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Editorial

The Missing Link in CJEU *Staatsanwaltschaft Aachen* (C-891/21) and the Argument for Humanitarian Considerations in Prison Transfer Proceedings

Introduction

In the 2023 case of *Staatsanwaltschaft Aachen* (C-891/21), the Court of Justice of the European Union (CJEU or the Court) ruled that the well-known 'two-step test', that was developed in the context of the European arrest warrant (EAW) mechanism, must also be applied to proceedings on the enforcement of custodial sanctions imposed in another EU Member State, at least insofar the right to a fair trial is at stake.[1] Consequently, in order to determine whether in a concrete case the enforcement of a foreign custodial sanction may be refused due to violations of the fair trial principle, the executing Member State has to examine, first, if "systemic or generalised deficiencies" exist in the issuing Member State (the convicting Member State) with regard to the right to a fair trial (step 1). Provided that such deficiencies exist, the executing Member State must subsequently assess whether in the particular case at hand the convicted person's right to a fair trial has been violated in the criminal proceedings which led to the conviction (step 2). Would that be confirmed as well, enforcement of the foreign custodial sanction may be refused.

The Court's judgment has been welcomed, but also criticised for a number of reasons – for example, because the mere copying of existing EAW-based case law to a mechanism on the enforcement of foreign convictions fails to address

1 CJEU 9 November 2023, case C-819/21 in the proceedings *Staatsanwaltschaft Aachen*, ECLI:EU:C:2023:841 (hereinafter briefly referred to as the *Staatsanwaltschaft Aachen* case).

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sharp criticism about the narrowness of the two-step test and the difficulties in applying it;[2] and, moreover, because the judgment seems to underline that the individual assessment (step 2) is subordinated to the general assessment (step 1), while there is a case to make for the autonomous application of the individual assessment.[3]

This short piece adds a further point of criticism, one that as such questions the precise comparability of both mechanisms: surrender versus prison transfer. It will be argued that the *differing effect* of cooperation under of both mechanisms justifies also a *differing approach* towards the operationalization of mutual recognition and mutual trust, and the limits thereto – to the benefit of the convicted person.

1 The CJEU Judgment in *Staatsanwaltschaft Aachen* (C-819/21): Application of the EAW-Based 'Two-Step Test' to the EU Prison Transfer Regime

In the case of *Staatsanwaltschaft Aachen*, Poland had requested the German authorities to enforce a six month custodial sentence that a Polish District Court had imposed on *MD*, resident in Germany. In the procedure that followed, the Regional Court (*Landgericht*) Aachen took into consideration the prevailing shortcomings in Poland in upholding the rule of law and safeguarding judicial independence. It wondered, among other things, whether these issues could provide ground to refuse the enforcement of the Polish sentence, just as, under certain conditions, is permitted in surrender cases under the EAW mechanism (Framework Decision 2002/584).[4] After all, in the EAW context, it is now standing CJEU case law that the assumption of mutual trust, pursuant to which EAW's must in principle be recognised and executed, can be rebutted in exceptional circumstances, i.e. where the sought person after surrender would be exposed to a real risk of breach of Article 4 (prohibition of inhuman

2 T. Wahl, 'ECJ: Deficiencies in Fair Trial Protection Can Block Recognition of Custodial Sentence', *Eucrim* 3/2023, p. 265, also available at: https://eucrim.eu/news/ecj-deficiencies-in-fair-trial-protection-can-block-recognition-of-custodial-sentence/ (last accessed on 12 June 2024).

3 J. Callewaert, 'Two steps of unequal weight? Judgment of the CJEU in the case of Staatsanwaltschaft Aachen', posted on 5 December 2023 on the author's own portal: https://johan-callewaert.eu/two-steps-of-unequal-weight-judgment-of-the-cjeu-in-the-case-of-staatsanwaltschaft-aachen/ (last accessed on 12 June 2024).

4 *OJ* 2002, L 190/1 (amended; consolidated text can be found in *OJ* 2009, L 81/24).

or degrading treatment) or Article 47, para. 2 (right to a fair trial) of the EU Charter of Fundamental Rights (the Charter).[5]

In *Staatsanwaltschaft Aachen*, the Court has indeed ruled that in the context of prison transfer too, fundamental rights concerns may constitute a ground to refuse the recognition and enforcement of a foreign criminal conviction, again in exceptional circumstances only.[6] That in itself is not surprising. As the Court demonstrates, it actually follows from the EU instrument for prison transfer (Framework Decision 2008/909[7]) itself – albeit in general terms only – that the Member States' obligations to respect and uphold fundamental rights and principles remain unchanged when applying the provisions of this instrument.[8] In EAW cases, the Court invariably cites similar references from Framework Decision 2002/584, in particular Article 1(3) thereof.[9]

