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Active personality and non-extradition of nationals in international criminal law at the dawn of the twenty-first century : adapting key functions of nationality to the requirements of International Criminal Justice

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**The Decline of the Nationality Exception in European Extradition?
The Impact of the Regulation of (Non-)Surrender of Nationals and Dual
Criminality under the European Arrest Warrant**

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ABSTRACT

The European Arrest Warrant constitutes an ambitious attempt to curb what has now for centuries been accepted as the sovereign right of States to refuse extradition of their nationals. Its regulations clearly draw on previous developments in the field of extradition, recognition and enforcement of foreign judgments, transfer of proceedings and transfer of prisoners. However, the European Arrest Warrant goes further than other instruments in its restriction of the nationality exception. Moreover, it simultaneously attempts to remove the dual criminality requirement for a large group of crimes. The present article analyzes the potential effects of these novel features of the European Arrest Warrant. The authors conclude that whereas the intentions of the drafters are commendable, the relevant provisions of this instrument as well as of its faulty domestic implementing statutes may in fact increase rather than reduce controversies related to requests for the surrender of nationals in Europe.

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1 INTRODUCTION

Many States are traditionally strongly opposed to extraditing their own nationals.¹ This attitude and practice are commonly based on or confirmed in national legislation (often of a constitutional rank) granting nationals the right to remain in the territory of the State, not to be extradited or expelled.²

The nationality exception to extradition has its origins in the sovereign authority of the ruler to control his subjects, the bond of allegiance between them, and the lack of trust in

¹ See, e.g., Ivan Anthony Shearer, *Extradition in International Law* (Manchester: Manchester University Press, 1971) 94-132; M. Cherif Bassiouni, *International Extradition: United States Law and Practice* (4th ed., Dobbs Ferry, N.Y: Oceana Publications, 2002) 682-689.

² For a recent review of such legislative provisions, see, e.g., Zsuzsanna Deen-Racsomány, 'A New Passport to Impunity? Non-Extradition of Naturalized Citizens versus Criminal Justice', 2 *Journal of International Criminal Justice* (2004) 761.

other legal systems. The traditionally voiced reasons in support of this exception are the following:

- (1) the fugitive ought not be withdrawn from his natural judges; (2) the state owes its subjects the protection of its laws; (3) it is impossible to have complete confidence in the justice meted out by a foreign state, especially with regard to a foreigner; and (4) it is disadvantageous to be tried in a foreign language, separated from friends, resources and character witnesses.³

These justifications, as well as the nationality exception in general, have been criticized, *inter alia*, for being based on ‘a form of legal xenophobia that is not warranted, especially if the treaties contain the requisite safeguards’,⁴ arguing that ‘if justice as administered in other States is not to be trusted, then there should be not extradition at all’.⁵ A more pragmatic problem with the application of the rule is that ‘prosecuting [the accused] for a crime committed far away will cause enormous difficulties and may cost huge amounts of money, with a still higher risk than in national cases that the accused may be found not guilty because of a lack of evidence’.⁶

[72] In fact, presumably few judges would have serious moral objections today to granting the extradition of fellow nationals for serious crimes committed abroad, which are obviously criminal wherever in the world they are committed if prosecution abroad had (procedural) advantages and due process safeguards were provided. Moreover, people doing – legal or illegal – business abroad may be expected to have acquired sufficient knowledge of the legal system of the State where they are active (‘when in Rome, do as the Romans do’), raising little sympathy in extradition proceedings if they knowingly commit crimes at the seat of their business and flee home.

However, many lawyers and judges would defend the nationality exception even today based on a less controversial – or chauvinistic – argument, namely the considerable expansion of extraterritorial jurisdiction during the past decades. Due to the far-reaching powers assumed by certain States in this regard,⁷ situations are increasingly common in which an individual becomes criminally liable before the courts of a foreign State – even without leaving the territory of his State of nationality and without having the slightest idea that his act might render him criminally responsible in a foreign jurisdiction. In most cases, such individuals are not completely innocent under the domestic legal system either. Nevertheless, the inherent unfairness of such situations (arising out of the lack of knowledge, but often associated with an inequality in terms of sentences and different standards of legal protection) tends to invoke the sympathies of national judges. Accordingly, they often consider the nationality exception to provide *reasonable and necessary* safeguards at least in the context of foreign requests for extradition of nationals for overt acts committed within the national territory, especially if domestic courts have concurrent jurisdiction.⁸

³ Sharon A. Williams, ‘Nationality, Double Jeopardy, Prescription and the Death Sentence As Bases for Refusing Extradition’, 62 *International Review of Penal Law* (1991) 259 at 260-261, citing the findings of a 1878 British Royal Commission chaired by Lord Cockburn.

⁴ *Ibid.* 261.

⁵ Harvard Draft Convention on Extradition, 21 *AJIL* (1927) Suppl. 21 at 128.

⁶ Stefan Oeter, ‘Effect of Nationality and Dual Nationality on Judicial Cooperation, Including Treaty Regimes Such As Extradition’, in David A. Martin and Kay Hailbronner (eds.) *Rights and Duties of Dual Nationals: Evolution and Prospects* (The Hague: Kluwer Law International, 2003) 55 at 59. On the above arguments, see too Shearer, *supra* note 1 at 118-125; Michael Plachta, ‘(Non)-Extradition of Nationals: A Neverending Story?’, 13 *Emory Int’l L.R.* (1999) 77 at 86-88.

⁷ See, e.g., Ariana Pearlroth/Redress, ‘Universal Jurisdiction in the European Union’, Report (2003), available online at <http://www.redress.org/conferences/country%20studies.pdf> (visited 7 October 2004) on the expansion of extraterritorial jurisdiction (not only over *jus cogens* crimes) in the EU.

⁸ A relevant recent Dutch example concerns the case of an Amsterdam cab driver, Dietz, who allegedly sold over 100,000 XTC pills to US tourists in Amsterdam. His customers subsequently smuggled the drugs to the United States. US authorities requested Dietz’ (a Dutch national) extradition from the Netherlands for conspiracy to

[73] While the status of the nationality exception is still unsettled in customary international law⁹ and its moral and practical utility remains debated, most extradition treaties at least permit the contracting parties to refuse handing over their own nationals.¹⁰

State practice is far from uniform. Civil law legal systems traditionally resort to this measure to protect their nationals. To compensate for any negative effects, these States commonly provide for jurisdiction over crimes committed by their nationals abroad. In contrast, in common law systems the primary basis of jurisdiction is territoriality. Hence, they generally do not establish jurisdiction over extraterritorial acts of their nationals, confine it to serious offenses or impose a dual criminality requirement. To facilitate justice, they usually permit the extradition of nationals.¹¹ Due to these fundamental differences of approach, the non-extradition of nationals often leads to disputes between States.

It has, however, been shown that increased cooperation and trust between States in the field of the investigation and prosecution of crime can lead to decreased reliance on the nationality exception.¹² Due to the similarity of values and its long shared history, it was predicted by many that Europe would be one of the first regions where [74] the nationality exception would be abolished. Rightly so, it seems. In late 2001, European States agreed significantly to circumscribe their sovereign right to invoke the nationality of the accused or convicted person as a basis for refusing surrender under the Framework Decision on the European Arrest Warrant.¹³ Based on the restriction of the broad discretion of States under

import XTC to the US. They claimed jurisdiction based on the objective territoriality principle, arguing that the accused could have suspected that his customers would take the drugs with them to the United States. He thus became criminally liable under US law for acts committed in the Netherlands, without knowing that his acts could render him responsible in that – foreign – jurisdiction. (See, e.g., Bart Nooitgedagt, ‘De Ontwerp Overeenkomst betreffende Uitlevering tussen de Verenigde Staten van Amerika en de Europese Unie: Kanttekeningen en vraagtekens’ [The Draft Agreement concerning Extradition between the United States of America and the European Union: Sideremarks and Questionmarks], Sect. II(d), available online at <http://www.njcm.nl/upload/VS-EU-NJCM.PDF> (visited 7 October 2004).) In the end, Dietz was extradited to the USA in July 2003, where he was sentenced to seventy months imprisonment based on a plea agreement. He will be returned to the Netherlands for the execution of his sentence in October 2004, in accordance with Article 11 of the Convention on the Transfer of Sentenced Persons (note 60, *infra*). (See ‘Dietz naar Nederland’ [Dietz comes to the Netherlands], *Het Parool*, 4 August 2004).

This case indicates that the nationality exception has some merits in certain instances, especially considering the significantly more severe penalties applicable to (soft) drug offenses in the USA than in the Netherlands and the fact that through his acts Dietz became criminally responsible in the Netherlands as well, making Dutch prosecution possible. See, *ibid*.

⁹ Dominique Poncet and Paul Gully-Hart, ‘Extradition: The European Model’, in M. Cherif Bassiouni (ed.), *International Criminal Law*, (1st ed., Dobbs Ferry, NY: Transnational Publications, 1986), Vol. 2, 461 at 468, 489. *Sed contra* [confirming the customary status of the rule: Declaration of acting President Oda, in *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie* (Libya v. United Kingdom), Order on Provisional Matters, 1992 ICJ Reps., 17 at 19, Dissenting Opinion of Judge Bedjaoui in *ibid.*, 33 at 39, para. 12; Dissenting Opinion of Judge El-Koshi in *ibid.* 94 at 109, para. 55.

¹⁰ This fact may be explained by the lack of any general obligation under customary international law to extradite persons apprehended by a State on its territory. (See, e.g., Robert Y. Jennings and Arthur Watts (eds.) *Oppenheim’s International Law* (9th ed., London: Longman, 1996) at 950.) Consequently, the limits of extradition arrangements are freely determined by the parties themselves and many States do not extradite at all in the absence of a treaty obligation.

¹¹ See, e.g., Christopher L. Blakesley, ‘The Law of International Extradition: A Comparative Study’, 62 *International Review of Penal Law* (1991) 449 at 451-459; Plachta, *supra* note 6 at 118-122.

¹² Helen Duffy, ‘National Constitutional Compatibility and the International Criminal Court’, 11 *Duke J. Int’l L.* (2001) 5 at 26; Plachta, *supra* note 6 at 99-104.

¹³ Council Framework Decision of 13 June 2002 on the European Arrest Warrant and the surrender procedures between Member States (2002/584/JHA), OJ L 190, 18.7.2002, p.1 [hereinafter EAW or Framework Decision]. The European Arrest Warrant entered into force on 1 January 2004, replacing previous extradition arrangements between Member States of the European Union. (See, however, note 21, *infra* on its application in relation to

this traditional exception in the EAW, the EU was praised for having established a system in which nationality plays a very limited role. The Framework Decision was even heralded as a victory, signifying the decline of the nationality exception.¹⁴

Yet, States that traditionally do not extradite their nationals and are now expected to accommodate their obligations under the EAW may still face unexpected or unacknowledged constitutional problems, specifically in the context of surrender requests concerning their nationals. Moreover, a closer look reveals that the Framework Decision and domestic implementing acts provide a few opportunities for States wishing to do so to protect their nationals from foreign prosecution and/or imprisonment abroad.

The present study attempts to provide a balanced evaluation of the Framework Decision's achievements relating to the nationality exception. While acknowledging its novelty and its positive contribution to ending the century-long reliance on the nationality exception, the authors draw attention to problems associated with the Framework Decision and implementing acts. They consequently warn against too much optimism and against too readily assuming that the adoption of the EAW signals a watershed in the history of the nationality exception.

The analysis of relevant EAW dynamics requires reference to the dual criminality requirement, another common exception to extradition recognized in treaties. Under this rule, extradition is only granted in respect of a deed which is a crime according to the law of the state which is asked to extradite, as well as of the state [75] which demands extradition – although not necessarily a crime of the same name in each, so long as there is a substantial similarity between the offences in each state.¹⁵

This rule is frequently applied also to transfer of prisoners or enforcement of foreign judgments, requiring criminality in both the prosecuting and the enforcing State. Its origins should be sought in the fact that many, if not all, States consider it as against their *ordre public* to extradite persons or carry out sentences passed abroad for acts that are not locally punishable.

We can distinguish two major forms of this requirement. The quotation describes what we might call *simple* dual criminality, requiring criminality but no minimum sentence.¹⁶ In the other type, the provision specifies beyond the mere criminality of the acts in both States the additional requirement that they should be punishable with a certain minimal maximum sentence in one or both States.¹⁷ This article will refer to such provisions as requiring *qualified* dual criminality.

As will be demonstrated, problems related to the limitation of the nationality exception may become elevated due to the EAW's (partial) removal of this requirement.

States that have not yet implemented the Framework Decision.) It should, however, be noted that the EAW does not have a direct effect in the jurisdiction of the Member States and requires domestic implementation.

¹⁴ On the website of the UK Home Office (<http://www.homeoffice.gov.uk/crimpol/oic/extradition/bill/eaw.html> (visited 7 October 2004)) the following comment is made:

For the first time, under the EAW, other countries will not be able to refuse to surrender a fugitive simply because they are one of their own nationals.

See, too, information available at http://europa.eu.int/comm/justice_home/fsj/criminal/extradition/printer/fsj_criminal_extradition_en.htm (visited 7 October 2004).

¹⁵ Jennings and Watts, *supra* note 10 at 958.

¹⁶ *E.g.*, Art. 4 of the European Convention on the International Validity of Criminal Judgments, *ETS* No. 70. *Cf.* note 43, *infra*; Art. 2(4) of the Framework Decision and text accompanying notes 81-82, *infra*.

¹⁷ *E.g.* Art. 2(1), European Convention on Extradition, *ETS* No. 24. *Cf.* text accompanying note 23, *infra*.

2 RECENT DEVELOPMENTS RELATING TO THE NATIONALITY EXCEPTION IN EUROPEAN EXTRADITION LAW: SLOW BUT CERTAIN EROSION

2.1 *From European Convention on Extradition to Convention on Extradition between Member States of the European Union*

The history of the non-extradition of nationals in Europe dates back to at least the 18-19th century.¹⁸ The dominance of civil law systems resulted in the nationality exception being a recognized rule, sanctified by constitutional provisions, national statutes and extradition agreements. Even treaties concluded with common law States – not opposed to extraditing their nationals – usually left the freedom of the parties not to extradite their citizens unaffected. The predominance of the nationality excep-[76] tion in the recent history of European extradition is well documented in multilateral European extradition agreements.

