The Manifesto on European Criminal Procedure Law; a commentary on the perspective of mutual recognition and violations of defence rights

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The Manifesto on European Criminal Procedure Law was presented in order to provide the EU legislator with guidance for a more balanced and coherent policy regarding criminal procedural law. This article explores two important demands being made; first, that mutual recognition shall not be absolute and secondly, that compensation of any deficits in the European criminal proceedings must be provided. It is underlined that the system of mutual recognition of decisions has left many questions unanswered regarding how the interests of the States and those of the individuals affected by such proceedings can be balanced. The Author agrees that a limitation of mutual recognition, for example in the shape of human rights bars to cooperation, is absolutely necessary in order to prevent violations of the procedural rights of a defendant. However, it is argued that there are significant difficulties in practice to enforce such provisions, and several examples of the underlying reasons therefore are given. An overall conclusion is that a limitation of mutual recognition can never be a substitute for procedural legislative action, and the importance of the demand for compensation is thereby emphasized. The Author suggests that the guidelines of the Manifesto should spark discussions about what kind of European criminal law we want to achieve.

I. Introduction

In 2013 the *Manifesto on European Criminal Procedure Law* (hereafter referred to as "the Manifesto") was presented by the *European Criminal Policy Initative*.[2] The purpose of the Manifesto was to provide the European Union legislator with guidance for a more balanced and coherent policy regarding new legislation in the area of criminal procedural law. Many new EU-instruments have been adopted in this area in the last few years, but the development is piecemeal and legislative action is often taken without sufficient consideration of the consequences for legal practice. In particular, the shift from traditional judicial assistance to a system of mutual recognition and execution of judicial decisions has left many questions unanswered regarding how the interests of the States and those of the individuals affected by such proceedings can be balanced.

Member States' obligations under international human rights instruments regarding, for example, the procedural rights of defendants did of course not change by the introduction of a cooperation-model based on the principle of mutual recognition. At the same time, this new method of cooperation has partly resulted in serious problems regarding the respect for and the enforcement of defence rights in

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[2] See *Zeitschrift für Internationale Strafrechtsdogmatik*, 11 (2013), p. 406-446.

the practice of the Member States. Against this backdrop, I will address mutual recognition in the context of state responsibility for violations of procedural rights of a defendant and refer this to two important demands being made in the Manifesto. The first issue to be discussed is the first demand that mutual recognition shall not be absolute. Thereafter, focus will be on the sixth demand that the Union legislator must provide for compensation of any deficits or shortcomings in the European criminal proceedings.

II. The first demand in the Manifesto

1. A limitation of mutual recognition

According to the first demand in the Manifesto, mutual recognition should not be absolute, but must be limited in certain cases in order to protect fundamental rights of individuals and/or to take account of the legitimate interests of the executing States.[3] Bars to international requests for judicial assistance based on such interests have traditionally been a very important restriction on the obligations of States to cooperate in criminal matters.

The Union legislator has so far not created any absolute, unrestricted application of the principle of mutual recognition within criminal law. Consequently, there are certain mandatory and facultative grounds for not executing a warrant.[4] Some of these refusal grounds have been adopted in order to protect fundamental rights of defendants. However, none of the instruments on mutual recognition – which are in force at the moment in the pre-trial stage – have any *explicit general* mandatory bars in cases where an executing State finds that the fundamental rights of a defendant have been or would be violated in an issuing State. Neither is there any such provision based on *ordre public*. Within mutual recognition it is presumed that all Member States have functioning criminal legal systems with due process rights, and this mutual trust is the fundamental basis of the system. On the other hand, most of the EU-instruments on mutual recognition contain some principal provisions – often contained in the recitals – on the protection of fundamental rights. A common phrase which is found provides, for example, that the legal instrument in question:

"shall not have the effect of modifying the obligation to respect fundamental rights and fundamental legal principles as enshrined in Art. 6 of the Treaty of the European Union."[5]

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[3] *Supra* Note 2, p. 430-432.

