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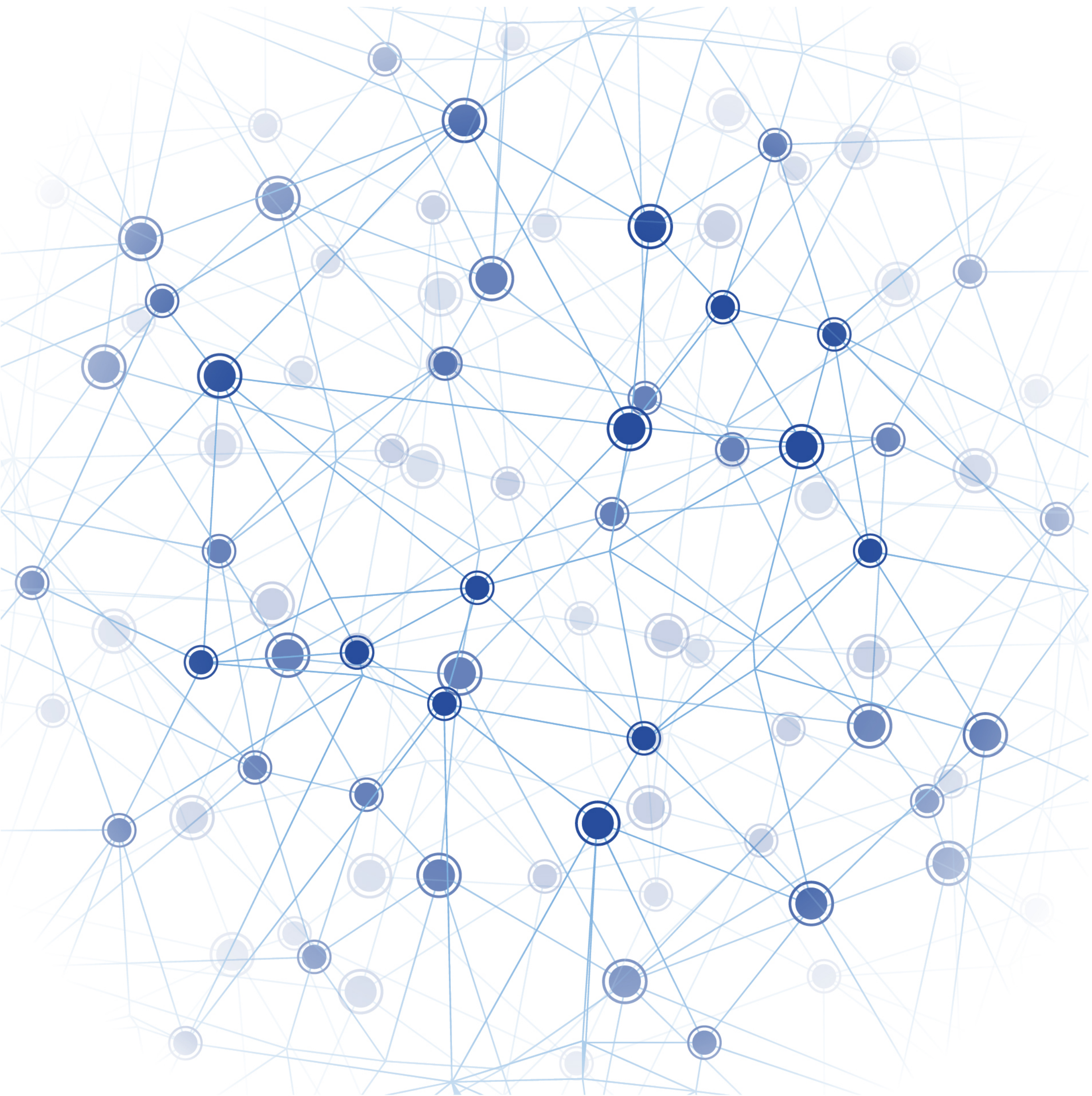
REVISTA INTERNACIONAL DE DERECHO EXTRADICIONAL

INTERNATIONAL REVIEW OF EXTRADITION LAW



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Primera edición electrónica: diciembre de 2025
First electronic edition: December 2025

Segunda edición electrónica: julio 2026
Second electronic edition: July 2026

Revista electrónica disponible en https://revistas.inej.online/index.php/revista-extradicional/es
Electronic journal available at: https://revistas.inej.online/index.php/revista-extradicional/en

ISSN: L 3122-6345

Revista Internacional de Derecho Extradicional, Volumen 2, Número 2
International Review Of Extradition Law, Issue 2
Julio 2026 / July 2026

Se terminó de producir digitalmente en julio de 2026
Digitally produced in July 2026.

EDITORIAL

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Hoy se cumplen seis meses del lanzamiento del número inaugural de la *Revista Internacional de Derecho Extradicional* cuya segunda entrega el lector se dispone a analizar si esta editorial no le provoca un efecto disuasorio. La experiencia demuestra que muchas empresas ni siquiera tienen la oportunidad de echar la vista atrás para conocer su período de maduración porque perecen por el camino. Y, en el ámbito de la producción científica del Derecho, lograr la publicación de un segundo número de esta revista semestral constituye, sin duda, un hito que me da la tranquilidad de su permanencia en el tiempo. Se trataba de un momento crítico, pues no es sencillo lograr cinco contribuciones de calidad que superen los filtros de los pares ciegos y determinados requisitos de forma no siempre agradables para el autor o la autora, pero que son necesarios para garantizar la homogeneidad y cumplir con los estándares de acreditación.

Con este segundo número damos un paso más en el objetivo de posicionar nuestra revista como referente internacional en el ámbito extradicional. Y para ello contamos, en esta ocasión, con un elenco de autores y autoras de las más variadas procedencias, que deleitarán al lector con sus estudios, de marcado carácter práctico, pero con sólidos fundamentos teóricos. Si en el primer número contamos con tres contribuciones en español y una en inglés, ahora, en el segundo número, y en sintonía con la vocación internacional de la revista, el lector podrá acceder a tres artículos en lengua inglesa redactados por autores de Bélgica, Francia y Rumanía, así como como a dos artículos en lengua castellana, uno de los cuales, además, tiene su origen en Venezuela.

En el ámbito de la difusión de la revista, hace escasos días tuve la suerte de participar en el Congreso anual de Extradición y Orden Europea de Detención y Entrega celebrado en Sarnico (Italia), organizado por Stefano Maffei (Universidad de Parma) y Thomas Wahl (Instituto Max Planck), donde además de conversar sobre estas temáticas, tuve la oportunidad de presentar el proyecto, que generó mucho interés y compromiso por parte de los asistentes, lo que, a buen seguro, reforzará la pervivencia de la revista. Gracias, Stefano y Thomas.

Sin más, les dejo ya con lo verdaderamente importante: los diversos estudios extradicionales que nos han brindado cinco expertos internacionales en la materia.

Pasen y vean.

En España, a 6 de julio de 2026.

EDITORIAL

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Today marks seven months since the launch of the inaugural issue of the *International Review of Extradition Law*, whose second issue the reader is about to examine — unless this editorial does not put them off first. Experience shows that many projects never even get the chance to look back on their maturity period, since they perish along the way. And within the field of legal scholarly production, achieving the publication of a second issue of this biannual journal is, without doubt, a milestone that gives me confidence in its lasting continuity. It was a critical juncture, since it is no easy task to secure five quality contributions capable of passing blind peer review and certain formal requirements that are not always welcomed by the author, but which are necessary to ensure consistency and to meet accreditation standards.

With this second issue, we take a further step towards our goal of establishing the journal as an international benchmark in the field of Extradition. To that end, we are joined on this occasion by a roster of authors from the most varied backgrounds, who will delight readers with studies of a markedly practical character, yet grounded in solid theoretical foundations. Whereas the first issue featured three contributions in Spanish and one in English, now, in this second issue, and in keeping with the journal's international vocation, readers will have access to three articles in English written by authors from Belgium, France and Romania, as well as two articles in Spanish, one of which, moreover, originates from Venezuela.