The European Convention on Extradition concluded within the Council of Europe in 1957 confirms the *right* of Contracting Parties to refuse extradition of their nationals.¹⁹ In addition, the parties to the Convention are given the freedom to attach a declaration defining the meaning of the term ‘nationals’ for the purposes of the application of the convention.²⁰ Of the present 25 members of the European Union, the following 18 have attached such declarations to the Convention: Austria, Cyprus, Germany, Denmark, Estonia, Finland, France, Greece, Hungary, Ireland, Lithuania, Luxembourg, Latvia, the Netherlands, Poland, Portugal, Spain, Sweden.²¹ While the exact definition contained in each instrument is not relevant for the purposes of this study, the number of declarations is indicative of the extensive reliance on the non-extradition of nationals in Europe.

To compensate for the negative effects of this rule, a subsequent provision imposes a requirement on the party that refuses extradition

at the request of the requesting Party [to] submit the case to its competent authorities in order that proceedings may be taken if they are considered appropriate. [...]²²

No solution is, however, suggested for the eventuality that the requested State does not have jurisdiction over the act concerned. Admittedly, however, the likelihood that such cases would occur is reduced by the requirement of qualified dual criminality, specifying that the convention applies only to offences ‘punishable under the laws of the requesting Party and of the requested Party by deprivation of liberty or under a [77] detention order for a maximum period of at least one year or by a more sever penalty.’²³

¹⁸ Shearer, *supra* note 1 at 102-103.

¹⁹ Art. 6(1)(a), *supra* note 17; Plachta, *supra* note 6 at 80-84.

²⁰ *Ibid.*, Art. 6(1)(c).

²¹ See declarations and reservations available online at <http://conventions.coe.int/treaty/Commun/ListeDeclarations.asp?NT=024&CM=&DF=&CL=eng&VL=1> (visited 7 October 2004).

It should be noted that as of 1 January 2004, the EAW replaced the relevant provisions of this Convention in its application between EU members. See, Art. 31(1)(a) EAW. On the other hand, there is some uncertainty about its applicability in relation, for instance, to States that have not yet implemented the Framework Decision (at that time). Moreover, Art. 31(2) appears to permit the continued application of those treaties, should that make the execution of the EAW procedures more effective. See, *e.g.*, Jan Wouters and Frederik Naert, ‘Of Arrest Warrants, Terrorist Offences and Extradition Deals. An Appraisal of the EU’s Main Criminal Law Measures against Terrorism after ‘11 September’’, Institute for International Law, K.U. Leuven, Working Paper No. 56 (June 2004), available online at <http://www.law.kuleuven.ac.be/iir/eng/wp/WP56e.pdf> (visited 7 October 2004), pp. 8-11.

²² *Ibid.*, Art. 6(2).

²³ *Ibid.*, Art. 2(1). Other factors such as domestic statutes of limitations or the *ne bis in idem* rule may, nonetheless, make domestic prosecution impossible.

Chapter 4

The Benelux Treaty on Extradition and Mutual Assistance in Criminal Matters²⁴ signed in 1962 similarly prevents the extradition of nationals of the contracting parties. It is even more categorical than the Council of Europe convention: it lays down an *obligation* not to extradite.²⁵ Moreover, it fails to provide for a corresponding obligation to prosecute domestically. Nonetheless, the Convention imposes a qualified dual criminality requirement.²⁶

The willingness of EU members to do away with the nationality exception appears still to have been limited at the time of the conclusion of the Convention implementing the Schengen Agreement in 1990. This instrument does not explicitly refer to the non-extradition of nationals. However, Article 66 provides that

1. If the extradition of a wanted person *is not obviously prohibited* under the laws of the requested Contracting Party, that Contracting Party *may authorize* extradition without formal extradition proceedings, provided that the wanted person agrees thereto in a statement made before a member of the judiciary after being examined by the latter and informed of his right to formal extradition proceedings.[...]²⁷

Due to the wide acceptance of the non-extradition of nationals, it is safe to assume that the prohibition under domestic laws referred to herein was intended to cover, *inter alia*, the nationality exception.

Conversely, this article, or any other rules contained in the Convention, do not oblige the Parties to extradite their nationals with or without formal proceedings and **[78]** irrespective of the consent of the wanted person. Moreover, it does not refer to a duty to prosecute if extradition is denied nor does it contain any general provisions on dual criminality.²⁸ However, these may be implied from the reference to the European Convention on Extradition and the Benelux Treaty.²⁹ Accordingly, whilst the Schengen *Acquis* encourages contracting parties to ease extradition requirements, it does not affect their relevant rights and obligations.³⁰

In contrast, the Convention on Extradition between Member States of the European Union drafted in 1996 ambitiously attempted to reverse the traditional regime relating to the nationality exception. Article 7 declares that

1. Extradition may not be refused on the ground that the person claimed is a national of the requested Member State within the meaning of Article 6 of the European Convention on Extradition.

²⁴ 616 UNTS 120, Art. 5. This treaty, together with the above Council of Europe convention, subsequently served as a basis of extradition in the EU.

²⁵ 'The High Contracting Parties shall not extradite their nationals.' Art. 5(1), *ibid*.

²⁶ *Ibid*. Art. 2(1), requiring that the act be punishable in both States with a deprivation of liberty of at least a maximum period of six months.

²⁷ 1990 Convention implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders, published as part of the Schengen *Acquis*, OJ L 239 22.9.2000 1 at 19, available online at [http://europa.eu.int/smartapi/cgi/sga_doc?smartapi!celexapi!prod!CELEXnumdoc&lg=EN&numdoc=42000A0922\(02\)&model=guichett](http://europa.eu.int/smartapi/cgi/sga_doc?smartapi!celexapi!prod!CELEXnumdoc&lg=EN&numdoc=42000A0922(02)&model=guichett) (visited 7 October 2004). Emphases added. The following Member States are parties to the Convention: Austria, Belgium, Denmark, France, Finland, Germany, Greece, Iceland, Italy, Luxembourg, the Netherlands, Norway, Portugal, Spain and Sweden. (See http://www.auswaertiges-amt.de/www/en/willkommen/einreisebestimmungen/schengen_html#1 (visited 7 October 2004).)

²⁸ The Convention contains a qualified dual criminality requirement only with regard to extradition from France. (Art. 61.)

²⁹ *Ibid.*, Art. 59.

³⁰ The Chapter on extradition (Title III, Chapter IV) is superseded by the EAW as of 1 January 2004 (Art. 31(1)(e) EAW). See note 21, *supra*.

Chapter 4

2. When giving the notification referred to in Article 18(2) [of having completed the ratification procedure], any Member State may declare that it will not grant extradition of its nationals or will authorize it only under certain specified conditions.

[...] ³¹

In other words, this EU Convention aimed at rendering the nationality exception an exception in European extradition. This intention is well illustrated in the explanatory report attached to the Council Act on the convention:

Paragraph 1 establishes the principle that extradition may not be refused on the ground that the person claimed is a national of the requested Member State within the meaning of Article 6 of the European Convention on Extradition. This is an important step towards removing one of the traditional bars to extradition among Member States. The reasons for this change, as already emphasized in the general part of the explanatory [79] report, are to be found in the shared values, common legal traditions and the mutual confidence in the proper functioning of the criminal justice systems of the Member States of the European Union.[...]

Paragraph 2 provides for the possibility to derogate from the general principle laid down in paragraph 1. The reservation possibility in this regard was considered appropriate since the prohibition of extradition of nationals is established in constitutional law or in national laws which are based on long-standing legal traditions, the change of which appears to be a complex matter. However, paragraph 3 provides for a system which will encourage a review of the reservations made. ³²

Indeed, the Council envisaged the possibility of reservations as a temporary measure from the outset. The Convention even provides that such reservations are valid for a period of five years but are renewable for successive periods of five years. ³³

Fifteen of the twenty-five current EU Member States have ratified the Convention. Of these, thirteen attached declarations ³⁴ in accordance with Article 7(2). The following six States have submitted an unconditional declaration, categorically refusing the extradition of their nationals: Austria, Denmark, ³⁵ Germany, Greece, Latvia, ³⁶ Luxembourg. Others (Belgium, Finland, Ireland, Netherlands, Portugal, Spain, Sweden) declared that they would subject extradition of their nationals to certain conditions (*e.g.* guarantees of return to serve sentence, dual criminality, reciprocity, terrorist offences and organized crime, residence in the requesting State, *etc.*).

Ratification of this Convention took at least four years in most cases, providing ample time for even a constitutional change in most countries. However, no such amendments have taken place. It may thus be doubted whether the States in question had any intention at all upon ratifying the Convention to change their domestic legislation concerning non-extradition

³¹ Council Act of 27 September 1996 drawing up the Convention relating to extradition between Member States of the European Union, Official Journal C313, 23.10.1996, available online at <http://ue.eu.int/accords/default.asp?lang=en> (visited 7 October 2004). It should be noted that due to the French and Italian failure to ratify the Convention, it has not entered into force but was provisionally applied between States that had provided such declarations in accordance with Article 18. (For further information see the above website.) As of 1 January 2004, the EAW superseded this Convention in accordance with Art. 31(1)(d) of the Framework Decision. See note 21, *supra*.

³² Explanatory Report to the Council Act (*supra* note 31) available online at http://europa.eu.int/smartapi/cgi/sga_doc?smartapi!celexapi!prod!CELEXnumdoc&lg=en&numdoc=51997XG0623&model=guichett (visited 7 October 2004).

³³ Art. 7(3).

³⁴ The text of the declarations and reservations is available online at http://ue.eu.int/cms3_Applications/applications/Accords/details.asp?cmsid=297&id=1996063&lang=EN&doclang=EN (visited 7 October 2004). The two States that have not submitted declarations related to the nationality exception are the United Kingdom and Lithuania.

³⁵ Denmark has reserved the right to refuse extradition.

³⁶ This reservation was made on 14 June 2004, *i.e.* following the entry into force of the European Arrest Warrant. Latvia promulgated its legislation implementing the EAW two days later. This legislation entered into force on 30 June 2004.

of nationals in accordance with Article 7. This fact [80] together with the large number of declarations in force eight years after its adoption indicate the failure of the regime of the Convention in this respect.

Similarly to the above instruments, the Convention requires qualified dual criminality. In this case, the requirement is formulated in an asymmetrical form, requiring a maximum punishment of at least 12 months deprivation of liberty in the requesting State but only 6 months under the law of the requested State.³⁷ In the absence of an obligation under the Convention to prosecute domestically if extradition (of nationals) is refused, this provision does not improve chances that the offender will be brought to justice. Yet, it at least reduces the potential under the Convention for extradition in cases related to attempts to exercise overly expansive extraterritorial jurisdiction over nationals of another contracting party.

In sum, a review of multilateral European extradition agreements demonstrates a hesitant move away from the nationality exception. Whereas some fail to provide for an obligation to prosecute if the requested State refuses to hand over its nationals, all require qualified dual criminality as a condition of extradition. This requirement improves chances for domestic prosecution and to some extent it eliminates perceptions of unfairness relating to extraterritorial jurisdiction.

2.2 *Indirect Contribution through Increased Cooperation in Related Fields*

These extradition conventions did not come into existence in a legal vacuum. Simultaneously with their conclusion, legal instruments in other – related – fields were drafted which had an indirect but all the more significant impact on the decline of the nationality exception. These instruments regulated and stimulated cooperation in the fight against (international) crime within the European Union, following up on previous work in the Council of Europe. They specifically address the mutual recognition of foreign judgments, transfer of proceedings and transfer of sentenced persons.³⁸

In 1970, ‘[c]onsidering that the fight against crime, which [was] becoming increasingly an international problem, call[ed] for the use of modern and effective methods on an international scale’,³⁹ the Council of Europe adopted the European Convention on the International Validity of Criminal Judgments. The Convention provides that [81]

1. A Contracting State shall be competent in the cases and under the conditions provided for in this Convention to enforce a sanction imposed in another Contracting State which is enforceable in the latter State.
2. This competence can only be exercised following a request by the other Contracting State.⁴⁰

One of the situations for which the enforcement of foreign sentences was envisaged is where the State requested to enforce the sentence ‘is the *State of origin* of the person sentenced and [it] has declared itself willing to accept responsibility for the enforcement of that sanction.’⁴¹ The nationality exception was thus indirectly bolstered. This is not surprising

³⁷ Art. 2(1).

³⁸ In contrast to some of the above extradition instruments, Conventions discussed below are not replaced by the EAW. Rather, to the extent that they facilitate the application of the Framework Decision, the EAW encourages their application. (Art. 31(2).)

³⁹ *Supra* note 16, preambular para. 2.

⁴⁰ *Ibid.* Art. 3.

⁴¹ *Ibid.* Art. 5(b). Emphasis added.

considering the amount of problems caused by the nationality exception, and keeping in mind that a main purpose of the Convention is to promote rehabilitation.⁴²

On the other hand, the Convention required dual criminality⁴³ (*i.e.* ability) beside mere willingness to enforce the sentence. Moreover, requests could be refused based, *inter alia*, on the related ground that enforcement would violate fundamental principles of one's own legal system (*ordre public*), or that the State would be unable to enforce the sanction.⁴⁴

Even though, or exactly because, only a limited number of EU members are parties to this Convention⁴⁵ which entered into force in 1974, the EU adopted its own treaty on the subject in 1991: the Convention between the Member States of the European Communities on the Enforcement of Foreign Criminal Sentences.⁴⁶ One of the eventualities in which the enforcement of the custodial sentence by another State may be requested under this instrument is where [82]

the sentenced person is in the territory of the administering State and is a *national* of this State or is permanently resident in its territory.⁴⁷

Here, too, enforcement is subject to (simple) dual criminality.⁴⁸

The Convention is not yet in force and is temporarily applicable between the Netherlands and Germany only. It should be noted that Germany has declared upon notification of the completion of the ratification process that it '[would] accept the enforcement of a custodial sentence only on condition that a German court declared the sentence imposed in the sentencing State to be enforceable'.⁴⁹ It thereby explicitly conditioned execution of a sentence in Germany on its ability to enforce it.

