human Rights case-law with the European Arrest Warrant component, in light of the corresponding developments in the EU Court of Justice practice (*Aranyosi/Căldăraru*). The main argument presented was that the recent *Castano/Bivolaru and Moldovan* rulings of the Strasbourg Court seem to indicate a new step in the judicial dialogue between two European courts as they incorporated a new proportionality test in the Law of the European Convention, at least in the EAW-related lines of reasoning.

Even though the Strasbourg Court refused to reconsider the «*exclusionary*» approach to the applications of Art. 6 («*The Right to a Fair Trial*») ECHR within the EAW context, it was recognised in *Castano* that the requested State should have still fulfilled its *procedural obligation to cooperate under* Art. 2 *(«The Right to Life»)* ECHR. It was interpreted within this

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118 In this sense, see for example Opinion of Advocate General Campos Sánchez-Bordona delivered on 12 November, 2020, *L. and P.* (*intervener: Openbaar Ministerie)*, Joined Cases C354/20 PPU and C412/20 PPU, ECLI:EU:C:2020:925.

119 CJEU Judgment of 15 October 2019, *Dorobantu*, Case C-128/18, ECLI:EU:C:2019:857, para 57.

120 In this sense, see Concurring Opinion of Judge Spano joined by Judge Pavli, ECtHR Judgement of 9 July 2019, Case *Romeo Castaño v. Belgium*, application no. 8351/17, hudoc.int.

context as a need to support the investigation in the requesting State by conducting the two-stage assessment of the situation of the EAW detainee in light of Art. 3 («*The prohibition of torture*») ECHR severity threshold by (1) assessing the factual basis demonstrating the risk of the ill treatment in the requesting State and (2) the exposure of the Warrant detainee to this risk under the factual circumstances of the case.

Hence, one could conclude that the CJEU's benchmarks of the EAW refusals legality assessment – i.e. a risk of *inhuman or degrading treatment* in the requesting State (*Aranyosi/Căldăraru)* – were transposed to the Strasbourg practice in *Castano.* This presumably demonstrates the ECtHR´s unwillingness to conflict with the CJEU in a sensitive area (i.e. a «*cornerstone*» of judicial cooperation in the European Union). The subsequent *Bivolaru and Moldovan* judgment developed the *Castano* formula, by demonstrating the applicability of the «*Bosphorus*» *doctrine* to the European Arrest Warrant-related cases and even the rebuttal of the presumption of equivalent protection within this context.

For now, the scrutiny concerns only the charges of murder, manslaughter, trafficking in human beings, sexual assault and terrorism (*Castano, Bivolaru and Moldovan, Alosa*). At the same time, this interpretation opens the floor to the discussion on potential applicability of other Convention provisions within this context (Arts. 4, 5, 8) to other offences listed in Art. 2(2) of the EAWFD (such as, for instance, corruption, fraud, computer-related crime etc.). Hence, the EU Member States´ courts can be forced – *de facto* – to consider an additional (ECHR-based) criterion for assessing the legality of refusals to execute an EAW as an integral part of the (CFREU-based) *Aranyosi/Căldăraru* formula.

This can arguably pose further questions upon the entry into force of Protocol No. 15 ECHR (August, 2021), as it amends the ECHR Preamble in order to favour the most effective realisation of the «*subsidiarity*» principle within the Convention system. From the broader perspective, it could be stated here that the Strasbourg Court *de facto* reflected the spirit of the TEU Preamble («*facilitating) the free movement of persons, while ensuring the safety and security of their peoples, by establishing an area of freedom, security and justice*'),[121] while – maybe – undermining to some ex-

[121] Consolidated version of the Treaty on European Union (2012), 2012/C 326/01, *26 October 2012*.

tent the spirit of the ECHR Preamble as amended by Protocol No. 15 («*the High Contracting Parties, in accordance with the principle of subsidiarity, have the primary responsibility to secure the rights and freedoms defined in this Convention and the Protocols thereto, and that in doing so they enjoy a margin of appreciation*»).[122]

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[122] Protocol No. 15 amending the Convention on the Protection of Human Rights and Fundamental Freedoms, 24 June 2013, E.T.S No. 213.

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