As for the dissemination of the journal, only a few days ago I had the good fortune to take part in the Annual Conference on Extradition and the European Arrest Warrant held in Sarnico (Italy), organised by Stefano Maffei (University of Parma) and Thomas Wahl (Max Planck Institute), where, in addition to discussing these subjects, I had the opportunity to present the project. It generated a great deal of interest and commitment among those attending, which will no doubt strengthen the journal's continued survival. Thank you, Stefano and Thomas.

Without further ado, I leave you now with what truly matters: the various Extradition studies contributed by five international experts in the field.

Come in and see for yourselves.

Spain, 6 July 2026

What is the value of mutual recognition today?: Compatibility of passive extraditions to belgium with the fundamental human rights in the light of the detention in belgian prisons

¿Qué valor tiene hoy en día el reconocimiento mutuo?: Compatibilidad de las extradiciones pasivas a Bélgica con los derechos fundamentales a la luz de la detención en las prisiones belgas

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Abstract

This article examined the current value of mutual recognition within the European Arrest Warrant system, focusing on passive extraditions to Belgium and their compatibility with fundamental human rights. Particular attention was given to detention conditions in Belgian prisons.

The research aimed to assess whether extraditions to Belgium remain compatible with fundamental rights obligations, especially in light of structural deficiencies in prison conditions and evolving case law.

A doctrinal legal analysis was conducted, combining the study of European Union legislation, case law of the Court of Justice of the European Union and the European Court of Human Rights, and reports from national and international monitoring bodies on Belgian prison conditions.

The findings showed that, although the European Arrest Warrant system was based on mutual trust, this trust had been increasingly challenged by persistent human rights violations in Belgian prisons, including overcrowding, inadequate hygiene, violence, and insufficient healthcare. Case law established a two-step assessment allowing suspension or refusal of extradition in cases of real risk of inhuman or degrading treatment, yet imposed a high evidentiary burden on executing states. Despite repeated condemnations of Belgium, structural improvements remained limited, raising doubts about the practical effectiveness of fundamental rights safeguards.

The research concluded that the principle of mutual trust was under significant strain and that the current legal framework insufficiently addressed systemic deficiencies, making a reassessment of the European Arrest Warrant system necessary.

Key words: European Arrest Warrant; Mutual recognition; Passive extradition; Fundamental rights; Belgian prisons; Detention conditions; Human rights violations; Overcrowding; European Court of Human Rights; Judicial cooperation

Resumen

Este artículo examina el valor actual del reconocimiento mutuo en el marco del sistema de la orden de detención europea, centrándose en las extradiciones pasivas a Bélgica y su compatibilidad con los derechos humanos fundamentales. Se prestó especial atención a las condiciones de reclusión en las prisiones belgas.

La investigación tenía por objeto evaluar si las extradiciones a Bélgica siguen siendo compatibles con las obligaciones en materia de derechos fundamentales, especialmente a la luz de las deficiencias estructurales en las condiciones carcelarias y la evolución de la jurisprudencia.

Se llevó a cabo un análisis jurídico doctrinal, combinando el estudio de la legislación de la Unión Europea, la jurisprudencia del Tribunal de Justicia de la Unión Europea y del Tribunal Europeo de Derechos Humanos, y los informes de organismos de supervisión nacionales e internacionales sobre las condiciones carcelarias en Bélgica.

Los resultados mostraron que, aunque el sistema de la orden de detención europea se basaba en la confianza mutua, esta confianza se había visto cada vez más cuestionada por las persistentes violaciones de los derechos humanos en las prisiones belgas, entre las que se incluyen el hacinamiento, la higiene inadecuada, la violencia y la atención sanitaria insuficiente. La jurisprudencia estableció una evaluación en dos fases que permite la suspensión o denegación de la extradición en casos de riesgo real de trato inhumano o degradante, pero impuso una elevada carga probatoria a los Estados de ejecución. A pesar de las repetidas condenas a Bélgica, las mejoras estructurales siguieron siendo limitadas, lo que suscitó dudas sobre la eficacia práctica de las garantías de los derechos fundamentales.

La investigación concluyó que el principio de confianza mutua se encontraba sometido a una presión significativa y que el marco jurídico actual no abordaba de manera suficiente las deficiencias sistémicas, lo que hacía necesaria una reevaluación del sistema de la orden de detención europea.

Palabras clave: Orden de detención europea; Reconocimiento mutuo; Extradición pasiva; Derechos fundamentales; Prisiones belgas; Condiciones de detención; Violaciones de los derechos humanos; Hacinamiento; Tribunal Europeo de Derechos Humanos; Cooperación judicial

Introduction

The European Arrest Warrant (EAW) system constitutes a cornerstone of judicial cooperation within the European Union, replacing traditional extradition mechanisms with a framework based on mutual recognition and mutual trust between Member States. Since its introduction, scholars such as Steven Dewulf and Michael Plachta have emphasized the transformative nature of this system, highlighting its efficiency and its shift from political to judicial decision-making. At the same time, other authors, including Tom Daems and Joost Huysmans, have critically examined the limits of mutual trust, particularly in light of divergent detention conditions across Member States and the risk of fundamental rights violations. The evolving case law of the Court of Justice of the European Union and the European Court of Human Rights further contributes to this debate by introducing safeguards that allow, under strict conditions, the refusal or suspension of surrender where there is a real risk of inhuman or degrading treatment.

Against this background, increasing attention is being paid to the compatibility of extraditions with fundamental rights, especially in countries facing structural deficiencies in their prison systems. Belgium has repeatedly been subject to criticism and condemnation by international monitoring bodies and courts for issues such as overcrowding, inadequate hygiene, insufficient healthcare, and prison violence. These persistent shortcomings raise serious questions about whether the presumption of compliance with fundamental rights – on which the EAW system is built– can still be upheld in practice.

This article therefore examines the extent to which passive extraditions to Belgium remain compatible with fundamental human rights, with particular focus on detention conditions and their assessment under European legal standards. It aims to evaluate the current value of mutual recognition in this context and to determine whether the existing legal framework provides sufficient safeguards or requires reconsideration in light of ongoing systemic deficiencies.

Methodology

This research was conducted using a qualitative and doctrinal legal approach, focusing on the analysis of legal norms, case law, and authoritative secondary sources. The study adopted an explanatory and exploratory design, as it sought both to clarify the functioning of the European Arrest Warrant system and to assess its compatibility with fundamental rights in the specific context of extraditions to Belgium.

The scope of the research was limited to passive extradition within the European Union, with particular emphasis on Belgium as the receiving State. Rather than relying on a statistical population or sample, the study examined a purposive selection of legal sources. These included European Union legislation, notably the Framework Decision on the European Arrest Warrant, as well as leading judgments of the Court of Justice of the European Union and the European Court of Human Rights. In addition, reports and findings from international monitoring bodies, such as the European Committee for the Prevention of Torture, and national oversight institutions were analysed to assess detention conditions in Belgian prisons.

The research was carried out through systematic legal analysis and comparative interpretation. Case law was examined to identify the criteria developed for assessing risks of fundamental rights violations, particularly under Articles 3, 6, and 8 of the European Convention on Human Rights. Furthermore, doctrinal literature was reviewed to contextualise the evolution of mutual recognition and to incorporate differing scholarly perspectives on its limits.

The practical implementation consisted of collecting, selecting, and critically analysing relevant legal materials, followed by synthesising the findings to evaluate whether current legal safeguards adequately address structural deficiencies in detention conditions. This methodological approach ensured transparency and allows for the reproduction of the analysis by consulting the same legal sources and applying similar interpretative techniques.

I. Passive Extradition Based On The EAW-ACT

1.1 Execution of a European Arrest Warrant

Passive extradition within the European Union is today primarily governed by the European Arrest Warrant (EAW) system. The EAW system represents a fundamental transformation of traditional extradition law, replacing political and diplomatic decision-making with a system based on judicial cooperation and mutual recognition between Member States.