Almost simultaneously with this process, principles relating to transfer of proceedings in criminal matters were laid down in the Council of Europe and later in the European Communities. In 1972 the Council of Europe adopted the European Convention on the Transfer of Proceedings in Criminal Matters.⁵⁰ In another attempt to ensure justice even in cases of conflicting competence and interests, this instrument provides that

[f]or the purpose of applying this Convention, any Contracting State shall have competence to prosecute under its own criminal law any offence to which the law of another Contracting State is applicable⁵¹

and that

[w]hen a person is suspected of having committed an offence under the law of a Contracting State, that State may request another Contracting State to take proceedings in the case and under the conditions provided for in this Convention.⁵²

One of those conditions is simple dual criminality.⁵³

⁴² *Ibid.* preambular para. 4.

⁴³ *Ibid.* Art. 4. The Convention does not require qualified dual criminality, merely that the act for which the sanction was imposed must also constitute an offence if committed in the enforcing State. This low threshold is logical in the face of the fact that the Convention covers 'fines or confiscation' and 'disqualifications' beside 'sanctions involving deprivation of liberty' (Art. 2).

⁴⁴ *Ibid.* Art. 6(a) and (h).

⁴⁵ Denmark, the Netherlands and Spain of the EC members in 1991, plus Austria, Cyprus, Estonia, Lithuania, Sweden.

⁴⁶ Available online at http://ue.eu.int/ueDocs/cms_Data/docs/PolJu/EN/EJN319.pdf (visited 7 October 2004).

⁴⁷ *Ibid.* Art. 3(a). Emphasis added.

⁴⁸ *Ibid.* Art. 5(b). This Convention, too, applies even to minor sanctions imposed for a broad range of acts, including even administrative offences and offences against regulations. *Cf.* note 43, *supra* and Arts. 1(a), 3 and 4, of this Convention.

⁴⁹ Ratification status and declarations available at http://ue.eu.int/cms3_Applications/applications/Accords/details.asp?cmsid=297&id=1991074&lang=EN&doclang=EN (visited 7 October 2004).

⁵⁰ ETS No. 73.

⁵¹ *Ibid.* Art. 2(1).

⁵² *Ibid.* Art. 6(1).

[83] One of the situations in which '[a] Contracting State may request another Contracting State to take proceedings' is 'if the suspected person is a *national* of the requested State or if that State is his *State of origin*.'⁵⁴ The Convention thus aims, *inter alia*, at reducing the impact of the non-extradition of nationals on criminal justice.

While the Convention has been in force since 1978, it has few parties which are members of the European Union.⁵⁵ This fact may have prompted the European Communities to adopt their own Agreement between the Member States on the Transfer of Proceedings in Criminal Matters in 1990.⁵⁶ This instrument has not proved to be much more successful than the Council of Europe Convention on the same subject or the previously discussed mutual recognition and enforcement treaties. It still has not entered into force. Yet, its provisions are relevant in the present context and were probably milestones for later EU initiatives for increased cooperation in criminal matters by encouraging flexibility in these areas:

For the purpose of applying this Agreement, the requested State shall have the competence to prosecute under its own law the offences mentioned in the preceding Articles in respect of which a request for proceedings has been made.⁵⁷

Similarly to the above instruments, the Agreement can be seen as addressing, although indirectly and to a limited extent, the consequences of the nationality exception. It namely provides that

[a]ny Member State having competence under its laws to prosecute an offence may send a request for proceedings to the Member State of which the suspected person is a *national*, to the Member State *where the suspected person currently is* or to the Member State in which the suspected person is *ordinarily resident*.⁵⁸

[84] The transfer of proceedings is still subject to a simple dual criminality requirement.⁵⁹ Unfortunately, this Agreement has not attracted general support within the EU.

A third attempt towards increased cooperation in criminal matters and to promote criminal justice was undertaken in the field of the transfer of sentenced persons. In 1983 the Council of Europe adopted the Convention on the Transfer of Sentenced Persons.⁶⁰ The goals of the Convention are similar to those expressed in the preambles of the previously discussed instruments, namely to achieve greater unity and increased cooperation, as well as to 'further the ends of justice and the social rehabilitation of sentenced persons'.⁶¹ The Parties to the Convention have agreed to cooperate fully in the transfer of sentenced persons, at the request of either the sentencing or administering State.⁶² While this particular instrument does not affect the negative consequences of the nationality exception in general,⁶³ nationality plays a

⁵³ *Ibid.* Art. 7(1). This low threshold of unqualified dual criminality can be explained by the fact that the Convention covers as 'offences' to which it applies any 'acts dealt with under the criminal law [...]' (Art. 1(a)), including even simple traffic offences such as speeding.

⁵⁴ *Ibid.* Art. 8(1)(b). Emphases added. See, too, Art. 8(2).

⁵⁵ Denmark, the Netherlands and Spain of the EC members in 1990, plus Austria, Czech Republic, Estonia, Latvia, Slovakia, Sweden.

⁵⁶ Available online at http://ue.eu.int/ueDocs/cms_Data/docs/PolJu/EN/EJN233.pdf (visited 7 October 2004).

⁵⁷ *Ibid.* Art. 4.

⁵⁸ *Ibid.* Art. 2. Emphases added. The other cases may signal a trend to equate residence or domicile with nationality in the field of international cooperation in criminal matters.

⁵⁹ *Ibid.* Art. 3(1). See too note 53, *supra* and Art. 1 of the Convention, which includes among the offences covered even 'administrative offences and offences against regulations'.

⁶⁰ ETS No. 112

⁶¹ *Ibid.*, preambular para. 4.

⁶² *Ibid.* Art. 2.

⁶³ It should, however, be noted that in 1997 an additional protocol was attached to the Convention (Additional Protocol to the Convention on the Transfer of Sentenced Persons, ETS No. 167.) which has a direct impact on the nationality exception. Art. 2(1) of the Protocol namely provides that

[w]here a *national* of a Party who is the subject of a sentence imposed in the territory of another Party as a part of a final judgment, seeks to avoid the execution or further execution of

significant role: the Convention applies only to nationals of the administering State.⁶⁴ Another relevant condition of transfer is dual criminality, arguably a qualified one.⁶⁵ Two EU [85] members (Germany and Portugal) have even attached declarations to the effect that enforcement in these States is subject to the condition that local courts declare the sentence enforceable.⁶⁶

This particular agreement is widely ratified (by 57 States). States parties include all twenty-five members of the European Union.⁶⁷

While, accordingly, no separate EC instrument was required in this field, the Communities adopted an Agreement on the Application Among the Member States of the European Communities of the Council of Europe Convention on the Transfer of Sentenced Persons⁶⁸ in 1987, with the aim of broadening the application of the Convention and improving its operation.⁶⁹ The Agreement aimed at extending the coverage of the Council of Europe Convention on the same subject to cases where at least one of the parties has not ratified that Convention⁷⁰ – to this extent it lost significance with the last EU member's ratification of the Council of Europe convention.

However, the EU Agreement also enlarges the range of persons to which it applies:

For the purpose of applying Article 3(1)(a) of the Convention on Transfer, Each Member State shall regard as its own nationals the nationals of another Member State whose transfer is deemed to be appropriate and in the interest of the persons concerned, taking into account their habitual and lawful residence in its territory.⁷¹

This Agreement has not yet been ratified by all States that were EC members at the time of its opening for signature and hence it has not entered into force. Nonetheless, its significance – especially in the context of the EAW – should not be underestimated.

[86] The European Commission stated in its commentary to the 2001 proposal on the EAW Framework Decision that

the sentence in the sentencing State by fleeing to the territory of the former Party before having served the sentence, the sentencing State may request the other Party to take over the execution of the sentence.

Emphasis added.

⁶⁴ Convention on the Transfer of Sentenced Persons, *supra* note 60, Art. 3(1)(a).

⁶⁵ *Ibid.* Art. 3(1)(e). This provision does not explicitly require a minimum possible sentence similar to the that contained, for instance, in the European Convention on Extradition (See *supra* note 23 and accompanying text). However, it speaks of 'criminal offences' in contrast to 'offences' referred to in other mutual assistance conventions, which may be read as a qualification relating to the nature of the offence.

Moreover, Art. 3(1)(c) *ibid.* requires – unless the parties agree otherwise under Art. 3(2) – that 'at the time of the receipt of the request for transfer, the sentenced person *still has at least six months of the sentence to serve or [...] the sentence is indeterminate*' (emphasis added), excluding minor offences. Admittedly, according to the Explanatory Report to this Convention (available online at <http://conventions.coe.int/Treaty/en/Reports/Html/112.htm> (visited 7 October 2004)) this provision was included to serve the purpose of the convention to enhance social rehabilitation, which is better facilitated when the sentence still to be served is sufficiently long. Another reason was the costly nature of the transfer of prisoners (para. 22). Nonetheless, this condition supports the impression evoked by Art. 3(1)(e) that the Convention at least implicitly establishes a qualified dual criminality requirement, relating only to crimes ('*delits*' or '*crimes*' in French law), the more serious types of offences, but not to misdemeanors ('*contraventions*' in French law).

⁶⁶ See declarations available online at <http://conventions.coe.int/Treaty/Commun/ListeDeclarations.asp?NT=112&CM=1&DF=11/08/04&CL=ENG&VL=1> (visited 7 October 2004).

⁶⁷ See ratification list available online at <http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=112&CM=1&DF=&CL=ENG> (visited 7 October 2004).

⁶⁸ Available online at http://ue.eu.int/cms3_Applications/applications/Accords/details.asp?cmsid=297&id=1987010&lang=EN&doclang=EN (visited 7 October 2004).

⁶⁹ *Ibid.* preambular para. 2.

⁷⁰ *Ibid.* Art. 1(2).

⁷¹ *Ibid.* Art. 2.

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If the European arrest warrant was issued pursuant to a final judgment, the judicial authority of the executing State may decide that it is preferable for the future social rehabilitation of the person in question to serve his sentence on the spot. [...]

The principle must be that the warrant must be executed even if it concerns a national. However, it may be preferable for the requested person (national or permanent resident) to serve his sentence in the State where he was arrested. In that case, the executing State will be able, with the person's consent, to decide to execute the sentence on its territory rather than executing the warrant.

*Technically, for the implementation of this principle, Member States may look for inspiration to the 1983 Convention on the Transfer of Sentenced Persons and the Agreement on the Application, between the Member States of the European Communities, of the Convention of the Council of Europe on the Transfer of Sentenced Persons of 25 May 1987, where they have ratified these instruments.*⁷²

In sum, the effects of the nationality exception were – often indirectly – mitigated through the adoption of these Conventions. This was due, *inter alia*, to envisioning the prosecution or enforcement of offences in the State that refused extradition and to the possibility of transfer of sentenced persons. The impact of some of these developments is clearly observable on the relevant provisions of the Framework Decision.

2.3 Final Triggers

The European Arrest Warrant was originally drafted in 2001, a mere five years after the conclusion of the Convention on Extradition between Member States of the European Union. During those five years three major developments and events took place which signified or even induced a changed attitude on the nationality exception in Europe.

The first of these milestones was the adoption of the Rome Statute for the International Criminal Court⁷³ in July 1998. During the *travaux préparatoires*, a considerable amount of attention was paid to civil law jurisdictions' concern with [87] extraditing their nationals.⁷⁴ The final outcome was Article 102, which distinguishes *surrender* to international courts from State to State *extradition*, thereby establishing the inapplicability of the nationality exception. Admittedly, due to this distinction this provision did not have any direct beneficial effect on international law relating to the non-extradition of nationals. However, the adoption of the Statute induced debates in some States, which did not consider the distinct definitions in Article 102 of the Statute sufficient to ensure legal certainty, about amending (constitutional) provisions on the right of nationals not to be extradited. Once such amendments were decided upon, further exceptions could be added.⁷⁵

The second major event was the 1999 Tampere European Council meeting. This summit made cooperation in criminal matters a clear priority within the European Union. It called for 'enhanced mutual recognition of judicial decisions and judgments and the necessary approximation of legislation', arguing that this

⁷² Proposal for a Council Framework Decision on the European arrest warrant and the surrender procedures between the Member States, Explanatory Memorandum (September 2001), Ch. IV, Art. 33, available online at http://www.ecre.org/eu_developments/terrorism/Commission%20proposal%20for%20framework%20decision%20on%20arrest%20warrant%20and%20surrender%20procedures.doc (visited 7 October 2004). Emphasis added.

⁷³ UN Doc. A/Conf.183/9* (July 17, 1998), *corrected* Nov. 10, 1998 and July 12, 1999 (English version), available online at <http://www.icc-cpi.int> (visited 7 October 2004), *reprinted in* 37 ILM 999 (1998) (uncorrected version).

⁷⁴ See, e.g., Phakiso Mochochoko, 'International Cooperation and Judicial Assistance' in Roy S. Lee (ed.), *The International Criminal Court: The Making of the Rome Statute; Issues, Negotiations, Results* (The Hague: Kluwer Law International, 1999), 305 at 309.

⁷⁵ See notes 89-92, *infra*, on the German amendments.

would facilitate co-operation between authorities and the judicial protection of individual rights. The European Council therefore endorse[d] the principle of mutual recognition which, in its view, should become the cornerstone of judicial co-operation in both civil and criminal matters within the Union.⁷⁶

In addition, the conclusions add that the Council considers that the formal extradition procedure should be abolished among the Member States as far as persons are concerned who are fleeing from justice after having been finally sentenced, and replaced by a simple transfer of such persons, in compliance with Article 6 TEU. Consideration should also be given to fast track extradition procedures, without prejudice to the principle of fair trial. The European Council invites the Commission to make proposals on this matter in the light of the Schengen Implementing Agreement.⁷⁷

Arguably, the work that was initiated or at least intensified hereafter and the results reached in response to these conclusions contributed greatly to the adoption of the [88] European Arrest Warrant in general and to the decline of the nationality exception in particular. Mutual recognition of judgments and transfer of prisoners namely provide valuable and increasingly popular alternatives to extradition. The recent emphasis on these forms of cooperation reduces the importance attributed to extradition, and to the non-extradition of nationals.