[4] See for example Art. 3-4 in the *Council Framework Decision of 13 June 2002 on the European Arrest Warrant and the Surrender Procedures between Member States*, *OJ* L 190, 18.7.2002, p. 1-18, Art. 13 in the *Council Framework Decision of 18 December 2008 on the European Evidence Warrant for the Purpose of Obtaining Objects, Documents and Data for Use in Proceedings in Criminal Matters*, *OJ* L 350, 30.12.2008, p. 72-92 and Art. 7 in the *Council Framework Decision of 22 July 2003 on the Execution of Orders in the European Union of Orders Freezing Property or Evidence*, *OJ* L 196, 2.8.2003, p. 45-55.

[5] Compare for such provisions, Art. 1 (3) and Recital 12 in the *Council Framework Decision of 13 June 2002 on the European Arrest Warrant and the Surrender Procedures between Member States*, *OJ* L 190, 18.7.2002, p. 1-18, Art. 1 (3) and Recitals 27 and 28 in the *Council Framework Decision of 18 December 2008 on the European Evidence Warrant for the Purpose of Obtaining Objects, Documents and Data for Use in Proceedings in Criminal Matters*, *OJ* L 350, 30.12.2008, p. 72-92 and Art. 1 and Recital 6 in the *Council Framework Decision on the Execution of Orders in the European Union of Orders Freezing Property or Evidence*, *OJ* L 196, 2.8.2003, p. 45-55.

Many Member States have in fact used such provisions as a basis for explicit human rights bars to recognition in their implementing legislations.

In a recent publication,[6] I have studied the effects of such human rights bars regarding the *Framework Decision on the European Arrest Warrant* (hereafter referred to as "the *FD on EAW*").[7] The domestic legislation and case-law in question concerned the Swedish and English system. According to the *European Commission* about two thirds of all Member States have built in explicit bars in their national legislations to an EAW in the case of violations of fundamental rights.[8] However, my research shows that it is quite difficult for a defendant to succeed and to block a warrant for surrender with an argument of violations of defence rights in the issuing State. This may seem surprising as the workload from many NGOs concerned with transnational cases (for example *Fair Trial International)* show that there are many violations of the most fundamental defence rights within the Union.[9] Several cases concern suspects or defendants who have not been informed about the criminal charges or have not been allowed the assistance of a defence lawyer. Many defendants have also been refused translation during the proceedings in the issuing State or have been denied access to the case file in the foreign State.[10]

There are various reasons for the significant difficulties in practice to limit the system of mutual recognition by setting up and applying human rights bars in such situations. In what follows, I will shortly address the three most important of these.[11] Even if I refer mostly to the *FD on EAW*, much of this is in principle also applicable to mutual recognition in other areas of the pre-trial stage.

2. Practical and procedural difficulties

If a defendant, for example, claims within a surrender proceeding that there is no fair trial in an issuing State, this means, in practice, that the court in the executing State must rule on foreign procedural law and on the functioning of foreign criminal proceedings. There are wide discrepancies regarding criminal procedure and the concept of a fair trial is very different from State to State within the Union. This means that such a task is both politically sensitive and extremely difficult. The courts therefore demand *substantial grounds*, meaning convincing documentation of clear violations of human rights in the specific case, and the burden of proof lies on the defendant. However, due to the tight time limits[12] the courts have in reality very little time to carefully review such arguments, and the defendant often lacks

[6] *Thunberg Schunke*, Whose Responsibility? A Study of Transnational Defence Rights and Mutual Recognition of Judicial Decisions within the EU, Intersentia, 2013.

[7] *Council Framework Decision of 13 June 2002 on the European Arrest Warrant and the Surrender Procedures between Member States*, *OJ* L 190, 18.7.2002, p. 1-18.

[8] European Commission, Report on the implementation of the EAW, COM (2006) 8 final, p. 5.

[9] See for example www.fairtrials.org.

[10] See, for example, the cases of *Garry Mann*, *Andrew Symeou* or *Andrew and Graham Stow*, described at www.fairtrials.org.

[11] For the complete study, see *Thunberg Schunke*, *Supra* Note 6.

[12] Art. 17 and 23 in the *FD on EAW* stipulates that a final decision on the execution of a warrant should normally be taken within a period of 60 days after the arrest of the requested person.

time to prepare sufficient documentation in order to support the arguments. A further difficulty is that there is no transnational right of access to the case-file in a foreign state. According to my findings, there are here different types of invoked human rights violations. Some may be more easily controlled and assessed by an executing State, for example the lack of assistance of an interpreter or a defence lawyer during the proceedings in an issuing State. In other cases, such arguments from a defendant are more difficult to handle within the surrender proceeding as it would require that an executing State assesses evidence in the same way as will be done in the following trial in the issuing State. Examples of such cases are when the defendant claims that evidence being the basis of a warrant is obtained through torture or is otherwise illegally obtained.