In what follows, however, the Court also concisely concludes that this additional fundamental rights exception must be assessed on the basis of the same two-step examination as required in EAW cases. Very precise or otherwise to-the-point arguments to support that specific conclusion, have not been given. In fact, the Court's considerations 'only' include comparing the legislative framework that governs prison transfers in the EU (pursuant to Framework Decision 2008/909) with the legislative framework underlying the EAW mechanism (Framework Decision 2002/584, in the context of which the two-step examination has been developed). In that regard, the Court points out that both frameworks rest on the same principles, i.e. the principles of mutual trust and mutual recognition. Consequently, under both instruments, Member States are in principle required to comply with requests from other Member States – whether it concerns surrender or the executing of a prison sentence – unless one of the limited number of refusal grounds, exhaustively foreseen

5 ECJ 5 April 2016, joined cases C-404/15 and C-659/15 PPU in proceedings relating to the execution of European arrest warrants issued in respect of Pál Aranyosi and Robert Căldăraru, ECLI:EU:C:2016:198, par. 91–94 (hereinafter briefly referred to as the *Aranyosi/Căldăraru* case); ECJ 25 July 2018, C-216/18 PPU in proceedings relating to the execution of European arrest warrants issued against LM, ECLI:EU:C:2018:586, par. 68 (hereinafter briefly referred to as the *LM* case); and ECJ 22 February 2022, joined cases C-562/21 PPU and 563/21 PPU in proceedings relating to the execution of European arrest warrants issued against X and Y (hereinafter briefly referred to as the *X/Y* case).

6 *Staatsanwaltschaft Aachen* case, par. 27.

7 *OJ* 2008, L 327/27.

8 See the Court's references to Article 3(4) as well as recital 13 of Framework Decision 2008/909 in *Staatsanwaltschaft Aachen* case, paras. 25–26.

9 See e.g. the *Aranyosi/Căldăraru* case, par. 83; or the *LM* case, par. 45.

in both Framework Decisions, applies.[10] However (as already mentioned above[11]), the Court also observes that, like Framework Decision 2002/584, the text of Framework Decision 2008/909 itself recalls the unaffected applicability of fundamental rights obligations for Member States. For the Court this apparently suffices to recognise not only an additional fundamental rights exception for extraordinary circumstances, but in the same breath – i.e. without any additional elucidation – also the exact same two-step test.[12] It is this 'jump' that will be critically reflected on in the next Section. After all, it is one thing to acknowledge an additional fundamental rights exception; it is another to require that assessments resulting from it, must follow the exact same steps known from EAW case law.

2 The Missing Link in *Staatsanwaltschaft Aachen*

As mentioned, in its judgment in *Staatsanwaltschaft Aachen*, the CJEU's comparison between the legislative frameworks for prison transfer and surrender remained restricted to underlying principles (mutual trust and mutual recognition) and the codified room for discretion that directly follows from these principles. Viewed from these aspects only, I can see the logic behind extension of the EAW-based two-step test to the EU mechanism for prison transfer – with the convenient result of an equal approach to fundamental rights assessments in two different cooperation instruments.[13] Therewith, the Court has also, once again,[14] upheld the requirement for executing

10 *Staatsanwaltschaft Aachen* case, par. 19–20.

11 See in particular the text accompanying footnotes 8 and 9.

12 See *Staatsanwaltschaft Aachen* case, par. 27–30.

13 According to the report on the latest round of evaluation of mutual recognition instruments, it was already the case prior to the judgment in the *Staatsanwaltschaft Aachen* case that Member States with the intention of issuing a request for prison transfer took inspiration from the Court's judgment in the *Aranyosi/Caldararu* case (from which the two-step test originates) to assess the detention conditions in the intended executing Member State, see: Council of the European Union, 'Final report on the 9th round of mutual evaluations on Mutual recognition legal instruments in the field of deprivation or restriction of liberty', Brussels 1 March 2023, council document 6741/23, p. 35.