The final and most direct trigger of the Framework Decision was, however, added by the September 11, 2001 attacks on the World Trade Center. This tragic event made European leaders recognize the importance of cooperation in fighting international crime ever so clearly, and directly contributed to a speedy agreement on the Framework Decision. In the face of the severity of the crimes experienced by the world, negotiators may have been more prepared to compromise and give up their traditional strict insistence on issues previously held to be of major importance, such as the nationality exception and the dual criminality requirement. The outcome related to these issues is seen by many as a major achievement of the European Arrest Warrant.

2.4 EAW: Considerable Progress with Remnants of the Nationality Exception

The results of the above processes and events are striking. The Framework Decision constitutes a significant step towards the abolition of the nationality exception. However, it still contains some remnants of this age-old privilege.

Articles 3 and 4 of the EAW deal with ‘Grounds for mandatory non-execution of the European Arrest Warrant’ and ‘Grounds for optional non-execution of the European Arrest Warrant’, respectively. They are groundbreaking in the history of European multilateral extradition agreements, for these provisions do not recognize what has for centuries been considered the unconditional sovereign right to refuse extradition of one’s own subjects. Admittedly, the EAW still mentions nationality as an optional ground for refusal of execution but this may be invoked only under certain conditions. Article 4(6) specifies that the execution of the European arrest warrant *may be refused* [89] where a national or resident of the executing State is *wanted for the execution of a custodial sentence or detention order*, subject to the condition that the executing State *undertakes to enforce* the sentence domestically.⁷⁸

⁷⁶ Tampere European Council (15-16 October 1999), Presidency Conclusions, para. 33, available online at http://www.europarl.eu.int/summits/tam_en.htm (visited 7 October 2004).

⁷⁷ *Ibid.*, para 35.

⁷⁸ EAW, Art. 4(6). *Cf.* text accompanying note 114, *infra* for the exact wording of this provision. It should be noted that in contrast to traditional extradition treaty terminology, the EAW refers to ‘issuing State’ instead of ‘requesting State’, to ‘executing State’ where extradition treaties refer to ‘requested State’ and to ‘surrender’ or

The special relation of a State to its nationals is, nonetheless, recognized in another provision relating to ‘guarantees to be given by the issuing Member State in particular cases’.⁷⁹ If a request for the surrender of a national is made for the purposes of *prosecution* in the requesting State, the executing State (State of nationality) may make execution under this title *conditional upon guarantees* that if sentenced to a custodial sentence the national will be *returned* to it to serve his or her sentence there.

Enforcement of the sentence in the State of nationality may, however, be problematic. The Framework Decision namely denies the applicability of the dual criminality requirement in the case of the offences listed in Article 2(2). Nonetheless, it appears to allow at least simple (unqualified) dual criminality to be tested and required with regard to the listed crimes if they are *not* ‘punishable in the issuing Member State by a custodial sentence or a detention order for a maximum period of at least three years as they are defined by the law of the issuing Member State’.⁸⁰ Moreover, Article 2(4) preserves the dual criminality requirement with regard to

offences other than those covered by paragraph 2, [in which case] surrender may be subject to the condition that the acts for which the European arrest warrant has been issued constitute an offence under the law of the [90] executing Member State, whatever the constituent elements or however it is described.⁸¹

While this provision deals with criminality in the executing State, it is only logical that the acts must constitute an offence in the issuing Member State. Hence the dual criminality condition is established. In addition, the EAW specifies at the outset in Article 2(1) that

[a] European arrest warrant may be issued for acts punishable by the law of the issuing Member State by a custodial sentence or a detention order for a maximum period of at least 12 months or, where a sentence has been passed or a detention order has been made, for sentences of at least four months.⁸²

Significantly, however, Article 2(4) does not qualify the level of required criminality of the act in terms of a minimum sanction applicable in the *executing* State. Moreover, the provision speaks of ‘offences’ rather than ‘criminal offences’ and requires only that the act constitute ‘an offence under the law of the executing Member State’. Consequently, the EAW may arguably even apply to a traffic offence which is subject only to administrative or pecuniary sanctions in the executing State, provided that the requirement of Article 2(1) is fulfilled.

We can thus conclude that obvious loopholes exist in the EAW due to the inclusion of references to guarantees of return and undertakings of enforcement in the State of nationality

‘execution’ (of the warrant) instead of ‘extradition’. This article follows classical extradition terminology when referring to the regime prior to the EAW but adopts the new terms in the context of the Framework Decision and its implementation.

Further terminology-confusion is created by the EAW through its reference to ‘execution’ in the context of the arrest warrant (*i.e.* compliance with request for surrender) as well as in relation to the enforcement of a sentence. Where required for clarity, this article refers to ‘enforcement’ in the latter context.

In addition, in contrast to the classical scope of the nationality exception, the EAW permits refusal of execution of the warrant (for prosecution as well as enforcement) not only in relation to nationals but also if the person whose surrender is requested is an alien *resident* of the executing Member State. This aspect is no novelty. The European Convention on Extradition already granted the contracting parties the right to define ‘nationals’ in declarations, and several States used this freedom to extend the coverage of the nationality exception to their (permanent) residents. (See notes 20-21, *supra* and accompanying text.) For simplicity, we will continue referring to ‘nationals’, ‘nationality’ and ‘State of nationality’, while recognizing that the exception is in fact considerably broader in this context.

⁷⁹ Art. 5(3), *ibid.* Cf. text accompanying note 101, *infra*, for the exact wording of this provision.

⁸⁰ Art. 2(2), *ibid.*

⁸¹ Art. 2(4), *ibid.* See too Art. 4(1), confirming dual criminality as an optional non-execution ground.

⁸² Art. 2(1), *ibid.* It should be emphasized that, while raising the threshold of the applicability of the EAW, this provision does not in itself require dual criminality.

in Articles 4(6) and 5(3). The problems created by those loopholes are elevated through the waiver of the dual criminality requirement in relation to most crimes, and the failure to qualify dual criminality by requiring a minimum sentence for the others. This oversight could lead to problems in the following situations:

Member State A receives a European arrest warrant from Member State B concerning X, a national of A. X is wanted *for the prosecution of a crime* listed in Article 2(2), punishable with a maximum of four years of imprisonment in State B. Hence dual criminality cannot be tested.

Assume that A's domestic legislation provides guarantees against the extradition of nationals but permits surrender if any resulting sentence may be carried out in State A. Authorities from State B assure State A that if X is sentenced to a custodial sentence, it can be enforced in A. X is subsequently surrendered to B and is sentenced to two years imprisonment.

[91] In accordance with its assurances, B intends to transfer the offender back to A. However, the transfer will not be effectuated if, reading the judgment A's authorities eventually realize their lack of competence to enforce the sentence due to the fact that the acts which served as a basis of the conviction do not constitute an offence there. Moreover, the Convention on the Transfer of Sentenced Persons, under which such transfer would normally take place also requires dual criminality,⁸³ making this particular transfer impossible. As a result, a dispute is likely to develop between X and States A and/or B or between the two States about transfer and the enforcement of the sentence in the light of their conflicting obligations under the two regimes and B's assurances.⁸⁴

In fact, A should have requested more information from State B to be able better to judge the fulfillment of the dual criminality requirement (as well as, *e.g.*, the applicability of statutory limitations). However, B would not be obliged to provide any more details than a (limited) description of the circumstances of the offence(s) (including the time, place and degree of participation) as well as the categorization of the offence under its own legal system and according to the EAW list.⁸⁵ If State B were unwilling or unable to provide such information, State A would face the choice of denying surrender in violation of the EAW or surrendering X at the potential risk of being unable to enforce the sentence. The latter option may result in the violation of X's (constitutional) rights against extradition if he is subsequently not returned by B due to A's inability to enforce the sentence.⁸⁶

⁸³ *Supra* note 60, Art. 3(1)(b). *Cf.* note 65, *supra*.

⁸⁴ As unlikely as it may seem, such cases may occur in practice. The Mannesmann trial provides useful illustration. Here *Untreue* constituted a part of the charges against international businessmen in their trial in Germany. The accused were acquitted. (See, *e.g.*, Christian Buchholz, Arne Stuhr und Matthias Kaufmann, 'Mannesmann-Prozess: 'Keine strafbare Untreue'' [Mannesmann-trial: 'No criminal fraud'], *Manager Magazin*, 31 March 2004, available online at <http://www.manager-magazin.de/unternehmen/artikel/0,2828,293390,00.html> (visited 7 October 2004).)

However, should for instance Dutch nationals have been involved, their conviction in Germany in this case could have posed serious problems for the Dutch judicial authorities. *Untreue* is namely a form of fraud (fraud is listed in Article 2(2) of the Framework Decision) that in several aspects has a much wider scope than fraud (*oplichting*) in the Netherlands. In some cases, the acts forming *Untreue* under German law could at most give rise to civil proceedings in the Netherlands, so there is no dual criminality. Accordingly, in such cases there would be no basis for enforcement in the Netherlands.

⁸⁵ See Section (c) of the standard European arrest warrant form, annexed to the Framework Decision, *supra* note 13.

⁸⁶ A similar situation could arise also in relation to offences not listed in Article 2(2), falling under Article 2(4). A Dutch national could be accused of a traffic offense in Germany for which a maximum of 13 months imprisonment may be imposed in Germany but which is subject to pecuniary sanctions only in the Netherlands., the Dutch would not be able to undertake to enforce the sentence locally, should the Dutch national be sentenced for instance to 10 months imprisonment. (The applicable conventions would even prevent the Netherlands from converting the custodial sanction into a pecuniary penalty in this case. See Art. 11(1)(b) of Convention on the

[92] In the second hypothetical case, the same Member State A receives an arrest warrant from Member State B concerning Y, a national of A, *for the purposes of the enforcement* of a previously handed down custodial sentence of five years, for a crime listed in Article 2(2) of the EAW. Again, dual criminality is not required and its absence is no excuse. However, upon examination of the case the authorities of State A find that the acts do not constitute an offence under its laws. State A thus cannot enforce the sentence due to the lack of criminality of the acts in its jurisdiction. At the same time, it cannot execute the warrant concerning Y due, for instance, to its constitutional guarantees against the extradition/surrender of nationals (which may also cover extradition and surrender for the purposes of enforcing a sentence). Either way, it will be violating one of its obligations.

It appears that, while the intention may have been right, the ambitions of the drafters were too high and/or the drafting process too speedy. Consequently, the end result contains some loopholes which are created due to the wish to abolish two of the traditional exceptions in extradition (nationality and dual criminality) at the same time. The potential problems seem to be the result of a lack of concern given to realities in the existing domestic legislation and longstanding traditions of the Member States. They appear further aggravated by a lack of familiarity with the Convention on the Transfer of Sentenced Persons,⁸⁷ the keystone of the regime of surrendering nationals without violating their constitutional rights. As Member States are obliged to implement the Framework Decision, the ball is thrown to domestic legislatures to find appropriate solutions, if any.⁸⁸

[93] Clearly, despite these potential problems, its treatment of the nationality exception still makes the EAW a unique document inasmuch as it applies even to civil law countries traditionally strictly opposed to extradition of their nationals. It eradicates this privilege in certain cases and considerably limits its scope in others. However, the above examples suggest that it may be too naive to assume that the Framework Decision will do away with all controversies concerning extradition of nationals.

3 A LOOK BEYOND THE SURFACE

3.1 *The Achievements of the EAW at the National Level*

In spite of the (limited) exceptions and loopholes, the Framework Decision is undeniably a milestone in the history of the extradition of nationals. Whereas it is probably better seen as a culmination of the above described legal developments and of political pressures than as constituting a single pioneering step, its practical significance should not be underestimated. The Framework Decision signals the changing attitude of European States to the admissibility

Transfer of Sentenced Persons (*supra* note 60) and Art. 8(5)(b) of the Convention between the Member States of the European Communities on the Enforcement of Foreign Criminal Sentences (see notes 45, and text accompanying note 48-49, *supra*.)

In contrast to the above, in this case (as the offence is not listed in Article 2(2)), Germany would have to submit a full description of the offence in Section (e)(II) of the standard arrest warrant form (*supra* note 85). The Netherlands could thus see beforehand that it would not be able to enforce a resulting custodial sentence. By granting the request without requiring guarantees of enforcement in the Netherlands, it could end up violating a constitutional right of its national against extradition. (This right is subject only to the limitation of surrender on condition of enforcement in the Netherlands. See note 110, *infra*.) By refusing execution of the warrant despite the German willingness to transfer enforcement to the Netherlands, it would violate the EAW.

⁸⁷ *Supra* note 60.

⁸⁸ Moreover, in accordance with Article 34(1) of the EAW, Members were to implement the Framework Decision before 31 December 2003, leaving little time for finding such solutions and carrying out possibly required constitutional amendments.

of the nationality exception within Europe. In addition, it proves that the link between mutual trust and the decline of the nationality exception is more than a purely theoretical construction. Beside the adoption of the Framework Decision, the efforts in the European Union to increase mutual trust between the Member States through cooperation and harmonization of the domestic legal systems have in fact already resulted in constitutional and other legal amendments at the national level.

One of the most notable examples of constitutional change is that of Germany. Previously, the German constitution provided that

[n]o German may be extradited to a foreign country. Persons persecuted for political reasons enjoy the right of asylum.⁸⁹

This provision was amended in 2000, primarily to accommodate Germany's obligations under the ICC Statute.⁹⁰ However, due to notable developments in the EU in the field of judicial cooperation,⁹¹ an opening was made for exceptions within Europe as well. As a result, the provision now reads as follows: **[94]**

No German may be extradited to a foreign country. A different regulation to cover extradition to a Member State of the European Union or to an international court of law may be laid down by law, provided that constitutional principles are observed.⁹²

Views may differ as to whether this amendment is a positive development from the perspective of the future of international cooperation in criminal matters. Some may perceive it as regrettable that Germany – together with other States⁹³ – did not consider the EAW procedure as different from extradition, rather than as being subject to constitutional limitations on extradition. Others may focus on the German willingness to amend the constitution and see it as a progressive step. In any case, for now the end result is a possibility for increased cooperation and a more limited invocation of the nationality exception. Considering the traditional civil law attitude to non-extradition of nationals, this is a significant achievement. While the EAW was not its direct catalizator, the change is nonetheless commendable and is at least in part due to the legal developments which led to the European Arrest Warrant.