A certain "division of labour" between the States within mutual recognition regarding the assessment of whether there has been a violation of human rights in the specific case may in some cases be necessary and suitable. However, a crucial question, which cannot be discussed in the framework of this article, is in which cases an executing State has an *own* extraterritorial responsibility for violations which occur in the context of an execution on the basis of a foreign surrender warrant.[13]

3. The relationship between the concept of mutual trust and human rights bars

Another problematic aspect regarding the limitation of mutual recognition concerns *the relationship* between mutual trust and human rights bars. The above mentioned study of surrender has, for example, shown that the national courts often consider that a complete and critical assessment of arguments of violations of procedural rights is *per se* in conflict with the system of mutual recognition. There is thus a strong presumption that all Member States respect fundamental rights, and a defendant is therefore referred to the issuing State to "solve any problems". Neither the national legislator nor the Union legislator has given sufficient guidance on how the concept of mutual trust shall be interpreted and applied. This means that any existing domestic human rights bars often clash with the obligation to recognise and the presumption of mutual trust in the framework decisions on mutual recognition.

In her very-well reasoned opinion in the *Radu*-case[14] the Advocate General *Sharpston* argued that executing States can refuse a request for surrender without being in breach with the obligations stated by Community law, and that a State is even *bound to* have regard to the fundamental rights set out in the *European Convention for the Protection of Human Rights and Fundamental Freedoms* (ECHR) and the *Charter of Fundamental Rights in the European Union*.[15] It is a pity that the *Court of Justice of the European Union* did not follow this path, as it avoided to clearly take

[13] See further on such issues, *Thunberg Schunke*, *Supra* Note 6, especially p. 72-83 and 112-118.

[14] *Criminal Proceedings against Radu*, C-396/11, Judgment of 29 January 2013.

[15] Compare for example Para. 73 of the Opinion of Advocate General Sharpston in the *Criminal Proceedings against Radu*, C-396/11, delivered on 18 October 2012.

position on such general issues in the judgment that followed in the *Radu*-case and also in the *Melloni*-case.[16]

In domestic case-law on surrender, there are regrettably many examples of mutual trust applied as *blind* trust. In English case-law it was, for example, declared in the *Klimas-case* that:

"… the district judge need not, save in wholly extraordinary circumstances in which the constitutional order of the requesting State has been upset – for example by a military coup or violent revolution – examine the question at all."[17]

Such an application of human rights bars obviously renders the human rights guarantees of any substance, and has luckily been moderated by later case-law.[18] A rejection of blind trust has also been made by both European Courts regarding cases of mutual recognition in the area of European asylum law. In these cases, it has been declared that a State is under an obligation to carefully consider well-founded arguments of violations in the framework of such cooperation and that a conclusive presumption that other Member States observe fundamental rights is not permitted.[19] One may expect that the Courts may soon have to decide on cases regarding the obligation to surrender under the *FD on EAW* in relation to, for example, cases of poor detention conditions and other shortcomings of the prison systems in other States.[20] The general principles developed in European asylum law concerning the interpretation of mutual trust ought thereby to be applied analogously to the area of mutual recognition in criminal matters.

4. The threshold of flagrant denials of human rights

The last obstacle to the application of human rights bars in practice is the threshold of flagrant denials of human rights. The national courts strictly follow the case-law of the *European Court of Human Rights* (ECtHR), and the principle of the *Soering*-judgment has been recognized as applicable to the *FD on EAW*.[21] According to the case-law of the ECtHR, States are under an obligation to refuse cooperation in cases of "flagrant denials" of human rights. There is no requirement in transnational cases to control that all procedural safeguards in Art. 6 ECHR are complied with by other States. This means in principle that a defendant in transna-

[16] *Melloni v. Ministerio Fiscal*, C-399/11, Judgment of 26 February 2013. See for an analysis of these cases, *Thunberg Schunke*, *Supra* Note 6, p. 58-67.