14 See for instance CJEU 17 December 2020, joined cases C-354/20 PPU and C-412/20 PPU, in proceedings relating to the execution of European arrest warrants issued in respect of L and P, ECLI:EU:C:2020:1033 (hereinafter in footnotes briefly referred to as the *L/P* case). In this judgment already, the Court did not follow the referring court's suggestion to drop the second, individualised step. In the *Staatsanwaltschaft Aachen*, it was again not self-evident for the referring court that upholding this second step would be the best way

authorities to carry out the individualised assessment (step 2 of the two-step test), following the establishment of "systemic or generalised deficiencies" in the issuing Member State in safeguarding the right to a fair trial (step 1) – this despite recurring criticism that the two-step test has set the bar too high and imposes practical hurdles.[15] For the obvious reason that until the judgment in *Staatsanwaltschaft Aachen* the two-step test was only applicable in surrender cases, this specific point of criticism has to date largely been made in relation to surrender, but in reaction to *Staatsanwaltschaft Aachen* it has been reiterated by some in relation to EU prison transfer.[16]

However, as I will argue hereafter, the mechanism for prison transfer cannot so easily be put on an equal footing with the EAW mechanism as regards the appreciation of the two-step test and the extent to which it would set too high a bar for fundamental rights protection in cross-border cooperation in criminal matters. Both mechanism may well correspond in terms of underlying principles and the resulting discretionary powers for executing Member States, but beyond these issues they differ significantly. For instance, as pointed out by Montaldo, under the mechanism for prison transfer the roles of the issuing and executing authorities are reversed, compared to their roles under the EAW mechanism.[17] This is, indeed, the logical consequence of the difference in the purpose of both cooperation mechanisms. EAW's are issued in order to be able to enforce self-imposed judicial decisions domestically, requiring the transfer of suspected or sentenced persons *from the executing Member State to the issuing Member State*; Requests for prison transfer seek the enforcement of self-imposed prison sentences in another Member State, requiring transfers of judgments and frequently also transfers of sentenced persons *from the issuing Member State to the executing Member State*. Consequently, whereas under the EAW mechanism the actual transfer of the sought person must be performed

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to follow, judging by the third preliminary question, see *Staatsanwaltschaft Aachen* case, par. 17.

15 See amongst may other articles and blogposts: P. Bárd and W. van Ballegooij, 'Judicial independence as a precondition for mutual trust? The CJEU in *Minister for Justice and Equality v. LM*', *New Journal of European Criminal Law* 2018–3, p. 291–299; or A. Frackowiak-Adamska, 'Trust until it is too late! Mutual recognition of judgments and limitations of judicial independence in a Member State: L and P', *Common Market Law Review* 2022, p. 113–150. Contrasting viewpoints have been put forward as well, see A. Klip, 'Eroding Mutual Trust in an European Criminal Justice Area without Added Value', *European Journal of Crime, Criminal Law and Criminal Justice* 2020, p. 109–119.

16 See Wahl's observation, supra n. 2; and Callewaert's analysis, supra n. 3.

17 S. Montaldo, 'Intersections among EU judicial cooperation instruments and the quest for an advanced and consistent European judicial space: The case of the transfer and surrender of convicts in the EU', *New Journal of European Criminal Law* 2022, p. 264.

by the *executing Member State*, under the prison transfer mechanism it is the *issuing Member State* that usually, or at least oftentimes, must undertake the actual transfer of the convicted person. Because of this immanent distinction between both mutual recognition instruments, it has been concluded by Montaldo that the two-step test, established in CJEU case law with regard to EAW procedures, "can hardly be replicated as such in cross-border transfers".[18]

Admittedly, the perspective on which this conclusion rests (the question being whether fundamental rights in the executing Member State are compliant) is another one than features in *Staatsanwaltschaft Aachen* and in this article (focusing on fundamental rights compliance in the issuing Member State).[19] So, I do fully share Montaldo's conclusion, though not on the sole basis of the aforementioned difference only. My main argument to conclude that the EAW-based two-step test fails to fit prison transfer proceedings, rather is that both cooperation instruments crucially differ in their impact on the individual when the executing Member State decides to refuse recognition and enforcement of the foreign judicial decision at hand because of serious fundamental rights concerns. The following section aims to demonstrate this. True, this argument is related to the 'reversed roles'-argument. Still, it adds a perspective that to my knowledge has not yet been present in the scholarly debate on adequate rights protection in prison transfer proceedings in the EU, and it opens up the room for an alternative way of dealing with serious fundamental rights concerns in such proceedings, namely by permitting humanitarian considerations (see Section 3).

2.1 *So Close, Yet so Different: Refusal of Surrender vs. Refusal of Prison Transfer and the Different Impact on the Individual Concerned*

Under the *EAW mechanism*, recognition and enforcement of a European arrest warrant is bound to lead up to the requested person's transfer – called: surrender – from the executing Member State to the issuing Member State, either for the purpose of being prosecuted, or for the purpose of undergoing a custodial sanction that has previously been imposed by the authorities of that issuing Member State. If the executing Member State *refuses* to recognise and enforce the EAW, the requested person stays where he/she is: on the territory of the executing Member State – 'safe' from the law enforcement activities of the issuing Member States.