According to Article 1(2) of the EAW Framework Decision (hereafter: EAB-FD), Member States are in principle obliged to execute arrest warrants issued by other Member States. The logic underlying the EAW is that judicial authorities in the European Union should trust each other's criminal justice systems. Consequently, surrender of the requested person constitutes the rule, whereas refusal must remain the exception and must therefore be interpreted restrictively and motivated extensively (Article 17 (6) EAW-FD).[1]

Nevertheless, the execution of an EAW is not entirely automatic. The Court of Justice of the European Union (hereafter: CJEU) has explicitly ruled that there is no absolute obligation to execute an EAW.[2] The executing judicial authority must verify whether the conditions for surrender are fulfilled and whether one of the legally defined refusal grounds applies.[3] These grounds constitute an important safeguard within the system, ensuring that cooperation does not take place at the expense of fundamental legal principles or individual rights.[4]

The Framework decision on the implementation of the EAW mentions mandatory and optional refusal grounds.

1.2 Grounds of refusal

1.2.1 Mandatory refusal grounds

a. Amnesty

One of the mandatory refusal grounds concerns situations in which the offence underlying the EAW is covered by amnesty. Article 3 EAW-FD provides that surrender must be refused where the offence is subject to an amnesty.

Amnesty differs from other forms of clemency in that it removes the criminal nature of an act retroactively and extinguishes both criminal liability and punishment. When such a measu-

1 Court of Justice of the European Union (CJEU), Samet Ardic, Case C-571/17 PPU, 22 December 2017, §70; Court of Justice of the European Union (CJEU), Dawid Piotrowski, Case C-367/16, 23 January 2018, §48; Belgian Court of Cassation, 13 December 2006, AR P.06.1557; Steven Dewulf, Overlevering (Mechelen: Wolters Kluwer Belgium, 2020), 102.

2 Court of Justice of the European Union (CJEU), João Pedro Lopes Da Silva Jorge, Case C-42/11, 5 September 2012, §30.

3 Michael Plachta, "European Arrest Warrant: Revolution in Extradition," 2003.

4 Dewulf, *Overlevering*, 102.

re applies, prosecution or punishment for the relevant offence becomes legally impossible. In that case, executing the arrest warrant would contradict the domestic legal order.

b. Ne Bis in Idem

Another important mandatory refusal ground is the principle of ne bis in idem, which prohibits an individual from being prosecuted or punished twice for the same acts. This principle, also referred to as the res judicata principle, forms a fundamental rule of criminal law and is widely recognised in both national and international legal systems.

Under Article 3(2) EAW-FD, surrender must be refused where the requested person has already been finally judged for the same facts and further prosecution is therefore impossible.

c. Age of the person

Pursuant to Article 3(3) EAW-FD, minority is considered to be a mandatory ground for refusal of the execution of a foreign EAW. More specifically, if, given their age, the person to whom this warrant relates cannot yet be held criminally responsible under the national law of the Member State for the offences underlying the warrant, the arrest warrant cannot be executed.

1.2.2 Optional refusal grounds

The executing judicial authority retains discretion to refuse execution of a European Arrest Warrant on a number of optional grounds, which are listed in Article 4 EAW-FD.

These include situations where: (1) the conduct underlying the warrant does not constitute an offence under the law of the executing Member State in cases falling outside the list of offences subject to automatic recognition, subject to the exception that differences in tax, customs, or exchange regulations cannot justify refusal; (2) the requested person is already being prosecuted in the executing Member State for the same acts; (3) the competent authorities of the executing Member State have decided not to prosecute, have terminated proceedings, or where a final judgment has been delivered in a Member State in respect of the same acts, precluding further proceedings; (4) prosecution or punishment is time-barred under the law of the executing Member State, provided that the acts fall within its jurisdiction; (5) the requested person has been finally judged by a third State for the same acts, provided that any sentence imposed has been served, is being served, or can no longer be executed; (6) the warrant has been issued for the enforcement of a custodial sentence or detention order and the requested person is a national or resident of, or stays in, the executing Member State, which undertakes to enforce the sentence domestically; and (7) the offences are deemed, under the law of the executing Member State, to have been committed wholly or partly within its territory, or outside the issuing Member State's territory where the executing Member State does not permit prosecution for such extraterritorial conduct.

1.3 PLACE OF FUNDAMENTAL RIGHTS WITHIN THE GROUNDS OF REFUSAL

1.3.1 In general

The Framework Decision notably omits explicit grounds for refusal based on fundamental rights, relying instead on mutual trust among Member States, all presumed to respect fundamental rights under the European Convention on Human Rights (hereafter: ECHR).[5] The respect for fundamental rights and the possibility to refuse execution is only mentioned once in the EAW-FD, in article 1 (3), but mostly it is mentioned in the preamble of this Framework Decision. The judicial value of the latter is uncertain to say the least.[6]

The fact that the respect for the fundamental rights is not marked as an explicit refusal ground, does not mean that it does not have an important place within the Framework Decision. Since this premise is a part of the chapter 'Definition of the European arrest warrant and obligation to execute it', every Member State has the obligation to take the fundamental rights into consideration when executing a European Arrest Warrant.[7]

In addition, a lot of Member States implemented their own refusal ground when incorporating the EAW-FD into their national framework, mentioning that an EAW cannot be executed when there is a real risk that the fundamental rights of the person concerned could be breached.[8] How these 'self-made' refusal grounds relate to the principle of mutual trust, is unclear.[9]

1.3.2 In practice: case law of the CJEU and ECtHR

Although the EAW system is based on mutual trust between EU Member States, this trust cannot be absolute. As several commentators and judicial authorities have pointed out, violations of fundamental rights may still occur within the Union, and the executing state must remain vigilant in this respect. The execution of European Arrest Warrants or the transfer of prisoners presupposes sufficient mutual trust in each other's prison systems, which –given the deplorable detention conditions in various EU Member States– is by no means a given.[10]

The most important judgement in this discussion is, without a doubt, the *Aranyosi and Caldararu* case. In this judgement, the CJEU reiterates the fundamental principle that the principles of mutual trust and mutual recognition are of essential importance to EU law, as they make possible and sustain the area without internal borders.[11] According to the Court, this mutual trust also means that, as regards the area of freedom, security and justice, each Member State assumes, barring exceptional circumstances, that all other Member States comply with EU law and, in particu-

5 Dewulf, *Overlevering*, 141.

6 Ibid., 144.

7 Dewulf, *Overlevering*, 145.

8 Ibid., 145.; Mark Mackarel, "The European Arrest Warrant – the Early Years: Implementing and Using the Warrant," *European Journal on Criminal Policy and Research* 2007: 37–47.

9 Dewulf, *Overlevering*, 145.

10 Tom Daems, "Wederzijds vertrouwen is geen blind vertrouwen: het Europees aanhoudingsbevel en detentiecondities binnen de Europese Unie" (KU Leuven, 2016), https://lirias.kuleuven.be/retrieve/831d6d1c-0495-41c2-9475-9de66e18a446.

11 Court of Justice of the European Union (CJEU), Aranyosi and Căldăraru, 5 April 2016; Court of Justice of the European Union (CJEU), Minister for Justice and Equality v LM, 25 July 2018; Court of Justice of the European Union (CJEU), Niculaie Aurel Bob-Dogi, Case C-241/15, 1 June 2016; Joost Huysmans, "Overbevolkte gevangenissen kunnen leiden tot weigering uitvoering Europees aanhoudingsbevel," Juristenkrant 2016, no. 329: 2.

lar, with fundamental rights.[12] However, the Court has developed a nuanced jurisprudence confirming that executing authorities can suspend, or in some cases refuse, an execution of a European Arrest Warrant. This decision must be preceded by two-factor authentication, which works as follows:

The Member State must assess credible evidence of real risk of inhuman or degrading treatment (Article 3 ECHR, Article 4 EU Charter) in the issuing State's detention facilities.