Hungary provides an example of a more limited but direct effect of the EAW. In 2003, in preparation for its accession to the EU, Hungary adopted the Law on Cooperation in Criminal Matters with the Member States of the European Union (Act No. CXXX.)⁹⁴ Prior to this, the 1996 Law on Mutual Assistance in Criminal Matters regulated the extradition of nationals in the following manner:

The extradition of a Hungarian national is permissible only if the requested person is at the same time also a national of another State and has his or her permanent residence abroad.⁹⁵

In contrast, the 2003 Hungarian legislation implementing the Framework Decision provides for the possibility to surrender (within the European Union) even persons whose sole

⁸⁹ Art. 16(2) of the German Basic Law (*Grundgesetz*), before its 2000 amendment.

⁹⁰ See 'Progress Report by Germany And Appendices', Council of Europe, Consult/ICC (2001) 14, p. 2, available online at [http://www.legal.coe.int/criminal/icc/docs/Consult_ICC\(2001\)/ConsultICC\(2001\)14E.pdf](http://www.legal.coe.int/criminal/icc/docs/Consult_ICC(2001)/ConsultICC(2001)14E.pdf) (visited 7 October 2004).

⁹¹ See Section 2.2, *supra*.

⁹² Current Art. 16(2) of the German Basic Law (*Grundgesetz*), available online at <http://www.jurisprudencia.de/jurisprudencia.html> (visited 7 October 2004).

⁹³ Austria, too, is one of those States that took the position that the EAW procedure is a form of extradition, requiring amendment of the relevant constitutional-legislative provisions.

⁹⁴ Together with other implementing acts, the English version of the first part of this statute is available online at http://ue.eu.int/cms3_Applications/applications/PolJu/details.asp?lang=EN&cmsid=545&id=71 (visited 7 October 2004).

⁹⁵ Art. 13(1), Law No. XXXVIII, available (in Hungarian) online at <http://www.complex.hu/external.php?url=3> (visited 7 October 2004).

nationality is Hungarian and who are residents of Hungary, provided [95] their return is guaranteed.⁹⁶ In the light of the century-long Hungarian reliance on the nationality exception, the significance of this step is not to be underestimated.

Having received exemption until it has modified Article 12(1) of its *Auslieferungs- und Rechtshilfegesetz* (Law on Extradition and Mutual Assistance)⁹⁷ or at the latest until 31 December 2008 with regard to the execution of arrest warrants ‘if the requested person is an Austrian citizen and if the act for which the European arrest warrant has been issued is not punishable under Austrian law’⁹⁸, Austria is working on the required amendments.⁹⁹

On the other hand, several member States considered that transfer under the EAW would not be subject to any constitutional prohibition on the non-extradition of nationals. The French *Conseil d’État*, while not denying that surrender under the EAW is legally similar to extradition, concluded that the French practice not to extradite nationals does not rest on a constitutional obligation to do so or on an individual right. Accordingly, it found that no amendment of the French constitution was necessary for the implementation of these provisions of the Framework Decision.¹⁰⁰

3.2 Problems Related to Imperfect Implementation

3.2.1 Surrender of Nationals for the Purposes of Prosecution

In spite of its undeniable accomplishments, a word of caution is appropriate when evaluating the EAW and its role and success in ending or at least circumscribing reliance on the nationality exception in Europe. As shown above, the Framework [96] Decision contains some serious flaws related to the simultaneous restriction of the nationality exception and the dual criminality rule. Whereas it was suggested above that implementing acts could eliminate some of these flaws, it rather appears that those statutes will create as much controversy as they solve.

The provision of the Framework Decision on the nationality exception is rather straightforward. It states that

The execution of the arrest warrant by the executing judicial authority may, by the law of the executing Member State, be subject to the following conditions:

[...]

3. where a person who is the subject of a European arrest warrant for the purposes of prosecution is a national or resident of the executing Member State, surrender may be subject to the condition that the person, after being heard, is returned to the executing Member State in

⁹⁶ *Supra* note 94, Art. 5(2). *Cf.* note 103, *infra*, and accompanying text. It should be noted that paragraph 80 of the 2003 Law on Cooperation in Criminal Matters with the Member States of the European Union (note 94, *supra*) amended this provision, modifying the condition that the person has his or her *permanent residence abroad*. Under the current formulation, Hungary may permit extradition to non-EU member States only if the Hungarian national sought *does not have a residence in the territory of Hungary*.

⁹⁷ This provision has a constitutional status exactly in order to prevent too ready amendments. (Helmut Epps, ‘Overcoming constitutional barriers – The public law challenges for the EAW in national constitutional courts: The Austrian Example’, p. 2, available online at <http://www.justice.org.uk/images/pdfs/eurepp.pdf> (visited 7 October 2004).)

⁹⁸ Art. 33(1) EAW.

⁹⁹ See Sect. 77 of the Austrian *Bundesgesetz über die justizielle Zusammenarbeit in Strafsachen mit den Mitgliedstaaten der Europäischen Union* [Federal Law on Judicial Cooperation in Criminal Matters with the Member States of the European Union], available online at the EU site referred to in note 94, *supra*.

¹⁰⁰ *Avis du Conseil d’État N° 368-282* (26 September 2002), available online at <http://www.senat.fr/rap/102-126/102-12610.html> (visited 7 October 2004).

order to serve [97] there the custodial sentence or detention order passed against him in the issuing Member State.¹⁰¹

In fact, a number of implementing acts seem perfectly in line with this provision of the Framework decision.¹⁰² However, the implementing statutes adopted by other EU Members reverse the rule-exception relation, implying that the general rule is still that of refusing the surrender of nationals, and/or introduce a subjective element in requiring *sufficient guarantees* of re-transfer. These acts thereby confirm existing domestic laws and practices related to the non-extradition of nationals, rather than genuinely attempting to accommodate the new EAW regime.

The relevant provision of the Hungarian act gives way to subjectivity:

Where a person who is subject of a European arrest warrant for the purposes of prosecution is a national who is a resident of the Republic of Hungary, surrender *may be subjected* to the condition that the issuing judicial authority gives an *assurance deemed adequate* that where a sentence or a detention [98] order has been made, the person, at his request, after being heard, is returned to the territory of the Republic of Hungary in order to serve there the custodial sentence or detention order passed against him.¹⁰³

In turn, in contrast to the language of the EAW provision it is meant to implement, the German act, appears to make non-surrender of nationals the rule rather than the exception:

The extradition of a German citizen for the purposes of prosecution is *only permissible* if it is *guaranteed* that where a sentence or a detention order has been passed in the issuing State, the person, at his request, will be returned to the jurisdiction in which this law applies.¹⁰⁴

The Dutch legislation suffers from both inconsistencies. While rendering non-surrender of nationals the rule, conditional on guarantees of return, it is also quite categorical on the subjective discretion of the executing authorities in this matter:

¹⁰¹ Art. 5 of the EAW. Arguably, this provision has its origins in the conventions on the transfer of sentenced persons and validity/enforcement of foreign criminal judgments discussed above in section 2.2., *supra*. Unfortunately, subject to some minor exceptions (see Section 2.4. *supra*) the dual criminality requirement has, not been retained.

Rather than providing for a transfer of *proceedings* in line with the relevant instruments mentioned above, the drafters of the Framework Decision have clearly opted for the transfer of the enforcement of *sentences*. This fact does, nonetheless, not retract from the value and relevance of those conventions in the present context but limits their role to increasing flexibility and cooperation in the European system.

Albeit some of the extradition treaties reviewed in Section 2.1., *supra*, also contain provisions on temporary transfer of persons for the purposes of hearing or possibly trial abroad, they do not specifically limit this possibility to nationals of the requested/executing State, nor do they specify the place and circumstances of the execution of the judgment handed down during that temporary surrender. Moreover, in contrast to the EAW compromise related to the nationality exception, the purpose of such provisions is to avoid delay in foreign prosecution pending trial in the requested state, while the person is serving a custodial sentence in another State, or awaiting the outcome of extradition/surrender proceedings. They accordingly cannot be seen as the forerunners of this provision. See Art. 19(2) of the European Convention on Extradition, *supra* note 17; Art. 18(2) of the Benelux Treaty on Extradition and Mutual Assistance in Criminal Matters, *supra* note 24.

While the reference to ‘being heard’ in this provision may at first sight suggest otherwise (*i.e.* implying a short stay in the issuing State for the purposes of a mere hearing in the traditional sense), it is clear from the purpose of the rule that this formulation is the result of an unfortunate accident rather than a conscious choice of terminology. As the executing Member State will only be able to enforce a *final sentence*, the provision must be read as relating to surrender for the purposes of *trial* leading to such a sentence, rather than for a mere *hearing*.

¹⁰² See, *e.g.*, the implementing act of France (Art. 695-24, *Loi n° 2004-204 du 9 mars 2004 portant adaptation de la justice aux évolutions de la criminalité*) and Poland (Art. 607t, para. 1), both available at the EU site referred to in note 94, *supra*.

¹⁰³ Art. 5(2) of the Hungarian implementing act, *supra* note 94. Emphases added.

¹⁰⁴ Art. 80(1) of the German *Gesetz zur Umsetzung des Rahmenbeschlusses über den Europäischen Haftbefehl und die Übergabeverfahren zwischen den Mitgliedstaaten der Europäische Union* [Law (of 21 July 2004) implementing the Framework Decision of the Council of the European Union on the European arrest warrant and the procedures for surrender between the Member States of the European Union], *Bundesgesetzblatt*, (2004-I), Nr. 38, p. 1748.

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The handing over of a Dutch national *can be permitted as far as* it is requested for the purposes of conducting criminal proceedings *and in the view of the executing judicial authorities it is guaranteed* that, in case the facts for which his extradition is granted lead to an unconditional custodial sentence in the requesting State, he may serve this sentence in the Netherlands.¹⁰⁵

This formulation may cause several problems. First, like the German legislation, it suggests that the executing authorities are under an *obligation* – rather than merely possessing a right – to refuse surrender of nationals under the domestic statute unless the requisite guarantees are given. It may hence lead to suits against the Netherlands by Dutch nationals subject to warrants if enforcement in the Netherlands proves impossible in the end, because this outcome adversely affects their penal situation. [99] Secondly, the lack of an unambiguous standard for the objective determination of what would constitute ‘*sufficient* legal guarantees’ may lead to disputes between Member States.¹⁰⁶

In addition, the implementing acts fail to remedy the problem of the lack of a dual criminality requirement for most crimes as a precondition of the execution of foreign sentences. Accordingly, a situation may still arise wherein the person is surrendered having received sufficient guarantees that the sentence would be enforced in the State of nationality but enforcement proves impossible in that State.¹⁰⁷

The following hypothetical example may be used as an illustration: Italy requests the surrender of a Dutch national for murder/manslaughter under the EAW. As the requesting authority does not need to specify on the standard EAW form the facts in the case of offences listed in Article 2(2) but only the circumstances of the case (including time, place and degree of participation),¹⁰⁸ the Dutch authorities will not necessarily [100] be aware of all the

¹⁰⁵ Art. 6(1) of the Dutch *Wet van 29 april 2004 tot implementatie van het kaderbesluit van de Raad van de Europese Unie betreffende het Europees aanhoudingsbevel en de procedures van overlevering tussen de lidstaten van de Europese Unie* [Law of 29 April 2004 implementing the Framework Decision of the Council of the European Union on the European arrest warrant and the procedures for surrender between the Member States of the European Union], emphases added, available online at the EU website referred to in note 94, *supra*.

¹⁰⁶ In a recent case the Amsterdam District Court refused surrender of a Dutch national to France under the EAW. France requested the person for the purposes of prosecution. The French authorities have given guarantees that they would return the person to the Netherlands, if convicted, for the purposes of the enforcement of the sentence. However, they expressed objection to any conversion of the French sentence in accordance with Article 11 of the Convention on the Transfer of Sentenced Persons (note 60, *supra*). The Amsterdam District Court refused extradition arguing that the guarantee was thus insufficient. (LJN: AR4214, Amsterdam District Court, 1 October 2004, Parketnummer: 13.097.143-2004, RK nummer: 04/3235, available online at <http://zoeken.rechtspraak.nl/zoeken/dtluitspraak.asp> (visited 20 October 2004).) In contrast, the same Court granted surrender of Dutch nationals to Sweden and Belgium, respectively, where those authorities responded in the affirmative to the Dutch requests for assurances concerning return for enforcement as well as conversion of any resulting sentences. (LJN: AR4218, Amsterdam District Court, 8 October 2004, Parketnummer: 13.097.023-2004, RK nummer: 04/3239 and LJN: AR4230, Amsterdam District Court, 15 October 2004, Parketnummer: 13/097153-04, RK nummer: 04/3310, respectively. Both decisions are available in Dutch on the above cited website.)

¹⁰⁷ Such problems are likely to arise under the implementing legislation of, for instance, Belgium (Art. 8 of the Law concerning the European Arrest Warrant (2003-4784)); Finland (Sec. 8(1) of the Act on Extradition on the Basis of an Offence between Finland and Other Member States of the European Union (424/2003); Lithuania (Art. 9(4)(7) of Criminal Code of the Republic of Lithuania (Zin., 2000, No. 89-2741)); Sweden (Ch. 3, Sec. 2 of the Act (2003:1156) on surrender from Sweden according to the European arrest warrant), all available online at the EU website referred to in note 94, *supra*.

These statutes, while not establishing a requirement of ‘*sufficient* guarantees’, impose the condition of serving the custodial sentence in the State of nationality without in any way referring to the ability or willingness of the executing State to enforce that sentence. (*E.g.*, ‘Extradition of a Finnish citizen for prosecution *shall* be subject to the condition that he or she shall be returned to Finland immediately after the judgment becomes final in order to serve a possible custodial sentence imposed on him or her, if he or she has requested in connection with the consideration of the extradition that he or she be allowed to serve the sentence in Finland.’ Finish Act, *ibid.*, Sec. 8(1). Emphasis added.)