18 Idem, p. 265.

19 Idem. The same perspective was taken by T Marguery, 'Towards the end of mutual trust? Prison conditions in the context of the European Arrest Warrant and the transfer of prisoners framework decisions', *Maastricht Journal of European and Comparative Law* 2018, p. 713.

What this means in concrete terms, is perhaps easiest to imagine where substandard prison conditions in the issuing Member State would be the reason for refusal: the result would be that the requested person stays outside the deficient prison facility. But also in cases where the right to a fair trial is at stake, refusal on that ground would have concrete impact: the requested person would not be subjected to criminal proceedings liable to undermine the essence of his/her right to a fair trial and/or to incarceration based on such deficient criminal proceedings.

All this explains the criticism expressed at the narrowness of the two-step test, that the Court has established and upheld in the EAW context. The observation that in practice the application of this test can hardly ever result in an actual refusal of surrender, means people being transferred to Member States despite serious concerns about the safeguarding of their rights in those Member States.

Under the *EU mechanism for prison transfer*, recognition and enforcement of a foreign criminal conviction may result in the convict's transfer, but not necessarily so; the applicable rules also cover situations where the convicted person is already in the Member State on whose territory the custodial sentence should be undergone (see Article 4(1) Framework Decision 2008/909). If that is not the case, the convict's transfer will be from the issuing Member State to the executing Member State, i.e. in reverse of the transfer route under the EAW mechanism. After all, whereas EAW's are issued in order to enable the enforcement of a self-imposed judicial decision, requests for prison transfer intend to achieve that a judicial decision is enforced by another Member State.

If the executing Member State *refuses* to recognise and enforce the foreign judgment in cases where the convicted person already resides on the territory of the executing Member State (like *MD* in the case of *Staatsanwantlschaft Aachen*), the convicted person stays where he/she is: on the territory of the executing Member State – 'safe' from the law enforcement activities of the issuing Member State, like in EAW cases.

However, as mentioned, a request for prison transfer can also be issued when the convict is still in the issuing Member State. In such cases, it is far from uncommon that the convicted person remains in detention in the issuing Member State at the time when its authorities send out the request for prison transfer. Then, the executing Member State's refusal to recognise and enforce this conviction on its own territory, keeps the convicted person in that issuing Member State – i.e. '*not* safe' from that state's law enforcement activities.

What this means in concrete terms is in diametric opposite to EAW cases in which the right to a fair trial in the issuing Member State is at stake. Whereas in EAW cases, as previously described, the result of refusal would be that the requested person would not be subjected to deficient criminal proceedings and/or to incarceration based on such proceedings, the contrary result in prison transfer cases would be that the convicted person will remain incarcerated precisely on the basis of such deficient criminal proceedings – and, perhaps even more importantly, would run the risk of being subjected, in the course of execution, to follow-up procedures affecting the convict's right to liberty (e.g. on conditional release), in courts that are liable to suffer from the same deficiencies.

Consequently, to criticise the two-step test for setting the bar for refusal too high is not necessarily in the interests of safeguarding the individual's fundamental rights. Instead, in circumstances such as meant above – in which the convicted person resides, perhaps in detention, on the territory of the issuing Member State – the very limited ability under the two-step test to refuse recognition and enforcement of the criticised foreign judgment actually holds an opportunity to offer the convicted person a place in domestic prison facilities where he/she would stay safe from deficient (follow-up) proceedings in the issuing Member State. The perhaps uncomfortable truth thus is that in prison transfer proceedings, (a real risk of) inadequate safeguarding of fundamental rights by the issuing country, may rather constitute a *reason* for than an *obstacle* to recognise and enforce the prison sanction.

2.2 *The Case for a Tailored Approach to Rights Protection in Prison Transfer Proceedings*

Whatever opinion one may have about it, the fact is that the aforementioned realities, which make a significant proportion of prison transfer cases (namely those that would involve the transfer of the sentenced person) essentially distinct from EAW cases, have not at all been recognised or otherwise considered in the CJEU's judgment in *Staatsanwaltschaft Aachen* (nor in the Advocate-General's conclusion[20]). It is, in my view, the missing link in *Staatsanwaltschaft Aachen* – and quite a crucial one, because the differing impact of refusal under the one instrument and the other seriously detracts their very comparability. Both may well correspond in underlying principles (and the resulting, limited discretion for refusal) as well as in their general references to fundamental rights obligations, it is clear from the Court's further considerations in its more

20 Both the Court and the Advocate General have mentioned that under Framework Decision 2008/909 transfer of the sentenced person not necessarily has to take place, and that, if transfer must take place, it goes from the issuing Member State to the executing Member State, as opposite to transfer under Framework Decision 2002/584. However,

recent post-*Aranyosi/Căldăraru* case law, that the two-step test is meant to serve EAW-specific objectives and realities.