Executing courts must base their assessment on objective, reliable, and up-to-date information such as judgments form the European Court of Human Rights (hereafter: ECtHR), European Commission for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (hereafter: CPT) reports, or reports by international bodies.[13] They must consider concrete detention conditions including cell size, hygiene, and freedom of movement. However, a genuine general risk of a violation of fundamental rights is not sufficient grounds to refuse to execute an EAW. The executing judicial authority must, after all, still assess specifically and precisely whether there are substantial and fact-based grounds for believing that the person concerned will be exposed to –in this case– inhuman or degrading treatment, given the circumstances to be expected in the issuing Member State.[14] If the Member State comes to the conclusion that there is an individual risk, the execution of the EAW can be suspended. Both Member States then have the opportunity to exchange information and guarantees as to exclude the breach of fundamental rights in the specific case that is pending.[15] Only if the risk – which is the ground for the suspension of the execution of the EAW – cannot be remedied within a short period of time, the execution of the EAW can be denied definitively.[16]

The Court creates in this arrest[17] a new refusal ground and states that it is a mandatory one.[18] This standard applies to other fundamental rights, notably the right to a fair trial and independent judiciary.[19]

The ECtHR has also affirmed that its Soering principle applies to EAW cases, emphasizing the need for individualised risk assessment.[20] The ECtHR has condemned Belgium for failing to conduct such a specific assessment in the Romeo Castaño case.[21] The ECtHR once again expressly states that it is aware

12 Daems, "Wederzijds vertrouwen is geen blind vertrouwen."; Dewulf, *Overlevering*, 147.

13 Huysmans, "Overbevolkte gevangenissen," 2.

14 Paul Bekaert, "Twintig jaar Europees aanhoudingsbevel: geen verjaardagsfeest voor de grondrechten," *Juristenkrant* 2022, no. 450: 13; Dewulf, *Overlevering*, 149.

15 Huysmans, "Overbevolkte gevangenissen," 2.

16 Dewulf, *Overlevering*, 149.

17 Court of Justice of the European Union (CJEU), Aranyosi and Căldăraru, 5 April 2016.

18 Huysmans, "Overbevolkte gevangenissen," 2.

19 Court of Justice of the European Union (CJEU), *LM*, 25 July 2018.

20 European Court of Human Rights (ECHR), *Pirozzi v. Belgium*, 17 April 2018; Soering-principles: regarding the potential obstacle that a breach of Article 6 of the ECHR may pose to extradition.

21 European Court of Human Rights (ECHR), 9 July 2019.

that the EAW is based on the principle of mutual trust and that the instruments of mutual recognition are of crucial importance for the establishment of the area of freedom, security and justice within the EU. The Court reiterates that it supports this aspiration and states unequivocally that, in itself, the mechanism surrounding the EAW does not conflict with the ECHR. Nevertheless, the ECtHR goes on to point out that the creation of such an area and the application of such instruments must not be carried out in a manner that infringes the fundamental rights of the persons concerned. This also means that the Court must ensure that instruments of mutual recognition –such as the EAW– are not applied in an automatic and mechanical manner to the detriment of these fundamental rights.

It is recognised that detention conditions in European prisons vary greatly and that –as the European Court of Human Rights, the CPT and numerous NGOs have established– human rights violations do occur and inhumane detention conditions exist within the EU.[22] The 'two step verification' written down in the arrest of the CJEU *Aranyosi and Caldararu* gives Member States the possibility to remain vigilant regarding the fundamental rights of their people. It is nevertheless worrying that a horizontal dialogue is now emerging between Member States regarding compliance with fundamental rights in the context of an EAW –a kind of peer review, if you will– rather than an overarching oversight by the institutions of the European Union or the Council of Europe.[23]

22 Daems, "Wederzijds vertrouwen is geen blind vertrouwen."

23 Ibid.

II. Current Circumstances Of Detention In Belgium

II.1 Introduction

The Belgian prison system is facing a severe crisis characterised by overcrowding, inadequate facilities, insufficient access to healthcare, and escalating violence, which raise serious concerns about compliance with Article 3 of the European Convention on Human Rights (ECHR). These issues, including poor living conditions and increasing violence both among prisoners and towards staff, directly contravene the protections guaranteed under the ECHR.

Above all those things, there are strikes in combination with aggression from the prisoners, leading to inhuman conditions.

Article 3 of the ECHR, states that an inhuman treatment is forbidden. The fact that people are sleeping on the floor, that there are strikes leading to inhuman conditions, and that there are pests in certain prisons, leads to a breach of that article.[24]

It is important to mention that Belgium has been convicted several times by the ECtHR for the current condi-

24 Bente Vandekeybus, "Antwerpse cipiers klagen met staking ook staat van het gebouw aan: overal ongedierte en asbest," VRT Nieuws, 12 April 2024, https://www.vrt.be/vrtnws/nl/2024/04/11/staking-in-antwerpse-gevangenissen-sommige-gebouwen-zijn-echt/ (accessed April 23, 2026); Dorien Brosens, "Overbevolking Belgische gevangenissen is bedreiging voor fundamentele mensenrechten," Knack, 12 January 2024, https://www.knack.be/nieuws/belgie/justitie/overbevolking-belgische-gevangenissen-is-bedreiging-voor-fundamentele-mensenrechten/ (accessed April 23, 2026).

tions in the prisons.[25] The subjects of the convictions vary, such as overcrowding, lack of safety or failure to prevent injuries.

Even the CPT has published a report in 2021 on the conditions in Belgian prisons.[26] Topics such as violence between detainees, very poor hygiene and overcrowding are covered extensively in the report. It is clear that Belgium is under international scrutiny regarding prison living conditions.

II.2 Overcrowding and/or floor sleeping issues

Overcrowding is one of the most critical and persistent issues that Belgian prisons are facing. All prisons in Belgium have an overpopulation for many years and a solution is not in sight.[27] In all the prisons, the overcrowding leads to floor sleepers and lack of hygiene.

The monitoring committee's report of 15 March 2024 already raised the issues of overcrowding and ground sleepers again, with some remedies/suggestions, leading to no results for the time being. The impact of these suggestions remains insufficient to address overpopulation. It was found to be inversely proportional to the scale of the crisis prevailing in all prisons.[28] The Penitentiary Policy Council also wrote an opinion on the issue, sounding the alarm firmly.[29] Overcrowding has been an issue in Belgian prisons for a long time and there are no clear actions taken by the government. The numbers of 2024 indicate that, at that point, there was an overcrowding of 12.7 % over all, meaning that there were 12,249.7 detainees whereas the capacity was 10,868.9.[30]

Although efforts have been made to tackle overcrowding, one cannot deny that it is an issue until today, with even in early 2025 over 100 prisoners throughout the different Belgian prisons ha-

25 European Court of Human Rights (ECHR), B.D. v. Belgium, 27 August 2024; European Court of Human Rights (ECHR), Vasilescu v. Belgium, 25 November 2014; European Court of Human Rights (ECHR), Clasens v. Belgium, 28 May 2019; European Court of Human Rights (ECHR), Sylla and Nollomont v. Belgium, 16 May 2017; European Court of Human Rights (ECHR), Jeanty v. Belgium, 31 March 2020; European Court of Human Rights (ECHR), Rooman v. Belgium, 31 January 2019; European Court of Human Rights (ECHR), Horion v. Belgium, 9 May 2023; European Court of Human Rights (ECHR), Pirjoleanu v. Belgium, 16 May 2021.

26 Council of Europe, "European Committee for the Prevention of Torture (CPT)," https://www.coe.int/en/web/cpt.

27 Tobias Santens, "Kwart te veel gedetineerden in Vlaamse gevangenissen: zo ziet de overbevolking per gevangenis eruit," *VRT Nieuws*, 4 March 2024, https://www.vrt.be/vrtnws/nl/2024/03/04/overbevolking-gevangenissen-cijfers/.

28 Centrale Toezichtsraad voor het Gevangeniswezen, "Advies maatregelen overbevolking," 2024, https://ctrg.belgium.be/wp-content/uploads/2024/04/N_AV_2024_01_Advies-maatregelen-overbevolking.pdf (accessed March 16, 2026).