¹⁰⁸ See note 85, *supra*.

relevant details of the indictment.¹⁰⁹ The person subject to the European arrest warrant is a Dutch doctor, having his legal and permanent residence in Belgium who is in the Netherlands on holiday or having retired from practice. He is surrendered on condition that if sentenced to a custodial sentence, he will be able to serve it in the Netherlands. He is tried in Italy for having executed euthanasia *lege artis* – following the strict procedures prescribed under Belgian law – on a terminally ill Italian patient in Belgium, and is convicted of murder/manslaughter.

During the proceedings the Italian authorities receive information that as euthanasia *lege artis* is not a criminal offence under Dutch law, the Netherlands will not be able to enforce any sentence imposed by Italian courts in this case. Should Italy nonetheless return him knowing he will not serve his prison sentence? Alternatively, what should the Netherlands do if its authorities are informed (*e.g.* from a statement of the requested person) prior to his surrender that on the facts of the case the Dutch doctor is not likely to be criminally liable under Dutch law, hence Dutch authorities will not be able to enforce the sentence? Would they be acting in bad faith if they nonetheless requested a guarantee of return as a condition of surrender? Would they be acting in bad faith if they requested such a guarantee without even trying to check if they could enforce the sentence domestically? After all, in contrast to the EAW, the Dutch implementing act in effect requires the Netherlands to *refuse* execution of the arrest warrant *in all cases* where sufficient guarantees are not received. Accordingly, Dutch authorities certainly cannot surrender the doctor in the absence of such guarantees. What if Italy provides guarantees that the person will be returned if the Netherlands undertakes to enforce his sentence but the Netherlands sees this as an ‘inadequate’ guarantee due to the fact that Dutch authorities may not be able to enforce the sentence after all?¹¹⁰ What means are available to the Netherlands then to ensure compliance with the constitutionally guaranteed rights of its nationals while not violating the EAW?

[101] What if the problem is not detected until after the doctor’s return to the Netherlands, when a Dutch court tries to adapt his sentence to one under Dutch law? The Netherlands is prohibited by its laws¹¹¹ to (re-)surrender its national for the purposes of the enforcement of a sentence abroad but it is similarly unable to enforce the sentence domestically. The developing situation resembles a Catch 22.

This example illustrates how national implementing acts, rather than eliminating the problems discussed in Section 2.4, can make those even graver by making refusal of the execution of the warrant mandatory rather than optional and adding further (subjective) criteria for compliance.

Clearly, Member States will not be able to refer to their obligations under domestic law to refuse surrender of their nationals as an excuse for the non-fulfilment of their

¹⁰⁹ On the other hand, the Netherlands is likely to require more information, but Italy is not obliged under the EAW to supply it. If the Netherlands subsequently chooses not to execute the warrant in spite of Italy’s consent to enforcement in the Netherlands, it would violate its obligations under the Framework Decision.

¹¹⁰ It should be noted that, in accordance with the Dutch Constitution (note 143, *infra*), the Dutch Extradition Act provides that the general constitutional prohibition of extradition of nationals does not apply if extradition of a Dutch national is requested for the purpose of prosecuting him and *in Our Minister’s opinion* there is an *adequate guarantee* that, if he is sentenced to a custodial sentence other than a suspended sentence in the requesting state for offences for which his extradition may be permitted, he will be allowed to serve this sentence in the Netherlands.

Art. 4(2) of the Dutch Extradition Act (last amended in 1995) (emphases added), reproduced in Bert Swart and André Klip (eds.) *International Criminal Law in the Netherlands* (Freiburg im Breisgau: Edition Iuscrim, 1997) at 268.

¹¹¹ See Art. 6(2) of the EAW implementing legislation, *supra* note 105.

international obligation laid upon them by the Framework Decision.¹¹² However, requests addressed to some States to surrender their nationals may lead to legal disputes and State responsibility, cases before the Luxembourg Court, and eventually maybe to the need to amend incompatible (more restrictive) implementing legislation. In the meanwhile, the resulting controversies will reduce the effectiveness of the EAW and will raise problems of credibility, possibly leading to the decline of mutual trust and an increasing reluctance to let go of the nationality exception.

3.2.2 Non-surrender of Nationals for the Purposes of Enforcement of Sentences

The lack of a dual criminality requirement with regard to the facts listed in Article 2(2) of the EAW¹¹³ is bound to lead to disputes in another nationality related context, namely that of the enforcement of sentences. The Framework Decision provides that execution *may* be refused if the European arrest warrant has been issued for the purposes of execution of a custodial sentence or detention order, where the requested person is staying in, or is a national or a resident of the executing Member State [102] and that State *undertakes* to execute the sentence or detention order in accordance with its domestic law.¹¹⁴

The wording of the provision is straightforward and its meaning is clear. Its logical consequence is that if local laws do not permit enforcement of the sentence in the State of nationality and the undertaking referred to cannot be given, the execution of the European arrest warrant may not be refused.

Several member States have implemented this provision in a proper manner. The Portuguese Act, for instance, provides that the execution of a European arrest warrant *may* be refused

[i]f the arrest warrant has been issued for the purposes of execution of a custodial sentence or detention order, where the requested person is staying in the national territory, has the Portuguese nationality or lives in Portugal and the Portuguese State *undertakes to execute* the sentence or detention order in accordance with the Portuguese law.¹¹⁵

Even more clearly, the Danish provision that

[a] request for the extradition of a Danish national or a person who is permanently resident in Denmark for execution of a judgment *can* be refused *if the punishment can instead be served in Denmark*¹¹⁶

¹¹² Art. 3 of the ‘Text of the draft articles on Responsibility of States for internationally wrongful acts’, adopted by the International Law Commission at its 53rd session (2001); ‘Text of draft articles with commentaries thereto’, Commentary to Article 3, pp. 74-80, available online at http://www.un.org/law/ilc/texts/State_responsibility/responsibilityfra.htm (visited 7 October 2004 2004); Vienna Convention on the Law of Treaties, 1155 UNTS 331, Art. 27; *Polish Nationals in Danzig*, 1931 PCIJ, Series A/B, No. 44 at 24.

¹¹³ It should be recalled that dual criminality may be required if the offence in question is punishable by a custodial sentence or detention of less than three years in the issuing State or is not listed in Article 2(2). See Section 2.4., *supra*.

¹¹⁴ Art. 4(6) EAW. Emphasis added. The origins of this provision can also be traced back to previously adopted Council of Europe and EC/EU instruments on the validity/enforcement of foreign judgments and the transfer of sentenced persons. See Section 2.2 and note 101, *supra*.

¹¹⁵ Art. 12(1)(g) of the Law no. 65/2003 of 23 August 2003 of Portugal. Similar formulations are included in the implementing acts adopted by, e.g., Luxembourg (Art. 5 of the *Loi du 17 mars 2004 relative au mandat d’arrêt européen et aux procédures de remise entre Etats membres de l’Union européenne*) (both available at the EU website mentioned in note 94, *supra*); Belgium, (*supra* note 106, art. 6(4)); Lithuania (*supra* note 106, Art. 9(4)(3)).

¹¹⁶ Implementing legislation adopted by Denmark (Art. 10(b)(2) of Law No. 433 of 10 June 2003 amending the Law on extradition of offenders and the Law on the extradition of offenders to Finland, Iceland, Norway and

is unlikely to invoke disputes.

Austria, too, may steer clear of problems related to this rule. Its implementing act specifies that execution of a European arrest warrant concerning an Austrian national is prohibited – for prosecution as well as for enforcement of a sentence – *when it concerns crimes which fall under the Austrian criminal jurisdiction*.¹¹⁷ Moreover, Austrian authorities are not to execute a European arrest warrant which concerns a request [103] for the surrender of an Austrian citizen for the purposes of execution of a custodial sentence or detention order. However, the act provides that if the execution of the European arrest warrant would otherwise be impermissible, the sentence or measure imposed in the issuing State shall be executed in Austria according to Sections 39-44 of the Act and without any special request from the issuing judicial authorities.¹¹⁸

In turn, Section 39 states that the enforcement of a foreign sentence against an Austrian national is permissible *even when it concerns a sentence for an act which is not penalized under Austrian law*.¹¹⁹ Accordingly, the dual criminality requirement which clearly applies to the enforcement of foreign sentences in other cases¹²⁰ has been lifted to avoid clashes with Austria's obligations under the Framework Decision.¹²¹ However, enforcement requires the consent of the Austrian national in question, except where (s)he is a fugitive from justice or when the person would be prohibited by the law of the sentencing State from staying on its territory following enforcement.¹²²

Nonetheless, the practical application of these provisions may be more problematic than it would seem at first sight. Most States do not extradite, surrender or transfer persons, nor do they enforce foreign judgments, in the absence of an applicable treaty¹²³ [104] (which lays down the procedure and contains certain substantive and procedural guarantees). Whereas the EAW establishes procedures for surrendering a person for the purposes of trial, it does not in any way regulate the process of return following conviction for the purposes of enforcement of the sentence in the State of nationality. It similarly fails to lay down procedures for enforcement in the State of nationality in accordance with Article 4(6).

Sweden (transportation of the Council Framework Decision on the European arrest warrant, *etc.*), available at the EU website cited in note 94, *supra*. Emphases added.

¹¹⁷ Sect. 5(2) of the Austrian implementing act, *supra* note 99.

¹¹⁸ Sect. 5(4), *ibid.*

¹¹⁹ Sect. 39(1), *ibid.*

¹²⁰ Sect. 39(2)(2), *ibid.*

¹²¹ See, however, Sect. 77(2), *ibid.*, on the temporary regulation concerning non-surrender of nationals.

¹²² Sect. 40, *ibid.*

¹²³ Wouters and Naert, 'Of Arrest Warrants', *supra* note 21 at 11. See, *e.g.*, Art. 2(3) of the Dutch Constitution, Art. 2 of the Dutch Extradition Act (*Uitleveringswet*), Art. 2 of the *Wet overdracht tenuivoerlegging strafvonnis* [WOTS] (Act on the Transfer of Enforcement of Criminal Judgements), both available in English in Swart and Klip, *supra* note 110. *Sed contra*, *e.g.*, Hungary does not require treaty basis for extradition for prosecution or the enforcement of judgments. See 1996 Law, *supra* note 95.

Whereas the status of the Framework Decision is not unambiguous, it was clearly meant to replace certain applicable multilateral extradition conventions (see Art. 31 EAW). In this respect, it is at least comparable to international treaties. Moreover, it is not inconsistent with the definition of a 'treaty' provided in Article 1(a) of the Vienna Convention on the Law of Treaties, *supra* note 112.

In an advice (W03.01.0523/I/A, available online at <http://www.europapoort.nl/9294000/modules/vgbwr4k8ocw2/f=/vg44khhhehwe.doc> (visited 7 October 2004)) concerning the status of the EAW, the Dutch *Raad van State* (Privy Council) concluded in 2002 that 'the Framework Decision should be seen as a regulation with a binding supranational character over Member States' (the authors' translation). Moreover, the Framework Decision is a (*sui generis*) decision of an intergovernmental organization, one based on an international treaty, which, by the force of the treaty, binds both the requesting and requested State. For these reasons, the *Raad van State* found that the provision of the Dutch Constitution according to which 'Extradition may take place only pursuant to a treaty' (Art. 2(3)) does not need to be amended for the application by the Netherlands of the legislation implementing the EAW.

On the other hand, the applicable treaties concerning the recognition and enforcement of foreign sentences deal solely with cases in which the requirement of dual criminality – possibly even qualified by the acts having to constitute crimes rather than merely offences in both states – is fulfilled. It is therefore difficult to see on what legal basis – other than an *ad hoc* bilateral agreement – an Austrian national could be transferred back to Austria following his trial abroad, surrendered under the EAW, concerning acts which are not criminal under Austrian law. Similarly, despite its legislation, Austria may find itself in a legal swamp if it tries to enforce a sentence following guarantees given under Article 4(6) of the EAW in the absence of dual criminality.

Nevertheless, the Austrian example demonstrates a recognition of some of the problems related to enforcement in cases where the dual criminality criteria is not fulfilled. This is more than can be said of some of the other implementing acts which establish an *obligation* to refuse execution of the arrest warrant without considering the feasibility of domestic enforcement. For instance, the Swedish legislation provides merely that

[w]hen the person whose surrender is requested for execution of a custodial sentence or detention order is a Swedish national, surrender *may not be granted* if the person concerned demands that the sanction be enforced in Sweden.¹²⁴

An undertaking by Sweden to prosecute or execute is not mentioned, nor its ability to do so.

The Netherlands is clearly about to face problems in this context, too. Its implementing legislation namely lays down the rule that

2. The extradition of a Dutch national *is not permissible* if it is requested for the purpose of the execution of a final custodial sentence. [105]

3. In case of denial of extradition exclusively on the grounds stated in the second paragraph the Prosecutor shall inform the requesting State of the *readiness* to take over the enforcement of the sentence, in accordance with the procedure established in Article 11 of the Convention on the Transfer of Sentenced Persons [...] concluded in Strasbourg on 21 March 1983 or on the basis of any other applicable treaty.¹²⁵

There is an obvious gap in the Dutch law between the categorical impermissibility of surrender on the one hand and the requirement to inform the requesting State of the Dutch readiness to enforce the sentence on the other. What if the Dutch authorities cannot enforce the sentence under Dutch law, due, *e.g.*, to the dual criminality requirement?

The same gap exists in the Hungarian implementing act:

If the European arrest warrant has been issued for the purposes of execution of a custodial sentence or detention order, where the requested person is a national and a resident of the Republic of Hungary, the executing judicial authority *shall refuse* to execute the European arrest warrant, and *undertakes* to execute the sentence or detention order in accordance with the Hungarian Law (Section 6 of the Criminal Code, Section 579 of the Code of Criminal Procedure).¹²⁶

Even the elaborate Polish legislation is not free from the same type of problems. It provides that

¹²⁴ Ch. 2, Sect. 6, note 106, *supra*. Emphasis added. It should be noted that the Swedish text uses the phrase ‘*får överlämnande inte beviljats*’ (emphasis added). This makes it clear that ‘may not’ should be interpreted in the imperative (‘shall not’). See too Sec. 5(4) of the Finish Act, note 106, *supra*, for a similar provision.