This has become most evident since the Court's judgment in the *L/P* case where the Court was explicitly challenged to reconsider the requirement of an individual assessment (step 2). One of the Court's main arguments for maintaining this second step – purposefully designed for exceptional circumstances only[21] – was that dropping it would lead to a "high risk of impunity". In the Court's view this would be at odds with one of the very objectives of the EAW mechanism, which after all "in particular" serves to combat the impunity of persons who are not present on the territory of the Member State in which they allegedly had committed an offence.[22] And whether against or in favour of the impunity-argument,[23] the argument does work in the EAW context, admittedly: A broader human rights exception would, indeed, likely increase the number of refusals (and postponements), hence increase the number of requested persons released from detention in executing Member States and thus the risk of impunity – whereas (*vice versa*) upholding the narrow two-step test would likely change not much and thus prevent a considerable increase of refusals, hence safe havens, across the EU.

However, the same impunity-argument cannot logically and generically be relied on in the context of prison transfer, first and foremost because Framework Decision 2008/909 does *not* in particularly serve the prevention of impunity. Instead, the primary objective of the EU prison transfer mechanism is to enhance the social rehabilitation of prisoners.[24] Moreover, in many cases

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these remarks were not made in connection to the question whether the EAW-based two-step test should equally apply in prison transfer proceedings, but instead in relation to the follow-up question which date the executing Member State should take as the basis for carrying out the two-step examination. See *Staatsanwaltschaft Aachen* case, par. 39 and conclusion of Advocate General Emiliou of 4 May 2023 in the *Staatsanwaltschaft Aachen* case, ECLI:EU:C:2023:386, text in footnote 43.

21 See *Aranyosi/Căldăraru* case, par. 82 (with reference to the CJEU judgment in *Opinion 2/13*, EU:C:2014:2454, par. 191), and par. 93–94; soon thereafter confirmed in the *LM* case regarding concerns about fair trial rights.

22 *L/P* case, par. 62–64, repeated in 2022 in the *X/Y* case, par. 62.

23 In a previous editorial in this Journal, I critically reflected on the use of the impunity-argument in this context, followed by the suggestion to adopt an integrative approach to judicial cooperation mechanisms, see J.W. Ouwerkerk, 'Are Alternatives to the European Arrest Warrant Underused? The Case for an Integrative Approach to Judicial Cooperation Mechanisms in the EU Criminal Justice Area, *European Journal of Crime, Criminal Law and Criminal Justice* 2021–2, p. 87–101.

24 This follows from recital 9 to the preamble of Framework Decision 2008/909 ("Enforcement of the sentence in the executing State should enhance the social rehabilitation of the

impunity will not have to be feared at all following a refusal based on human rights grounds. As demonstrated in the previous section, in those cases where the convicted person resides in the issuing Member State, the result of refusal will be that the prison sentence will still be enforced by that state; impunity will only be the logical result of refusal (on whatever ground) where the convicted person is already present in the executing Member State.[25] To nonetheless decide that the EAW-based two-step examination for fundamental rights assessments also applies in prison transfer proceedings, should therefore rest on another argument/other arguments – but these have not been provided. In light of the quite crucial differences between the compared mutual recognition instruments (in particular the differing impact of refusal), this considerably diminishes, in my view, the persuasiveness of the Court's decision in *Staatsantwaltschaft Aachen.*

The Court's lack of differentiation can be considered somewhat surprising for two other reasons. First, in previous case law about fundamental rights protection in judicial cooperation in criminal matters, the Court did arrive at divergent standards of protection, precisely because of the differing impact of similar actions under two different mutual recognition instruments (though prison transfer not included). I am referring to the Court's case law about the level of independence required for prosecutors in order to qualify as competent authorities under, on the one hand, Framework Decision 2002/584 (on the EAW) and, on the other hand, Directive 2014/41 regarding the European

sentenced person") as well as from Article 4(2) ("The forwarding of the judgment and the certificate may take place where the competent authority of the issuing State [...] is satisfied that the enforcement of the sentence by the executing State would serve the purpose of facilitating the social rehabilitation of the sentenced person"). It has also been recognised by Advocate General Bobek in his conclusion of 3 June 2022 in Case C-910/19, *Generálna prokuratura Slovenskej republiky v X.Y.*, ECLI:EU:C:2021:454, par. 72 (concerning a case that has been removed from the Register; no judgment has been delivered), under reference to scholarly literature, such as: A. Martufi, 'Assessing the resilience of "social rehabilitation" as a rationale for transfer. A commentary on the aims of Framework Decision 2008/909/JHA', *New Journal of European Criminal Law* 2018, p. 43–61.