29 *VRT Nieuws*, "Penitentiaire beleidsraad slaat alarm over de overbevolking van gevangenissen," 13 January 2025, https://www.vrt.be/vrtnws/nl/2025/01/13/penitentiaire-beleidsraad-slaat-alarm-over-de-overbevolking-van/; Federale Overheidsdienst Justitie, "Penitentiaire beleidsraad," https://justitie.belgium.be/nl/themas/gevangenissen/toezicht_en_advies/penitentiaire_beleidsraad.

30 Directoraat-generaal Penitentiaire Inrichtingen, *Jaarcijfers 2024* (Brussel: FOD Justitie, 2024), https://justitie.belgium.be/sites/default/files/Jaarcijfers%202024%20-%20Penitentiaire%20inrichtingen%20.pdf (accessed April 9, 2026).

ving to sleep on the ground due to overcrowding.

The issue of overcrowding should not only be assessed on raw numbers of capacity compared to the prison population, since it also has to viewed in relation to the available staff members. The Belgian prisons face serious challenges to have sufficient staff members available in compliance with the minimum staff which should be present. Not having sufficient staff members makes that the prisons should be considered overcrowded even if it does not appear from the raw numbers. It is in an issues which is often overlooked but even more problematic than the aforementioned overcrowding figures.

II.3 General facilities and hygiene

The general facilities in almost all Belgian prisons are substandard and fail to meet the basic needs of detainees. Many prisons are plagued by insufficient infrastructure, leading to poor living conditions. Reports are made of poor hygienic conditions (a bucket instead of toilet for urgent needs, limited options for personal hygiene etc.).31 Overcrowding exacerbates these issues, leaving insufficient space for adequate sanitary facilities, proper ventilation, and safe living environments.[32]

Unsanitary Conditions: Detainees in overcrowded facilities are often forced to endure unsanitary conditions. The lack of proper cleaning resources, overcrowded cells, and inadequate hygiene measures lead to the spread of diseases and pest infestations. These conditions undermine prisoners' health and violate their right to live in humane conditions.

Inadequate Infrastructure: The prison buildings themselves are often outdated and not fit for purpose, with many facilities lacking basic infrastructure such as proper heating, ventilation, and appropriate spaces for exercise or recreation.

The unhygienic conditions are further exacerbated by the infestation of vermin, such as silverfish, which are found in both the kitchen and the cells. Additionally, mold in the showers has become a significant concern, adding to the already poor sanitary environment.

A recent report from the "Commissie van Toezicht" revealed the alarming extent of these issues, including structural issues, poor hygienic conditions and frequent food shortages, which have led to some cells being skipped during distribution.[33]

One particularly concerning case mentioned in the annual report involved an inmate who contracted a skin infection from the mold in the showers and was required to pay for the necessary medication out of pocket. The report also highlighted additional concerns

31 Belgische Senaat, Parlementaire vraag nr. 2974, https://www.senate.be/www/?MIval=/Vragen/SVPrint&LEG=4&NR=2974&LANG=nl (accessed February 12, 2025).

32 Vandekeybus, "Antwerpse cipiers klagen met staking"; "Gedetineerde probeert verpleegster te wurgen met schoenveter in Brugse gevangenis," *VRT Nieuws*, 31 augustus 2024, https://www.vrt.be/vrtnws/nl/2024/08/31/brugge-gevangenis-verpleger-schoenveter/

33 Rani Aertgeerts, "Van schimmel tot tekort aan voedsel: opnieuw schrijnende toestanden vastgesteld in Antwerpse gevangenis," *Het Laatste Nieuws*, 13 March 2025, https://www.hln.be/antwerpen/van-schimmel-tot-tekort-aan-voedsel-opnieuw-schrijnende-toestanden-vastgesteld-in-antwerpse-gevangenis.

such as water shortages in the showers and heating systems being left on during the summer months.

These persistent problems have led to unacceptable situations for the inmates. The oversight committee noted that the frustration arising from such conditions often contributes to heightened aggression toward staff.

II.4 Violence and strikes

In response to the high level of violence, in which it was pointed out that violence towards detainees has increased, numerous strikes took place.

In theory, there should be a minimum service during strikes to make sure the detainees receive the same treatment as in cases of no strikes. In practice, strikes lead to understaffing and less rights for the detainees, who have less opportunities to leave their cell, less possibilities to shower, cannot attend their court hearings due to no transportation services, etc.[34]

The minimum service in many prisons is not guaranteed, creating a situation where, on the one hand, there are protests against violence in prisons, but on the other hand, the risk of violence increases due to the absence of staff.[35] Reportedly, 12 out of 18 Flemish prisons are facing issues.[36] While minimum service is enshrined in law, it cannot be enforced during the first 48 hours. This means that the system designed to provide better service during strikes only begins to function once a strike lasts longer than 48 hours. For shorter strikes (which are often 1 to 1.5 days long), no solution is available as the measures cannot be enforced. Due to staff shortages during strikes, police forces have to step in. However, they are already under immense pressure due to understaffing (*"politiediensten worden leeggeplukt"*[37]).[38]

Furthermore, the strikes that happen regularly cause issues within the prison that affect the inmates. A recent and important one happened in the prison of Antwerp, where a case of torture occurred. During almost 72 hours, a detainee was tortured by his cellmates and it went undiscovered due to the fact that only 10 staff members were present during the strike to supervise more than 700 detainees. The victim was tortured and humiliated, while his cellmates made video footage of their atrocities, leading to discovery.[39] They raped him with a broomstick, forced him to eat a sandwich with excrement etc. It lasted several days without the prison staff no-

34 "Gedetineerde probeert verpleegster te wurgen met schoenveter in Brugse gevangenis," *VRT Nieuws*, 31 augustus 2024, https://www.vrt.be/vrtnws/nl/2024/08/31/brugge-gevangenis-verpleger-schoenveter/; "Staking in gevangenissen," *VRT Nieuws*, 27 januari 2025, https://www.vrt.be/vrtnws/nl/2025/01/27/staking-gevangenissen/..

35 "Staking in gevangenissen," *VRT Nieuws*, 27 januari 2025, https://www.vrt.be/vrtnws/nl/2025/01/27/staking-gevangenissen/.

36 According to Roby De Kaey of the socialist trade union ACOD.

37 Translated: Police services are being depleted.

38 According to Serge Rooman, prison director of Merksplas.

39 Hanne Decré and Caroline Van den Berghe, "Tijdslijn – 'Ik stop pas als hij dood is': een reconstructie van de dagenlange barbarij in cel 1311 van Antwerpse gevangenis," *VRT Nieuws*, 19 March 2024, https://www.vrt.be/vrtnws/nl/2024/03/19/tijdslijn-foltering-gevangenis-van-antwerpen/.

ticing due to the strike and understaffing as a result of this strike.

March 2024, staff refused to admit new detainees because of overcrowding. Poor infrastructure[40] adds to frustration among staff members.[41]

As mentioned before, Belgium has nearly 12,000 detainees, many of whom sleep on the floor. It has been established that overcrowding also leads to more cases of aggression.[42] The situation is described as untenable even then.

Incidents of violence are numerous. On 24 April 2024 there was a massive brawl in the Antwerp prison with several getting injured, after knifes had been thrown over the prison wall. Iron cutlery was used during the fight.[43]

In all the prisons in Belgium, violence is a consistent issue. Newspapers report several incidents where detainees either express physical violence among themselves or towards the staff. In 2024 and the start of 2025, there is an average of 2 to 3 reported violent incidents per prison. Below, you can find examples of reported incidents in the prison of Antwerp and Haren, but the other prisons have the same issue.[44] The incidents talked about in these articles include attempted rape of a social worker by a detainee, a stabbing with multiple serious injuries, a brawl that was subsequently shared on TikTok and an arson in the cell in which a detainee died. All these incidents happened over a period of a few weeks.

To conclude, aggression is emergent, which leads to more strikes. Strikes on the other hand, lead to understaffing which leads to more frustration amongst detainees and thus violence. The situations in the prisons are unbearable and seem to have no end in sight. Approaching the future is unsettling, because of numerous strikes and too few staff to prevent such acts.