¹²⁵ Art. 6 of Dutch implementing legislation, *supra* note 105. The authors’ translation. Emphases added.

¹²⁶ Art. 5(1) of the Hungarian implementing legislation, *supra* note 94. Emphasis added. The original Hungarian text, in fact, literally provides an even more vague guarantee of enforcement in the second part of the provision, namely that ‘*measures shall be taken towards* the enforcement of the custodial sentence or detention order (Section 6 of the Criminal Code, Section 579 of the Code of Criminal Procedure)’. *Ibid.*, the authors’ translation, emphasis added.

[i]f the European Arrest Warrant has been issued for the purposes of execution of custodial sentence or detention order, where the requested person is a Polish national or enjoys asylum in Poland, the warrant *cannot* be executed if the person does not agree to the surrender.¹²⁷

In a similar vein, the German statute lays down the rule that surrender of a German national for the purposes of the enforcement of a sentence is permissible only with the consent of the person whom the European arrest warrant concerns. Neither this [106] statute nor the Law on International Co-operation in Criminal Matters¹²⁸ which it seeks to amend contain any reference to any undertaking by the German authorities to enforce the sentence domestically.

The examples cited above related to the Mannesmann trial¹²⁹ and the imaginary scenario in which the Dutch doctor is charged with murder in Italy for legal euthanasia in Belgium¹³⁰ illustrate the type of problems that could arise under these provisions. Assume for the sake of argument that the Mannesmann trial led to conviction of a Dutch national or that the Dutch doctor was handed over by another State to Italy and was tried and sentenced there but they somehow returned to the Netherlands, or have been tried *in absentia*. The Netherlands is requested by Germany and Italy, respectively, to hand over these individuals for the purposes of execution of their sentences. Under the above cited provisions of the implementing legislation – and under other domestic statutes¹³¹ – the Netherlands cannot surrender its nationals for execution of a foreign sentence. Rather, it has to inform the issuing State of its readiness to enforce the sentence domestically. However, it cannot enforce the sentences as the acts for which they were imposed are not penalized in the Netherlands. Accordingly, it would seem that the Dutch authorities will have to choose again between violating the rights of a national protected by its laws and surrender him anyway, or violate their obligations under the Framework Decision and act inconsistently with their own implementing act by not surrendering while being unable to express readiness to enforce the sentence.

The Netherlands and several other States will face similar dilemmas, related, for instance, to fraud, abortion and euthanasia (if performed *lege artis*), use of drugs, or possibly even due to the very strict German legislation on hate speech.¹³² Again, it seems that the implementing legislation leaves the Netherlands (and some of the other member States mentioned in this section) worse off than a literal application of the EAW would have done.

[107]

3.2.3 Safeguards against Extraterritoriality – Nationality in Disguise?

Common law systems generally establish jurisdiction over extraterritorial acts of their nationals only where those constitute serious crimes. This fact appears indirectly to enable them to refuse surrender of their nationals under the EAW, should they wish to do so. The

¹²⁷ Art. 607(s)(1) of the Polish implementing legislation (unofficial translation), *supra* note 102.

¹²⁸ *Gesetz über die internationale Rechtshilfe in Strafsachen (IRG)*, available online at <http://bundesrecht.juris.de/bundesrecht/irg/inhalt.html> (visited 7 October 2004).

¹²⁹ Note 84, *supra*.

¹³⁰ Notes 108-111 and accompanying text, *supra*.

¹³¹ *Supra* note 110.

¹³² See, e.g., Philip Johnston, 'Britons face extradition for 'thought crime' on net', *The Daily Telegraph*, 18 Feb. 2003, pp. 1-2. While citizens of the United Kingdom do not enjoy any protection against extradition by the mere fact of their nationality, citizens of other EU members may be entangled in the type of cases discussed by Johnston. Alternatively, surrender of British subjects may be denied in the cases described in the provisions discussed below (Section 3.2.3, *infra*.)

Framework Decision namely establishes an optional non-execution ground for cases where the arrest warrant concerns offences which

have been committed outside the territory of the issuing Member State and the law of the executing Member State *does not allow prosecution for the same offences when committed outside its territory*.¹³³

Admittedly, this rule was adopted for other reasons, namely as a relic of the traditional condition of reciprocity and arguably to avoid a too ready application of extraterritorial jurisdiction. Yet, due to the jurisdictional traditions of common law, a literal interpretation of this provision could establish a wide exception of surrender of subjects of such States. In addition, unlike the articles limiting the nationality exception, the EAW does not in any way attempt to ensure domestic prosecution in this context even where that would be possible.

Whereas common law systems generally do not grant their nationals a constitutional protection against extradition, they have refused to extradite their nationals on a few occasions under the reciprocal nationality exception laid down in applicable treaties.¹³⁴ Even though these States are unlikely to resort to this article with the aim to protect their nationals, the possibility cannot be excluded. The resulting legal situation is paradoxical: the EAW generally denies States with a constitutional provision preventing extradition of nationals the right to refuse cooperation on this basis, while indirectly permitting common law countries (without such constitutional obligation) to do so. It should, however, be noted that as civil law systems generally do not establish jurisdiction over *all* acts committed by their nationals abroad either, this exception may even provide the already reluctant authorities of civil law jurisdictions with an excuse not to surrender in some limited circumstances.

Moreover, even civil law jurisdictions may resort to certain other exceptions, thereby indirectly protecting their nationals (and non-nationals, for that matter). One such possibility is provided for under Article 4(7)(a) of the Framework Decision. **[108]** This paragraph states that the executing State may refuse the execution of a European arrest warrant if it concerns offences ‘regarded by the law of the executing Member State as having been committed in whole or in part in the territory of the executing Member State or in a place treated as such’.¹³⁵

A French court (a civil law jurisdiction with a long tradition of non-extradition of nationals but without constitutional guarantees to this effect)¹³⁶ invoked this exception in a recent case concerning three French Basques. Spain had requested the surrender of these individuals under the EAW on terrorist charges, based on their membership of a Spanish youth organization (Segi) which is prohibited in Spain because of its claimed financial support to ETA. The court decided that France should refuse handing over the indicted French nationals under Article 4(7)(a) of the Framework Decision.

Similarly to the previously discussed exception, this Article does not require domestic prosecution. Irrespective of this lack of obligation, the three French persons sought by Spain are unlikely to be prosecuted in France in any case due to the fact that Segi is not prohibited there.¹³⁷

¹³³ Art. 4(7)(b) EAW. Emphasis added. See too Art. 7(2) of the European Convention on Extradition, *supra* note 17.

¹³⁴ See, e.g., US (and UK, *sed contra*) practice in Shearer, *supra* note 1, at 110-114 (and 97-102); Advice sent by the Department of State to the Spanish Embassy (concerning the extradition of José Luis Segimón de Plandolit to Spain), reprinted in M. M. Whiteman, *Digest of International Law*, Vol. 6., (Washington D.C.: Department of State Publications, 1968) at 869.

¹³⁵ Art. 4(7)(a) of the EAW. See too Art. 7(1) of the European Convention on Extradition, *supra* note 17.

¹³⁶ See note 100, *supra*.

¹³⁷ ‘Problemen met Europees arrestatiebevel’ [Problems with the European Arrest Warrant], *Staatscourant* (Netherlands) 2004 – 105, p. 5.

Another exception that has already been utilized in relation to a European arrest warrant concerning nationals is Article 4(4). This provision states that the execution of a warrant may be refused

where the criminal prosecution or punishment of the requested person is statute-barred according to the law of the executing Member State and the acts fall within the jurisdiction of that Member State under its own criminal law.¹³⁸

This provision was invoked in a Belgian case concerning a European arrest warrant issued by Spain against the naturalized Belgian – originally Basque – couple, Moreno-Garcia.¹³⁹ The cases indicate that States that do establish jurisdiction over extraterritorial acts of their subjects – which happen generally to be civil law jurisdictions with guarantees against the extradition of nationals – may refuse handing them over in accordance with Article 4(4) of the EAW. As this possibility relates to cases [109] where, albeit falling under its jurisdiction, the acts cannot be prosecuted in the State of nationality due to their being statute-barred, there is logically no obligation to prosecute domestically.

These examples indicate that some safeguards have been built into the Framework Decision – beyond the limited dual criminality¹⁴⁰ rule – which could be invoked by the executing authorities to prevent unreasonably broad application of extraterritorial jurisdiction.¹⁴¹ Consequently, the EAW's denial of the nationality exception will be defensible in most cases.

3.2.4 Problems on the Requesting End

The case of the Dutch drug baron, Henk R., *a.k.a.* 'the Black Cobra', indicates that the nationality exception may lead to disputes in yet another way. This example concerns Dutch extradition laws and practices, US attempts to obtain custody over a Dutch national and its derivative, the return guarantee. Its relevance arises from the fact that, rather than requesting the extradition of the 'Black Cobra' from the Netherlands when he was released after having served a Dutch sentence, US authorities waited until the accused left his State of nationality. Upon his arrival in Spain, they requested his extradition from the Spanish authorities.¹⁴² Dutch media has suggested that the US had played a trick to circumvent the application of the nationality exception. Whatever the merits of this contention in this specific case, as will be shown, such 'tricks' played by the issuing State could serve as an additional source of frustration under the EAW. While the 'Black Cobra' case relates to extradition of nationals under the US-Dutch extradition treaty rather than in the EAW context, it raises issues which may thus become relevant under the Framework Decision. This fact renders a deeper analysis of the case and applicable regulations important for our purposes.

¹³⁸ Art. 4(4) EAW.

¹³⁹ See Cedrik Ryngaert, 'Het Europees aanhoudingsbevel lastens Moreno-Garcia: de aanhouder wint' [The European Arrest Warrant against Moreno-Garcia: Perseverance overcomes all things] Institute for International Law, K.U. Leuven, Working Paper No. 59 (August 2004), available online at <http://www.law.kuleuven.ac.be/iir/nl/wp/WP59n.pdf> (visited 7 October 2004).

¹⁴⁰ See discussion above, notes 80-82, *supra*, and accompanying text.

¹⁴¹ Other traditional safeguards laid down in the EAW include *ne bis in idem* (Arts. 3(2), 4(2), 4(3) and 4(5)), protection against decisions passed *in absentia* (Art. 5(1)), amnesty (Art. 3(1)), and non-responsibility of minors (Art. 3(3)). See too preambular paras. 12 and 13 on non-discrimination and respect for fundamental rights, and protection from death penalty, torture and inhuman or degrading treatment, respectively. See, however, note 165, *infra*, on the problems related to the implementation of these provisions.

¹⁴² 'VS hekelen procedures uitlevering; Amerika zou Nederland bewust omzeilen inzake Zwarte Cobra' ['US annoyed by extradition procedures; America accused of intentionally circumventing the Netherlands in the case of the Black Cobra'], *Trouw*, August 12, 2004, p. 3.

As amended in 1986, the Dutch Extradition Act establishes the rule that extradition of a Dutch national for prosecution abroad is permissible only if the requested State **[110]** guarantees that any resulting custodial sentence may be served in the Netherlands.¹⁴³ While in practice Dutch subjects are frequently extradited for the purposes of prosecution,¹⁴⁴ the condition of guarantees is strictly observed. In addition, the enforcement of the foreign sentence is subject to a decision by Dutch courts.¹⁴⁵ Consequently, the custodial sentence enforced in the end is often much shorter than the original foreign conviction. This is especially apparent in cases of convictions related to (soft) drug offences, for which penalties under Dutch legislation are exceptionally mild.¹⁴⁶

According to some media reports, US authorities have become increasingly frustrated over time and complained of similar practices which developed under the Dutch-US extradition treaty, as well as of the cumbersome nature of Dutch extradition proceedings in general.¹⁴⁷ It has been suggested that one of the reasons for the US to wait until the 'Black Cobra' travelled to Spain rather than requesting his extradition from the Netherlands could be related to Dutch practices concerning extradition of nationals. If the request is granted by Spain, it could namely not be subject to the condition of guarantees of enforcement of the (converted) sentence in the Netherlands.¹⁴⁸

¹⁴³ Art. 4(2) of the Dutch Extradition Act. For the text of this provision, see note 110, *supra*. Notably, the Netherlands attached a declaration to the same effect to the European Convention on Extradition in October 1987 (*supra* note 21). This one is to date the only such declaration attached to the Convention. See, too, Art. 2(3) of the Dutch Constitution after the 1983 amendment, available at http://www.oefre.unibe.ch/law/icl/nl00000_.html (visited 7 October 2004).

As the enforcement of foreign sentences is in turn subject to the *WOTS* (*supra* note 123) which specifies that a request for enforcement may be accepted by the Netherlands, *inter alia*, if the sentence is enforceable (Art. 3(1)(a)), and the act which it concerns would be punishable under Dutch law (Art. 3(1)(c) and 3(2)), the Netherlands extradites its nationals only on condition of dual criminality.

¹⁴⁴ Frank van Hoorn, 'Per jaar tien Nederlanders uitgeleverd' ['Ten Dutch extradited yearly'], *De Volkskrant*, January 28, 2002, p. 2.

¹⁴⁵ Enforcement may take two forms under the 1983 European Convention on the Transfer of Sentenced Persons (*supra* note 60): direct enforcement (Art. 10) or conversion of the sentence to a sanction prescribed by the law of the enforcing State (Art. 11). The Dutch authorities are bound by a Supreme Court decision to opt exclusively for the Article 11 procedure. Moreover, in accordance with Article 10(2) of the same Convention, the Netherlands applies the rule in case of continued enforcement that the sentence served may not 'exceed the maximum prescribed by the law of the administering State'.

¹⁴⁶ 'VS hekelen procedures', *supra* note 142.

¹⁴⁷ *Ibid.*

¹⁴⁸ See 'Zwarte Cobra weer opgepakt op verzoek VS' [Black Cobra arrested again at US request], available at <http://www.advocatie.nl/Strafrecht/Strafzaak2003/november/cobra.shtml>, (visited 7 October 2004). Under those circumstances, due to the fact that his or her presence in the sentencing jurisdiction did not flow from his extradition from the Netherlands, the requesting State would not be required to give assurances of return. This could greatly simplify the extradition procedure.