25 True, this was the situation in *Staatsanwaltschaft Aachen*: the convict in this case, *MD*, was residing in Germany whose authorities had been requested to execute the prison sanction imposed on *MD* by a Polish court. In the Court's analysis regarding the applicability of the two-step assessment, however, it has not been mentioned at all that recognition would not include a transfer (that was only done in relation to another issue, see n. 19) and/or that refusal in this case would likely result in impunity. It can therefore safely be assumed that the Court purposefully decided to require executing authorities to apply the two-step assessment in *all* prison transfer proceedings in which serious fundamental rights concerns arise.

Investigation Order (hereinafter: EIO).[26] Concerning the EAW mechanism, the Court had ruled in 2019 that national public prosecution services that are subject to directions or instructions from the executive branch, e.g. a Minister of Justice, do not qualify as an "issuing judicial authority" within the meaning of Article 6 of Framework Decision 2002/584, and are therefore not authorised to issue EAW's.[27] Soon after, in 2020, it became clear that the Court does not require the same level of independence for prosecutors in order to qualify as the competent authority, within the meaning of Articles 1(1) and 2(c) of Directive 2014/41, for issuing EIO's.[28] In its analysis in the latter case, the Court pointed out a number of differences between both mutual recognition instruments. One essential difference concerns their distinct objectives: surrender for the purpose of either prosecution, or execution of a sanction (EAW) *versus* evidence gathering (EIO) – the result being that unlike an EAW, an EIO normally does not (significantly) interfere with the right to liberty and security as enshrined in Article 6 of the EU Charter on Fundamental Rights.[29] This essential difference between the (potential) impact of two mutual recognition instruments has clearly contributed to the Court's decision that, in contrast to EAW's, prosecutorial independence is no necessity for being able to issue EIO's. Why then has the route of differentiation not been followed in *Staatsanwaltschaft Aachen*?

Secondly, to take into account the distinctive effect of fundamental rights assessment in prison transfer proceedings would reflect the approach taken since long by the European Court of Human Rights (ECtHR or Strasbourg Court). Back in 1992, in the case of *Drozd and Janousek v. France and Spain*,[30] it ruled that state parties to the ECHR are *only* obliged to refuse a prison transfer under Article 6 ECHR if the underlying conviction results from a "flagrant denial of justice".[31] As follows from subsequent ECtHR case law, the bar for such a qualification has been set high: in the ECtHR's own words it constitutes "a stringent test of unfairness" that goes "beyond mere irregularities or lack of safeguards in the trial procedures", requiring therefore "a breach of the

26 *OJ* 2014, L 130/1.
27 CJEU 27 May 2019, joined cases C-508/18 and C-82/19 PPU, *OG and PI*, ECLI:EU:C: 2019:456.
28 CJEU 8 December 2020, case C-584/19, *A and others*, ECLI:EU:C:2020:1002.
29 Idem, par. 72–73.
30 ECtHR 26 June 1992, *Drozd and Janousek v. France and Spain*, appl. no. 12747/87 (hereinafter shortly referred to as ECtHR *Drozd and Janousek*), par. 108–110; confirmed in ECtHR 8 January 2013, *Willcox & Hurford v. United Kingdom*, appl. nos. 43759/10 and 43771/12, par. 94–95.
31 ECtHR *Drozd and Janousek*, par. 110.

principles of a fair trial […] which is so fundamental as to amount to a nullification, or destruction of the very essence, of the right guaranteed".[32] And while it is true that the same threshold must be applied in extradition and surrender cases, the relevant considerations in the few prison transfer cases that I know of, show that the Strasbourg Court relies on a context-specific reason for applying the same high threshold in prison transfer proceedings, namely that it is generally in the interests of the persons concerned that countries cooperate with each other, like through prison transfer.[33] Therewith, the Strasbourg Court implies that lowering the bar – i.e. obliging state parties to already refuse where the foreign conviction has any stain in terms of Article 6 ECHR – would not (necessarily) be in the interests of the convicted person. Tellingly, the ECtHR never choose to prescribe in prison transfer proceedings the same, or a similar two-step examination as it requires in cases concerning the expulsion of asylum seekers,[34] and that it has also applied – seemingly in a slightly amended form though – to surrender cases[35] (indeed, like the CJEU's two-step examination, it comprehends a general as well as an individualised assessment).