II.5 Conditions in the Belgian prisons in relation to Article 3 ECHR

From the above, one can conclude that prison conditions in Belgium are unbea-

40 Vandekeybus, "Antwerpse cipiers klagen met staking";

41 Ibid.

42 "Vakbonden gevangenissen dienen stakingsaanzegging in voor 11 januari," *Het Nieuwsblad*, 18 December 2023, https://www.nieuwsblad.be/cnt/dmf20231218_96403376; Nette Loots, "Gevangenispersoneel is agressie door overbevolking meer dan beu," *Gazet van Antwerpen*, 12 January 2024, https://www.gva.be/cnt/dmf20240111_94025802.

43 Nora Eurlings, "Grote vechtpartij in Antwerpse gevangenis nadat verboden voorwerpen over de gevangenismuur waren gegooid," *VRT Nieuws*, 24 April 2024, https://www.vrt.be/vrtnws/nl/2024/04/24/vechtpartij-gevangenis-antwerpen/.

44 Decré and Van den Berghe, "Tijdslijn – 'Ik stop pas als hij dood is'; "Sociaal assistente aangerand in gevangenis van Haren," *VRT Nieuws*, 11 februari 2025, https://www.vrt.be/vrtnws/nl/2025/02/11/sociaal-assistente-aangerand-in-gevangenis-van-haren/; "TikTok-filmpje toont afranseling in gevangenis Haren: man bewusteloos achtergelaten," *BRUZZ*, 11 december 2024, https://www.bruzz.be/actua/justitie/tiktok-filmpje-toont-afranseling-gevangenis-haren-man-bewusteloos-achtergelaten-2024; "Gedetineerde zwaargewond na steekincident in gevangenis Haren," *VRT Nieuws*, 6 augustus 2024, https://www.vrt.be/vrtnws/nl/2024/08/06/incident-zwaargewonde-haren-gedetineerde/; "Gedetineerde overleden die brand in cel stichtte in Haren," *VRT Nieuws*, 15 april 2024, https://www.vrt.be/vrtnws/nl/2024/04/15/gedetineerde-overleden-die-brand-in-cel-stichtte-in-haren/

rable and nothing changes for the better. Because of numerous strikes and too few staff to prevent such acts, incidents happen all the time.

The Belgian prisons are all overcrowded. The general overcrowding rate was 15,5 % in March 2024 with 12.397 people detained for 10.736 available spaces.[45] The Belgian State has already been convicted for the overcrowding of the prisons of Sint-Gillis and Vorst.[46]

The material conditions of the prison are poor. Reports are made of poor hygienic conditions (a bucket instead of toilet for urgent needs, limited options for personal hygiene etc.).

During strikes, it is almost impossible to get visits from family. Only lawyers should have access at all time (although there will be additional waiting time). Personal hygiene is even more of a problem, since it happens that detainees don't get the chance to take a shower for several days up to more than a week.

As mentioned before, Belgium has been convicted frequently for prison conditions which violated article 3 of the ECHR, mostly in relation to long lasting strikes.

Reference is made to some cases tried before the European Court of Human Rights in Strasbourg.

Pirjoleanu vs.Belgium, a judgement of 16 may 2021,[47] also resulted in a conviction of Belgium for a violation of article 3 ECHR. The applicant in this case, Mr. Pirjoleanu, was detained at Antwerp Prison from 18 to 23 March and from 20 May to 21 September 2018. During the latter period, prison officers went on strike for three weeks. The statutory minimum service provision was not yet in force at that time.

In March, the applicant shared an 8.24 m² cell with another prisoner, and from May to September he shared an 8.36 m² cell with two other prisoners. During the strike, access to the showers was provided almost every day and, from 24 to 28 June, access to the courtyard was also granted, but this was subsequently withdrawn or severely restricted. Family and social visits were cancelled until 4 July.

The Court reiterates that a requirement of 3 m² of floor space per prisoner (including the space occupied by furniture, but not the space occupied by sanitary facilities) constitutes the minimum standard in a shared cell: *"A personal space of less than 3 m² in a shared cell gives rise to a strong but not irrefutable presumption of a violation of Article 3 of the ECHR."*

This presumption may, however, be rebutted by the cumulative effect of other aspects of the conditions of detention, such as adequate compensation for the lack of personal space. In this regard, the Court takes into account factors such as the duration and extent of the restriction, the degree of freedom of movement and the availability of activities outside the cell, as well as the general adequacy of the conditions of detention in the institution concerned.

The Belgian State did not even try to argue this presumption. In the present case, the Belgian State did not dispu-

45 Santens, "Kwart te veel gedetineerden."

46 *Het Laatste Nieuws*, "België riskeert dwangsom voor overbevolking in gevangenissen Vorst en Sint-Gillis," https://www.hln.be/binnenland/belgie-riskeert-dwangsom-voor-overbevolking-in-gevangenissen-vorst-en-sint-gillis.

47 Council of Europe, "SPACE Report / Prison statistics," https://rm.coe.int/1680a922ac.

te that the applicant was held in a cell with dirty, damp and mouldy walls, containing two beds which he had to share with three other inmates, and in which the toilet was not fitted with a partition. He was provided with only two worn-out and irritating shirts and trousers, and the bedding was limited to two sheets which were washed every two weeks.

The Court then found that the State had not put forward any evidence that could have decisively alleviated the discomfort caused by the lack of sufficient personal space. Nor did the State dispute the persistent lack of physical exercise, the repeated breaches of hygiene standards and the lack of contact with the outside world during the prison staff strike.

In the case Clasens vs. Belgium (judgment of 28 May 2019),[48] the applicant was being held in Ittre Prison (Belgium), in execution of a final criminal conviction.

In April 2016 strike action by prison wardens affected prisons in Brussels and Wallonia. As a result, the guaranteed minimum service was no longer provided and the ordinary prison regime was suspended, to a greater or lesser degree depending on the prison in question.

In May 2016 Mr Clasens lodged an urgent application with the president of the tribunal de première instance (TPI), asking her to order the Belgian State to restore the ordinary regime and complaining about his conditions of detention. The next day, the president of the TPI allowed this request in part, ordering the Belgian State to provide and/or restore various services, subject to a daily penalty of 10,000 euros (EUR) per offence for non-compliance. About three weeks later, in view of the difficulties in executing the order, Mr Clasens had served on the Belgian State a demand for payment of the penalties. The Belgian State lodged an appeal.

In April 2017 the court of appeal –to which the Belgian State had applied in the interim period– upheld most of the order issued by the TPI president; however, it reduced the penalty to EUR 250 per day. In its judgment the court of appeal noted, in particular, that the prisoners' conditions of detention had deteriorated significantly, in breach of Article 3 of the Convention.

Thus, for almost two months Mr Clasens had had no access to activities outside his cell, to which he had been confined for 24 hours a day with the exception of a one-hour period in the recreation yard every three days, and had been able to take a shower only once or twice a week, with no opportunity to obtain hygiene products, distribution of which had been discontinued. Moreover, the prisoners had found themselves dependent on the refusal to work of large numbers of prison wardens, and obliged to accept the unlawfulness and uncertainty of the minimum services provided, without knowing when the strike would end and thus with no prospects of seeing the situation improve. They had been deprived of almost all contact with the outside world, including by telephone, family visits or meetings with their lawyers.

Rooman vs. Belgium, a judgment of 31 January 2019,[49] signifies an impor-

48 Council of Europe, "SPACE Report / Prison statistics," https://rm.coe.int/1680a922ac.

49 Council of Europe, "SPACE Report / Prison statistics," https://rm.coe.int/1680a922ac.

tant issue in Belgium. Mr. Rooman was interned in 2004 in the French speaking region of Belgium. He had only access to a French speaking psychiatrist, but he himself only spoke German (one of the three native languages of Belgium). There was no facility in the German speaking part of Belgium that could assist internees.