On the other hand, if a Dutch subject is arrested abroad and is subsequently sentenced in that or a third State, (s)he may still request transfer of the execution of the sentence. However, in the absence of prior assurances, guarantees or even exchanges of notes neither the accused nor the Dutch authorities would have any legal means to push for a transfer if the foreign State preferred domestic enforcement. It must however be noted that US Federal Authorities in fact permitted the transfer – in accordance with Article 11 of the Convention on the Transfer of Sentenced Persons (*supra* note 60) – of most if not all Dutch nationals sentenced in the USA whose presence there was obtained through means other than extradition from the Netherlands.

[111] Irrespective of the true US motives,¹⁴⁹ this case raises the question whether instances [112] of forum-shopping may occur under the EAW due to the lack of flexibility of its provisions – and especially of those of the implementing acts – related to the surrender of nationals. In fact, the often inflexible implementing statutes containing subjective criteria may prompt States wishing to obtain custody over an accused whose surrender may be subject, for instance, to Article 5(3) to resort to forum-shopping. Admittedly, however, other exceptions and guarantees in the EAW, coupled with differences in relevant domestic law provisions in various member States, may provide incentives for States wishing to prosecute persons not within their jurisdiction to request surrender from the most favourable forum.

In addition, differences in the length of the sentence imposed and the one enforced under Articles 5(3) and 4(6) may lead to the same result. The ‘Black Cobra’ case may again be used to illustrate the problem. Whatever the true motives of US authorities may have been in requesting his extradition from Spain rather than the Netherlands, it is a fact that if convicted in the US following his extradition from Spain, the ‘Black Cobra’ would possibly spend a great deal more time in prison than he would in the Netherlands, if extradited from the Netherlands under the US-Dutch extradition treaty. In the latter case, his extradition would likely have resulted in his re-transfer under Article 11 of the Convention on the Transfer of Sentenced Persons¹⁵⁰ following a conviction, permitting the Netherlands to adapt the sentence to local standards.

¹⁴⁹ It should be noted that the 1980 Dutch-US Extradition Treaty (1357 UNTS, No. 22924) denies any right to refuse extradition of nationals on the sole basis of their nationality, even without such guarantees. Article 8 provides that

[i]n the event there is a treaty in force between the Contracting Parties on the execution of foreign penal sanctions, neither Contracting Party may refuse to extradite its own nationals solely on the basis of their nationality.

Since 1988, both the Netherlands and the US have been parties to the European Convention on the Transfer of Sentenced Persons. (See note 60, *supra*.) This Convention allows for the execution in the Netherlands of final judgments imposed upon Dutch nationals abroad, fulfilling the treaty requirement.

The entry into force of this treaty resulted in a discrepancy between the thus arising categorical denial of the right to extradite persons based on their nationality and the Dutch statutory prohibition to extradite nationals in the absence of guarantees of return. This problem – which arose due to the conclusion of the extradition treaty prior to the amendment of the Extradition Act and well before the entry into force of the Convention on the Transfer of Sentenced Persons (*ibid.*) – was not foreseeable at the time of the conclusion of the US-Dutch treaty. Arguably, the Netherlands could have initiated the amendment of the treaty at this point, to make it consistent with its Extradition Act but apparently failed to do so. (It should, however, be noted that under Dutch law, conflicting treaties override Dutch statutes.)

Nevertheless, a practice developed in US-Dutch extradition relations which was consistent with the extradition treaty *and* the Dutch Extradition Act. Accordingly, the Dutch courts always ask for guarantees of return for enforcement in the Netherlands. In response, rather than giving formal guarantees, US public prosecutors declare that they would not object to the return of the person for enforcement in the Netherlands. So far, such cases always resulted in the return of sentenced Dutch subjects in accordance with the conversion model in Article 11 of the Convention on the Transfer of Sentenced Persons (*ibid.*). This bilateral practice is thus comparable to extradition on *condition* of return.

However, this practice does not rest on any legal obligations on the part of the USA and the Netherlands cannot request such guarantees as a matter of a legal right. This fact appears to discredit the argument implied in Dutch media that US authorities tried to circumvent the application of the nationality exception and corresponding guarantees of return. In fact, it is more likely that other factors such as the unusually strict Dutch *ne bis in idem* requirement, that the evidence may have been too tainted for Dutch standards (and consequently the threat of a flagrant violation of Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (1950, ETS No. 5) in case of extradition), or a Dutch statute of limitations, *etc.* led the US authorities to prefer requesting extradition from Spain. Nonetheless, at least on a theoretical level, the case illustrates aptly problems related to forum-shopping due to the nationality exception.

¹⁵⁰ *Supra* note 60.

The text of the Framework Decision does not specify any condition related to Articles 4(6) and 5(3) of enforcing exactly the same sentence as was rendered in the other EU Member State following surrender under a European arrest warrant. However, whereas the EAW aims to replace previously existing multilateral extradition treaties applicable between the Member States, it provides that

[m]ember States may continue to apply bilateral or multilateral agreements or arrangements in force when this Framework Decision is adopted in so far as such agreements or arrangements allow the objectives of this Framework Decision to be extended or enlarged and help to simplify or facilitate further the procedures for surrender of persons who are the subject of the European arrest warrant.¹⁵¹

One such applicable treaty, the European Convention on the International Validity of Criminal Judgments lays down the rule that **[113]**

1. The enforcement shall be governed by the law of the requested [*i.e.* enforcing] State and that State alone shall be competent to take all appropriate decisions such as those concerning conditional release.¹⁵²

In addition, it subsequently provides that

[i]f the request for enforcement is accepted, the court shall substitute for the sanction involving deprivation of liberty imposed in the requesting State a sanction prescribed by its own law for the same offence. [...]¹⁵³

As noted above, very few of the current EU members are parties to this convention.¹⁵⁴ Due to this fact and to its different and often stricter conditions of applicability than of the EAW, this Convention would not apply to many of the cases of surrender under the EAW.

These conclusions¹⁵⁵ are valid for the EC counterpart, the Convention between the Member States of the European Communities on the Enforcement of Foreign Criminal Sentences, as well. Enforcement under this Convention is subject to a regime that allows the enforcing State's judicial authorities to choose between merely enforcing the foreign sentence or adapting it to the law and penalties applicable in the enforcing State.¹⁵⁶

The same solution is adopted in the Council of Europe Convention on the Transfer of Sentenced Persons,¹⁵⁷ to which all current EU members are parties. Opting for the Article 11 procedure of enforcement, States may convert the sentence to domestic standards. However, due, *inter alia*, to the requirement of dual criminality under this convention, its provisions will not apply to all cases concerning request for the surrender of a national of the requested State under the EAW. The EC equivalent, the Agreement on the Application among the Member States of the European Communities of the Council of Europe Convention on the Transfer of Sentenced Persons,¹⁵⁸ adopts the same regime.

It thus appears that, whilst retaining the right to require guarantees of return, there is no obligation on EU members under the EAW or other applicable treaties not to adapt **[114]** the foreign conviction to be enforced under Articles 4(6) and 5(3) of the Framework Decision to local laws and local standards of penalties. Accordingly, the Netherlands – and other States wishing to do so¹⁵⁹ – may adopt the practice described above, even in the EAW context. In turn, it is possible that States seeking to prosecute and punish an offender will, where

¹⁵¹ Art. 31(2) EAW. See, too, Art. 31(1). See, too, accompanying text note 72, *supra*.

¹⁵² Art. 10, *supra* note 16.

¹⁵³ Art. 44, *ibid*.

¹⁵⁴ See note 45, *supra*.

¹⁵⁵ See note 49, *supra*, for ratification information.

¹⁵⁶ Art. 8, *supra* note 46.

¹⁵⁷ Art. 9, *supra* note 60. See too Arts. 10 [Continued enforcement] and 11 [Conversion of sentence], *ibid*.

¹⁵⁸ *Supra* note 68.

¹⁵⁹ See, *e.g.*, Sect. 42 of the Austrian implementing act (*supra* note 99); 1996 Hungarian Law (*supra* note 95), Arts. 51(4) and 52; Art. 607(s)(3)-(4) of the Polish implementing act (*supra* note 102).

possible, resort to forum-shopping to gain custody over the accused and to ensure that the person serves the entire custodial penalty (s)he would be sentenced to in that State. In fact, forum-shopping would be even more practicable under the EAW system due to the co-operation in the EU of national police forces in tracking down criminals and the establishment of a central police database. These factors contribute to a legal environment conducive to States submitting arrest warrants to and having criminals arrested in the most favourable forum.

On the positive side, this technique could help further reduce the impact of the last remnants of the nationality exception in the EAW. On the other hand, it is still to be seen if States will be as disinterested as the Netherlands was in this case in the protection of its nationals from such not necessarily illegal but certainly *mala fide* methods of securing custody.

4 CONCLUSION

As the above short overview of the history of post-World War II European multilateral extradition regimes reveals, there has been a move in the past years towards a decreasing reliance on the nationality exception. The process eventually culminated in the birth of a restriction on the right of parties to refuse extradition/surrender of their nationals that is unexemplified in (European) history. In this sense, the European Arrest Warrant is a truly novel instrument.

On the other hand, the review of the relevant provisions of the Framework Decision and the implementing acts has revealed that the EAW does not signal an era free from disputes relating to the extradition or surrender of nationals. The Framework Decision and the implementing acts have several serious shortcomings and it remains to be seen what settlement can be reached in concrete disputes. Controversies may arise due to the loopholes in the EAW itself left open for States that find it difficult to abandon the age-old practice of non-extradition of nationals, and the imperfect translation of the relevant provisions in the implementing legislation of what appears to be the majority of EU members. In fact, some of the implementing statutes appear to increase rather than eliminate the potential for controversy created by provisions of the Framework Decision related to nationality and dual criminality. It is thus feared that these omissions [115] will lead to more disputes and frustration on the side of the authorities of all parties than reliance on the old rule would have done. A possible outcome is forum-shopping. However, in the worst case scenario, these problems may even strengthen the mental barrier in civil law systems against the extradition of nationals and lead to a reemergence of the nationality exception in a stricter form.

It is of even greater concern that certain member States have not yet implemented the Framework Decision in their domestic legislation.¹⁶⁰ Especially discouraging is the case of the Czech Republic where President Klaus vetoed the law implementing the Framework Decision, based on the constitutional incompatibility of the law due to its provisions permitting the surrender of nationals. He argued that allowing the surrender of Czech subjects as proposed under the bill would mean ‘the abolition of the sovereignty of the Czech Republic and its capability to act independently in the matter.’¹⁶¹

¹⁶⁰ As of 20 October 2004, the only such Member State was Italy. Cf. Art. 34(1) EAW on the obligation to implement.

¹⁶¹ ‘Klaus vetoes European arrest warrant’, available online at <http://www.czech.cz/index.php?section=5&menu=0&action=new&id=1869> (visited 7 October 2004), quoting the President. The Czech draft statute was, however, sent back to the Chamber of Deputies which adopted it on 24 September 2004. It will enter into force on 1 November 2004. See note concerning Implementation of the Framework Decision on the European arrest

Admittedly, due to the fact that for an ill-defined group of crimes the dual criminality requirement has been abolished, the problems related to extraterritorial jurisdiction could be potentially much graver under the regime of the EAW than they are in traditional extradition. The insistence of certain States on the nationality exception may, therefore, be received sympathetically. On the other hand, it should be remembered that Member States are allowed to refuse execution of EAW requests on other grounds.¹⁶² Those exceptions could provide a significant measure of protection in cases similar to that of Dietz,¹⁶³ and deflate the argument in some cases under the EAW that the nationality exception is necessary to protect one's nationals from excessive exercise of extraterritorial jurisdiction.

Moreover, whereas fundamental defense rights are not guaranteed in the Framework Decision, it does aim to protect individuals subject to arrest warrants from the 'death penalty, torture or other inhuman or degrading treatment or punishment',¹⁶⁴ as well as from surrender for prosecution based on discrimination, offering some limited [116] safe-guards.¹⁶⁵ Furthermore, serious progress is presently being made in the EU in the preparation of the planned Framework Decision on Defense Rights. In fact, the original plan of an EAW was conceived of linked to the idea of a Green Paper on Procedural Safeguards for Suspects and Defendants in Criminal Proceedings throughout the European Union.¹⁶⁶ The failure to complete a document on such safeguards together with the EAW project may – at least in part – account for the reluctance to give up the traditional insistence on the nationality exception. Fortunately, the progress made in the drafting of a Framework Decision along the lines of the Green Paper (watered down as it may be) and other EU projects may be expected to contribute to the further harmonization of the rights of accused in Europe.¹⁶⁷ Such developments could, at least in the long run, lead to more leniency in carrying out the provisions of the EAW implementing acts related to the (non-)surrender of nationals, or possibly even to their amendment.

warrant, available online at http://ue.eu.int/ueDocs/cms_Data/docs/polju/EN/EJN620.pdf (visited 7 October 2004).

¹⁶² E.g., Arts. 4(4), 4(7)(a)-(b) EAW. See Section 3.2.3. *supra*.

¹⁶³ *Supra* note 8.

¹⁶⁴ Preamble, para. 13.

¹⁶⁵ Preamble, para. 12. It should, however, be noted that as the Framework Decision does not have a domestic direct effect in the Member States, direct protection can only be ensured in the implementing statutes, some of which fail to refer to such guarantees or limit them. (See, e.g., the Hungarian implementing act, *supra* note 94, and Art. 11 of the Dutch implementing legislation, *supra* note 105, respectively).

¹⁶⁶ See COM(2003)75 (19 February 2003). This project got divorced from the project on the EAW Framework Decision as a result of the September 11 attacks on the World Trade Center, due to the fact that that event speeded up the adoption of the EAW.

¹⁶⁷ On problems related to the inequality of defense rights and human rights protection related to detention and fair trial see, e.g., Alette Smeulders en Jan de Vries, 'Het Europees Aanhoudingsbevel: gerechtvaardigd vertrouwen?' [The European Arrest Warrant: Justified Trust?], *NJCM-Bulletin* (2003) 420-460.