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32 ECtHR 17 January 2012, *Othman v. United Kingdom*, appl. no. 8139/09 (hereinafter shortly referred to as ECtHR *Othman*), par. 258 (asylum case, deportation from UK to Jordan). In 2013, the same considerations have been used in a prison transfer case: ECtHR 8 January 2013, *Willcox & Hurford v. United Kingdom*, appl. nos. 43759/10 and 43771/12, par. 94–95 (hereinafter briefly referred to ECtHR *Willcox & Hurford*). By the way, see ECtHR *Othman*, par. 259 where the ECtHR gives examples of when such a 'flagrant denial of justice' could be determined (e.g. in case of a conviction *in absentia* without the subsequent possibility to obtain a fresh determination of the merits of the criminal charge; or detention without any access to an independent or impartial tribunal in order to have the legality of the detention reviewed).

33 ECtHR *Drozd and Janousek*, par. 110; ECtHR *Willcox & Hurford*, par. 94.

34 ECtHR *Othman*, par. 187; See also ECtHR 21 January 2011, *M.S.S. v. Belgium and Greece*, appl. no. 30696/09.

35 ECtHR 17 April 2018, *Pirozzi v. Belgium*, appl. no. 21055/11; ECtHR 25 March 2021, *Bivolaru and Moldovan v. France*, appl. nos. 40324/16 and 12623/17. The slight amendment that the ECtHR has seemingly established in this latter case, concerns the obligation to consider also the general human rights situation (step 1). For further reading on the (possible) implications of these judgments, including the application of the so-called *Bosphorus*-doctrine therein, see *inter alia* J. Krommendijk & G. de Vries, 'Do Luxembourg and Strasbourg trust each other? The CJEU's engagement with the jurisprudence of the ECtHR in AFSJ cases concerning mutual trust since 2017', *European Journal of Human Rights* 2021-4/5, p. 319–344; or (in Dutch only:) J.W. Ouwerkerk, 'Grenzen aan wederzijdse erkenning en wederzijds vertrouwen bij de uitvoering van Europese aanhoudingsbevelen: convergentie en divergentie in de rechtspraak van het HvJ EU en het EHRM (translated title: 'Limits to mutual recognition and mutual trust in executing European arrest warrants: convergence and divergence in CJEU and ECtHR case law'), *SEW: Tijdschrift voor Europees en economisch recht* 2021, p. 615–627.

3 Humanitarian Considerations

For the reasons set out in the preceding sections, the protection of fair trial rights in prison transfer proceedings deserves an approach that recognises the (likely) distinct impact of a refusal on the convict concerned. The EAW-based two-step test is not suitable to properly reflect such an approach, for it has been designed to provide an answer to the question under which circumstances fundamental rights breaches (or real risks to such breaches) create an obstacle for enforcement. In prison transfer proceedings, however, the question must also be under which circumstances fundamental rights breaches (or real risks to such breaches or their continued existence) actually provide a *reason* to undertake enforcement – that is to say, in cases where refusal would do the opposite of preventing or ending the situation of a serious breach or a serious risk of a breach. Counter-intuitive as it perhaps may feel to recognise a substandard or otherwise reprehensible judicial decision, the truth is that recognition could well be the lesser of two evils by improving the (legal) position of the convict concerned and/or by limiting the damage already inflicted on this person. In such cases, recognition is prompted by considerations of a humanitarian nature, aimed at improving the well-being of the individual concerned.

Permitting humanitarian considerations in prison transfer proceedings would create the opportunity to choose the least infringing option in the one single Area of Freedom, Security and Justice (cf. Article 3(2) TEU and Article 67 TFEU) – an opportunity, moreover, that does *not* detract from the principle of mutual recognition. After all, instead of being a limitation to the principle of mutual recognition, permitting humanitarian consideration to play a decisive role in cases where serious fair trial violations occur would in fact *encourage* recognition,[36] though in elegant conjunction with better circumstances for the convict concerned.