[17] Para.13 in *Arvdas Klimas v. Prosecutor General Office of Lithuania*, [2010] England and Wales High Court 2076 (Admin). Compare *R (Jan Rot) v. District Court of Lublin, Poland*, [2010] England and Wales High Court 1820 (Admin.).

[18] See for example *Agius v Court of Magistrates Malta,* [2011]England and Wales High Court 759 *(Admin).*

[19] *M.S.S v. Belgium and Greece,* No 30696/09, Judgment of 21 January 2011, ECHR (2011) 108 and *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,* C-411/10 and C-493/10, Judgment of the Grand Chamber of 21 December 2011.

[20] This has already occurred within some national case-law. As an example may be mentioned *Lithuania v. Liam Campbell*, Judgment of 22 February 2013, [2013] Northern Ireland Queens Bench of High Court of Justice 19. In this case a requested person succeeded to block an EAW by referring to a violation of Art. 3 ECHR based on the poor prison conditions in Lithuania. The High Court of Justice in Northern Ireland refused to execute the warrant on this ground, and argued that that there is no irrebuttable presumption that all EU States comply with the ECHR.

[21] See *Soering v. the United Kingdom*, No. 14038/88, Judgment of 7 July 1989, ECHR (1989) Series A No. 161 and *Stapelton v. Ireland*, No. 56588/07, Decision of 4 May 2010, Reports 2010.

tional proceedings has a lower protection and fewer rights than defendants in purely national proceedings. There are difficulties with the concept of a fair trial in Art. 6 ECHR as the article contains a *catalogue of procedural rights* and from the case-law of the ECtHR follows that a violation of one such right does not *per se* render the whole trial as unfair. However, such an application is problematic in the transnational setting as the procedural measures may take place in different States, at varying stages of the procedure and according to different procedural regimes. This may result in difficulties to control whether in the procedure as a whole a deficit regarding certain procedural rights has been or may be compensated for.

My opinion is that a less stringent threshold than "flagrant denials" must be used within an area of freedom, security and justice. In practice, this is an extremely high standard interpreted by the ECtHR in the following way:

"What is required is a breach of the principles of fair trial guaranteed by Article 6 which is so fundamental as to amount to a nullification, or destruction of the very essence, of the right guaranteed by that Article."[22]

A strong argument for a reconsideration of the use of such a high standard within the EU area is that the Union legislator has in the last decades created significant powers for law-enforcement agencies. This means that there is an urgent need to balance these with an *improved* concept of a fair trial where not only national decisions have an extraterritorial effect but also the procedural rights of individuals.

In a case before the ECtHR, which concerned the execution of an EAW, the defence made a plea that an executing State must instead of the "flagrant denial-test" be obligated to determine whether "there has been established a real risk of unfairness" in the criminal proceedings in the issuing State. The court did not follow this suggestion, but ruled that such an approach "would run counter to" the established principles of *inter alia* the *Soering*-case.[23]

Obviously, there is a need for a development of more modern concepts of state responsibility, because some of the new methods of criminal cooperation have led to new roles of the acting States. The time has come for the Union legislator to consider how the allocation of responsibility for human rights violations should be divided between the Member States. In this context, mutual recognition of judicial decisions is especially demanding, as one underlying aim of this measure is to *concentrate the proceedings to one State*. This may be practical and in some cases justifiable. On the other hand, the difficult issue to be solved in the future will be under which circumstances an executing State may escape its own responsibility under human rights instruments only by referring possible violations to the courts of an issuing State?

5. The need for general human rights bars within mutual recognition

My conclusion is that even with a completely harmonised procedural law within the Union, there must be space for explicit "emergency-brakes", that is human

[22] Para. 115 in *Ahorugeze v. Sweden*, No. 37075/09, Judgment of 27 October 2011.
[23] *Stapleton v. Ireland,* No. 56588/07, Decision of 4 May 2010, Reports 2010.

rights bars, in cases of violations of the most fundamental rights. Factual and procedural mistakes do occur in every system. Furthermore, the embarrassing statistics of the ECtHR not only show that there are violations of the convention in the Union, but that there are even cases of systematic violations of human rights in some Member States.

An encouraging development may, however, now be seen in the newly adopted *Directive on the European Investigation Order in Criminal Matters* where the Union legislator has, under the influence of the European Parliament, explicitly permitted a refusal to execute a warrant on general human rights grounds.[24] Art. 11 (1) (f) proclaims that the execution of a European investigation order (EIO) may be refused in the executing State where:

"there are substantial grounds to believe that the execution of the investigative measure indicated in the EIO would be incompatible with the executing State's obligations in accordance with Article 6 TEU and the Charter."