He requested to be released due to inadequate healthcare, but the Belgian State refused. In the meantime, Mr. Rooman had sued the Belgian State before a Brussels judge hearing applications for interim measures. Mr. Rooman requested to be discharged and, alternatively, to have authorities take the necessary measures in light of the state of his health. At the end of 2014, the judge concluded there was a violation of the right of access to health care and of the prohibition of inhuman and degrading treatment. In this respect, the Belgian State was ordered to appoint a German-speaking psychiatrist and medical assistant to take care of Mr. Rooman. In that same year, Mr. Rooman had likewise lodged a negligence claim against the Belgian State. In September 2016, the Brussels Court of First Instance observed a failure to provide psychological and psychiatric care in the Applicant's mother tongue between 2010 and 2014. According to the Court, this type of care should, unquestionably, be provided in the German language, being the only language Mr. Rooman had mastered and one of three official languages in Belgium. The Belgian State was ordered to pay a compensation amounting to 75,000 euros.

Lastly, in the case Horion vs.Belgium (judgment of 9 May 2023),[50] Belgium was convicted for making it impossible for Mr. Horion to return to society. Mr. Horion was sentenced to life imprisonment by the Assize court of Belgium for committing several murders. In the opinion of both the behavioural experts and the Sentence Enforcement Court (Tribunal d'application des peines/TAP), he was eligible for reintegration. In their view, this reintegration must take place under supervision and within a psychiatric clinic. However, the psychiatric institutions suitable for this purpose were unwilling to admit him because such admission is not funded by the state. The ECtHR concludes from these facts that, whilst Horion has a legal prospect of release, he has no realistic prospect. This constitutes a violation of Article 3 of the ECHR.

In each of these cases, Belgium has been convicted for a violation of article 3. Not much has changed since. Needless to say that only a small minority of detainees has the energy and means to start proceedings before the European Court of Human Rights and there are other convictions by the ECtHR as well, which are not discussed in this article. It signifies the constant lack of appropriate detention and healthcare for prisoners in Belgium. These are fundamental human rights which, given the mutual trust that underpins the EAW, other Member States expect to be respected when they extradite a national. Belgium does not have the means or capacity to ensure this.

The Council of Europe, the intergovernmental organization whose aim, among other things, is to protect human rights, analyses the situation in European prisons every year. New figures, covering a period from January 31, 2022 to January 31, 2023, were published on June 6. Belgium again was among the

50 Council of Europe, "SPACE Report / Prison statistics," https://rm.coe.int/1680a922ac.

worst in Europe.[51] The Council of Europe collected figures until January 31, 2023, but since September 1, 2023, Belgium has also been carrying out shorter custodial sentences of 6 months to 3 years.[52] Since then, even more people have actually had to be detained. According to Kati Verstrepen, Chairperson of the League for Human Rights, the situation is worse today than ever. And, it's not just the overpopulation: *"Every day there are also smaller violations that make life hell for people in prison"* The Chairperson raises the example of a detainee who has a broken hand and has not seen a doctor for 14 days: *"There is still no scan taken from the hand and still no plaster cast has been placed"*.

Lastly, the CPT held its periodic visit to Belgium from 15 to 26 May 2025. A new report is expected soon. The latest report from this facility was drafted in 2021 and published on 29 November 2022.[53] It reflects all the issues which are discussed in the previous chapters. The CPT notices violence from guards towards prisoners, and from one prisoner to the other. It also reiterates the importance of clean cells. The report states the following: "*The detention conditions for the person in question were downright humiliating."* The healthcare provided within the facilities (or rather: the lack of healthcare) was also a subject where the CPT formulated a lot of recommendations for the Belgian State.

In other words: it has been stated by multiple national and international entities that de circumstances of detention in Belgium are a breach of article 3 ECHR. As mentioned before, when executing an EAW, the extraditing Member State assumes that the State to which the person concerned is extradited, respects the basic human rights. Does this mutual trust still have value today, given the circumstances of detention in Belgium as stated above?

III. Conclusion: Possibility To Refuse Extradition Based On Article 3, 6 And 8 Echr When Extraditing To Belgium

The Aranyosi and Caldararu judgment, which plays a central role in this article, has an ambiguous effect on extradition to Belgium.

On the one hand, this judgment opens the door to a nuance in the principle of mutual trust when executing an EAW. On the other hand, this nuance is subject to rather strict conditions. It requires a huge amount of effort on the part of the executing state, raising the question of whether a Member State will allocate the necessary resources for these investigations. The risk of a breach of article 3, 6 or 8 ECHR must be assessed individually, which results in a high burden of proof for the extraditing Member State. In this regard, the mutual trust stands strong and takes precedence over the possibility of possible breaches of human rights.

51 Lies Wijns, "Overbevolking in gevangenissen: België opnieuw bij de slechtsten van de klas in Europa," *VRT Nieuws*, 6 June 2024, https://www.vrt.be/vrtnws/nl/2024/06/06/overbevolking-belgische-gevangenissen/

52 Before, these sentences were actually not enforced in prison, but through other means of enforcement (such as electronic surveillance) not resulting in having to detain people in prison.

53 Council of Europe, *Rapport au Gouvernement de Belgique relatif à la visite effectuée en Belgique par le Comité européen pour la prévention de la torture et des peines ou traitements inhumains ou dégradants (CPT) du 2 au 9 novembre 2021*, https://rm.coe.int/1680a922ac

In the light of all the aspects discussed in this article regarding the prison conditions of Belgium, which have been all-round inhumane for several years, even decades, one can pose the question whether an individual risk assessment is still necessary. It seems that the mutual trust which all the Member States should have, is breached on a daily basis by Belgium without any possibility of a refusal without following the two, rather strict, steps laid out by the CJEU.

An author in Belgium in 2016 assumed that this judgment would result in extraditions to Belgium becoming more difficult.[54] Whether the judgment has actually had this effect is unclear.

The Framework Decision with which the EAB was brought to life, dates back to 2002. Even the judgement that made it possible to refuse extradition based on a suspected breach of human rights, celebrates its tenth birthday this year. In the past 24 years, and even 10 years, a lot has changed on political, social and economic aspects. It is therefore perhaps time to reevaluate the EAB and all that it stands for, to ensure that the mutual trust can once again become a tangible reality.

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El asunto Encrochat y la prueba transnacional europea. Matización de las garantías procesales

The EncroChat Case and European Cross-Border Evidence. Nuancing Procedural Safeguards

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Resumen

Este trabajo pretende examinar, sin ánimo de exhaustividad, la problemática derivada de la utilización en el proceso penal español de las evidencias obtenidas a partir de la extraordinaria intervención tecnológica realizada por las autoridades francesas y holandesas en la red Encrochat.

Se analiza el status jurídico de la prueba cuando fue obtenida por las mencionadas autoridades nacionales, su transmisión mediante instrumentos de cooperación judicial europea y, finalmente, la incorporación de dicha prueba a los procedimientos judiciales españoles.

El análisis se realiza teniendo en cuenta las fuentes abiertas de carácter policial que se refieren al asunto Encrochat, la normativa española y europea y la jurisprudencia relativa al asunto, tanto del Tribunal de Justicia de la Unión Europea, como también de nuestro Tribunal Supremo, con especial mención de la doctrina relativa a la Orden Europea de Investigación.

El trabajo incide en los problemas derivados de la admisibilidad de la prueba tanto en relación con su obtención en la intervención tecnológica como también a su transmisión a las autoridades españolas desde Francia, así como a los problemas procesales derivados (contradicción efectiva, autenticidad del material, integridad del soporte material e imputación subjetiva del material probatorio).

Abstract

This paper aims to examine, without seeking to be exhaustive, the legal challenges arising from the use in Spanish criminal proceedings of evidence obtained through the extraordinary technological intervention carried out by French and Dutch authorities on the EncroChat network.

The study analyzes the legal status of the evidence at the time of its collection by the aforementioned national authorities, its transmission via European judicial cooperation instruments, and, ultimately, its admissibility and incorporation into Spanish judicial proceedings.

The analysis is conducted by taking into account open-source law enforcement data regarding the EncroChat case, Spanish and European regulations, and relevant case law from both the Court of Justice of the European Union (CJEU) and the Spanish Supreme Court, with particular emphasis on the doctrine surrounding the European Investigation Order (EIO).