The concept of humanitarian considerations in prison transfer proceedings is not new. It stems from the legal context in which prison transfers take places on the basis of bilateral or multilateral treaties (as was also the case across the EU, prior to the entry into force of the current mechanism laid down in Framework 2008/909). Particularly in scholarly literature from the seventies into the nineties, the dilemma over how to uphold domestic rule

36 True, in such cases mutual recognition would no longer rest on mutual trust, rather on rebutted trust. My take in this article therefore raises the follow-up question whether and to what extent the principle of mutual recognition could and should be based on other principles than mutual trust only. This question will not be further attended to in this article.

of law standards and at the same time protect convicts against substandard enforcement conditions, has been mentioned several times.[37] And national law-makers have been struggling with it too. For instance, as can be seen from Dutch parliamentary documents from around that time, the dilemma has been reason to reconsider the 'treaty requirement'. This requirement demands that enforcement of foreign judgments in the Netherlands is based on a (bilateral or multilateral) treaty, the *ratio* being that because treaties are only concluded provided that there is a sufficient level of trust in the criminal justice system of the other country, a treaty relationship secures such a sufficient level of trust. Eventually, the treaty requirement was hold on to; it has been laid down since in Article 2 of the Dutch Act on the Transfer of the Enforcement of Criminal Judgments[38] (currently, this act 'only' governs prison transfer proceedings with non-EU Member States[39]). But the role it fulfils is clearly broader than originally intended; throughout the years, the Dutch government did enter into a number of bilateral treaties (such as with Thailand and Brazil), clearly for humanitarian reasons only – i.e. to therewith create the legal possibility of transferring Dutch citizens, detained in these countries, back to the Netherlands to serve their (remaining) sentence in the Netherlands.[40]

37 Cf. i.a. H. Grützner, 'Die zwischenstaatlichte Anerkennung europaischer Strafurteile', *Neue Juristische Wochenschrift* 1969, p. 348; F. Thomas, *De Europese Rechtshulpverdragen in Strafzaken*, Gent 1980, p. 386; D. Oehler, *Internationales Strafrecht*, Köln/Berlin/Bonn/München 1983, p. 589; M. Plachta, *Transfer of prisoners under international instruments and domestic legislation: a comparative study,* Freiburg im Breisgau: Eigenverlag Max-Planck-Institut für ausländisches und internationales Strafrecht 1993, p. 340–341; D.J.M.W. Paridaens, *De overdracht van de tenuitvoerlegging van strafvonnissen*, Arnhem 1994, p. 277; H. van der Wilt, 'De WOTS jubileert: maar valt er eigenlijk wel wat te vieren?, *Delikt en Delinkwent* 1998–3, p. 237–239.

38 In Dutch: Wet overdracht tenuitvoerlegging strafvonnissen (WOTS), Act of 10 September 1986, *Staatsblad* 1986, 464. For the discussion in Parliament, see document series (*Kamerstukken*) 18 129, in particular no. 6: *Kamerstukken II* 1985–1985, 18 129, nr. 6 (MvA), p. 5 (via: https://zoek.officielebekendmakingen.nl/uitgebreidzoeken/historisch).

39 The EU regime for prison transfers has been laid down in the act implementing Framework Decisions 2008/909 and 2008/947: Wet wederzijdse erkenning en tenuitvoerlegging vrijheidsbenemende en voorwaardelijke sancties (WETS), Act of 12 July 2012, *Staatsblad* 2012, 333.

40 See J.W. Ouwerkerk & H.G. van der Wilt, 'Deel V. Overname en overdracht van strafexecutie. Hoofdstuk 2. Overname van strafexecutie door Nederland', in: M.J.J.P. Luchtman & H.G van der Wilt (eds.), *Internationale en interregionale samenwerking in strafzaken* (commentary on Dutch legislation on international and interregional cooperation in criminal affairs), Deventer: Kluwer 2016, i.a. par. V.2.5.1.1 and accompanying footnotes.

Concluding Remarks

Under the particular circumstances of the case of *Staatsanwaltschaft Aachen* – *MD* being resident in Germany already – a refusal to enforce the Polish custodial sanction in Germany would not have had the worrying impact that fundamental rights-based refusals *can* have in prison transfer proceedings, namely: that the convicted person must undergo his/her prison sentence in the country responsible for the substandard, or otherwise reprehensible criminal proceedings which led to the conviction. But it is precisely this possible consequence of fundamental rights-based refusals in prison transfer proceedings that has been argued to warrant a tailored approach to fundamental rights protection – one that cannot be copied from the EAW context. Serious fundamental rights breaches can indeed, like in EAW proceedings, constitute clear obstacles to recognition and enforcement in prison transfer proceedings. However, they may also prompt the exact opposite: to undertake enforcement domestically, and therewith improve the situation of the convicted person.

Therefore, this article has offered an argument for permitting humanitarian considerations in prison transfer proceedings in the EU – that is to say, in cases where a refusal on the ground of a serious fair trial violation would do the opposite of preventing or ending the violation. That way, two (perhaps seemingly opposite) EU interests can be reconciled: The principle of mutual recognition remains unaffected (the prison sanction will be enforced) whilst the circumstances in which the convicted person serves his/her sanction will be improved.

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