Further, very clear statements regarding the respect for the fundamental rights of the person concerned when deciding whether to execute a warrant is given in Recital 19 of the same directive.

The adoption of these provisions is a very important progress as it is explicitly underlined that the presumption of compliance by other Member States with fundamental rights is rebuttable also within mutual recognition. This clear admittance to safeguarding human rights could work against some of the difficulties mentioned above under *Section II.3* regarding the insecurity of national courts with the interpretation of the obligation to cooperate and its relation to the concept of mutual trust. On the other hand, it is also important to realize that the provisions in this directive are in fact only stating the existing human rights obligations of the States. The difficulties addressed under *Section II.2* above, regarding the practical and procedural difficulties for a defendant to show *substantial grounds,* still remain. In addition, the problems arising from the high threshold of flagrant denials will continue to hinder a defendant who seeks to block a warrant on such grounds (discussed under *Section II.4* above).

I fully support the first demand of the Manifesto that the States shall be allowed to limit the execution of decisions within the mutual recognition system in order to protect fundamental rights of individuals. However, *ordre public* or human rights bars must not be overestimated and can never be substitutes for procedural legislative action. Consequently, the significant importance of the sixth demand of the Manifesto becomes obvious.

III. The sixth demand of the Manifesto

According to this demand, the Union legislator must provide full compensation for deficits or weakened legal positions of individuals concerned by European

[24] *Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 regarding the European Investigation Order in Criminal Matters*, *OJ* L 130, 1.5.2014, p. 1-30.

criminal proceedings.[25] A harmonisation of the most fundamental defence rights on a European basis is probably one of the most effective ways to really change the position of transnational defendants. Some progress on procedural rights has already been made on the basis of the adopted Roadmap.[26] In order for future directives on procedural rights to have more effect it is necessary for the Union legislator to aim at raising the existing standards by exceeding the standards of the ECHR and the case-law of the ECtHR. The perspective must be on the *transnational setting*; how do specific procedural rights function in domestic proceedings and what happens to them when they are applied in a transnational case? An example of such a tailor made provision, which has been exclusively created for surrender proceedings, is the right of dual representation.[27] The defendant is here given a right to legal assistance in an executing *and* an issuing State. It remains to be seen how effective this procedural safeguard will become, but its adoption symbolizes the effort to create a counterweight to the law-enforcement powers. It may turn out to be very effective in terms of facilitating for the defence to prepare and revoke refusal grounds to the execution of a warrant.

Another method of strengthening the position of the defence would be to expressly state clear remedies for any violations of procedural rights. This was, for example, tried by the Union legislator in one draft of the *Directive on the Right of Access to a Lawyer,* where it was provided that any statements or evidence obtained in breach of the right of a lawyer should not be used as evidence against him in the criminal proceedings.[28] This could have been a very powerful means to secure that procedural rights are enforced in everyday practice of the Member States. The provision was, however, regrettably watered down in the adopted text of the Directive.[29] This is a pity because such a method could in fact be a way to deal with the problems following from the high threshold of flagrant denials, discussed under *Section 2.4*, as it would provide a higher protection for defence rights and thereby secure that transnational defendants do not have fewer rights.

The development of transnational criminal cooperation within the Union requires a coherent and well-reasoned European policy. In this context, I hope that the wise guidelines of the Manifesto will spark discussions about what kind of European criminal law we want to achieve.

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[25] See *Zeitschrift für Internationale Strafrechtsdogmatik*, 11 (2013), p. 406-446, at p. 433 and 444-446.

[26] *OJ* C 295, 4.12.2009, p. 1-3.

[27] Art. 10 (4) in *Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 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*, *OJ* L 294, 6.11.2013, p. 1-12.

[28] See Art. 13 (3) of the *Proposal for a Directive of the European Parliament and of the Council on the Right of Access to a Lawyer in Criminal Proceedings and on the Right to Communicate upon Arrest*, COM (2011) 326 final, Brussels 8.6.2011.

[29] Compare Art. 12 and Recital 50 of the *Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 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*, *OJ* L 294, 6.11.2013, p. 1-12.