The paper focuses on the issues stemming from the admissibility of evidence, both in relation to its initial seizure through technological intervention and its subsequent transfer to Spanish authorities from France. It further addresses the resulting procedural challenges, including effective cross-examination (*contradicción efectiva*), the authenticity of the material, the integrity of the physical or digital media, and the subjective attribution of the evidentiary material to the defendants.

Palabras Clave

EncroChat, Orden Europea de Investigación, prueba transnacional, garantías procesales, Intervención tecnológica

Key Words

EncroChat, European Investigation Order, Cross-border evidence, Procedural safeguards, Technological intervention

Introducción, objetivo y metodología

La globalización de las relaciones económicas y sociales como realidad bien implantada ya en los albores del siglo XXI determina con claridad el papel central de la prueba transnacional en procedimientos penales de cierta complejidad en tramas internacionales vinculadas, habitualmente, a delitos graves. El instituto procesal de la prueba, bien cuajado hasta hace poco tiempo, se resquebraja y pide ser reelaborado en un entorno que pugna con su vigencia: el recurso de las tramas internacionales a los sistemas informáticos, la digitalización, el uso de infraestructuras tecnológicas deslocalizadas han erosionado el uso de las categorías consolidadas sobre la prueba. No ya sólo sobre la configuración de la prueba obtenida en territorio nacional y la obtenida fuera de nuestras fronteras, sino también sobre las mismas garantías del instituto probatorio. El asunto Encrochat, como antes lo fue la famosa “lista Falciani” suponen un punto de inflexión de lo que será común en la era del big data: la obtención de prueba tecnológica que implicará la captación masiva de datos, la técnica de investigación digital invasiva, la transferencia internacional de resultados, su utilización por parte de jurisdicciones de distintos países y una necesaria reelaboración, o cuando menos una actualización, respecto de la suficiencia de las garantías procesales en el marco de un estado democrático y de derecho. La metodología ha consistido en el análisis de fuentes abiertas de órganos policiales europeos así como el análisis en profundidad de la Sentencia del Tribunal Supremo 854/2025.

1.- ¿QUÉ ES ENCROCHAT?

Según refiere Europol,[1] Encrochat era una red telefónica encriptada en la que se ofrecían a los clientes teléfonos que garantizaban un anonimato total. No se asociaban a dispositivos ni a tarjetas SIM en la cuenta del cliente y su adquisición se llevaba a cabo en condiciones que garantizaban su imposible trazabilidad. Además, se garantizaba también una discreción absoluta tanto respecto de la interfaz encriptada) sistema operativo dual, la interfaz encriptada oculta para no ser detectable), como también del propio terminal, al que se le extraían la cámara, el micrófono, el GPS y el puerto USB.

Junto con estas garantías también se incluían funciones destinadas a garantizar la "autodestrucción" de sus propios contenidos. Y así, incluía la eliminación automática de mensajes en los terminales de sus destinatarios, código PIN específico destinado a la eliminación inmediata de todos los datos del dispositivo (algo así como un botón del pánico) y la eliminación de todos los datos en caso de entradas consecutivas de una contraseña incorrecta. Funciones desarrolladas, aparentemente, para permitir borrar rápidamente los mensajes del dispositivo en caso de emergencia. Incluso se ofrecía el borrado del dispositivo a distancia por parte del servicio de asistencia.

Estos "criptoteléfonos" fueron vendidos por Encrochat a un coste aproximado de 1.000 de mil Euros cada uno a escala internacional y ofrecía suscripciones con cobertura mundial al coste de unos mil quinientos euros semestrales, con soporte las 24 horas todos los días del año.

2.- CRONOLOGÍA DE LA INTERVENCIÓN.

De acuerdo con Eurojust,[2] el Departamento de Informática Electrónica (INL) del Instituto de Investigación Criminal de la Gendarmería Nacional francesa (IRCGN) detectó en 2017 el uso de los teléfonos que utilizaban el sistema de comunicación segura EncroChat, y decidió iniciar una profunda investigación de estos teléfonos y su sistema de encriptado para poder comprender su funcionamiento.

El 15 de noviembre 2018 se abrió una investigación preliminar por parte del del Centro de Lucha contra el Crimen Digital de la Gendarmería francesa (C3N) llevándose a cabo las primeras investigaciones técnicas.

Fruto de aquellas primeras investigaciones, el día 7 de diciembre de 2018 la Jurisdicción Interregional Especializada (JIRS) de Lille abrió a su vez una investigación sobre Encrochat por los delitos de asociación de malhechores para cometer delitos castigados con al menos diez años de prisión y provisión, transferencia e importación de medios de criptología sin declaración previa.

Los Tribunales Interregionales Especializados (JIRS) fueron creados por la Ley nº 2004-204 de 9 de marzo de 2004 que adapta el sistema judicial a los cam-

1 Europol. (2020, July 2). Dismantling of encrypted network sends shockwaves through organised crime groups across Europe. https://www.europol.europa.eu/media-press/newsroom/news/dismantling-of-encrypted-network-sends-shockwaves-through-organised-crime-groups-across-europe

2 Eurojust. (2020, July 2). EncroChat investigation in France [PDF]. https://www.eurojust.europa.eu/sites/default/files/2020-07/2020-07-02_EncroChat-investigation-in-France_FR.pdf

bios en la delincuencia, conocida como "Perben II", y desempeñan un papel clave en el combate del crimen organizado. Este sistema se implementa en ocho tribunales judiciales: Burdeos, Lille, Lyon, Marsella, Nancy, París, Rennes y Fort-de-France. Cada tribunal especializado cuenta con una sección de la fiscalía, y centros de investigación propios. No constituyen un nuevo orden judicial, sino que se crean como secciones especializadas dentro de tribunales ordinarios para dar respuesta a fenómenos criminales de especial complejidad.

El JIRS de Lille asumió esta investigación debido a la localización en su demarcación de los servidores de Encrochat, que según la Sentencia del Tribunal Supremo núm. 854/2025 de 16 de octubre se encontraban en la localidad de Roubaix.

A principios de 2019, el proyecto CERBERUS, dirigido por la Gendarmería francesa y financiado con fondos europeos, permitió acelerar las investigaciones sobre estos teléfonos. Tanto la Gendarmería francesa como las investigaciones en curso demostraron la aparición recurrente de estos criptoteléfonos en casos de transporte y tráfico de drogas relacionados con el crimen organizado. Y las investigaciones técnicas realizadas por la misma Gendarmería permitió concluir que si bien esta solución de comunicación cifrada no estaba declarada en Francia, sí operaba desde servidores instalados en territorio francés (Roubaix) dando soporte a clientes internacionales.

De acuerdo con la Sentencia del Tribunal Supremo 854/2025, las operaciones tecnológicas fueron autorizadas por autos de 30 de enero de 2020, 12 de febrero de 2020, 4 de marzo de 20 de marzo de 2020 y 31 de marzo de 2020, a instancia del IImo. Sr. Fiscal de la República.

Según Europol,[3] fueron las autoridades francesas las que decidieron abrir un caso en Eurojust, la Agencia de Cooperación Judicial Penal de la UE, hacia los Países Bajos en 2019. Razón por la que la Sentencia 854/2025 antes citada refiere que fue un equipo conjunto formado por franceses y holandeses quienes, en fecha desconocida, pero en todo caso durante la primavera de 2020, infectaron el sistema Encrochat con una aplicación informática tipo "caballo de Troya" al que Europol se refiere eufemísticamente como "dispositivo técnico".[4] Un "troyano" que permitió a las autoridades examinar todas las comunicaciones vía Encrochat sin que sus usuarios pudieran advertirlo hasta la noche del 12 al 13 de junio de 2020, en que EncroChat emitió una alerta de seguridad a sus clientes indicando que la solución había sido víctima de una "intervención ilegal" por parte de "entidades gubernamentales". Se les aconsejaba apagar y deshacerse físicamente de sus dispositivos ("You are advised to

3 Europol. (2020, July 2). Dismantling of encrypted network sends shockwaves through organised crime groups across Europe. https://www.europol.europa.eu/media-press/newsroom/news/dismantling-of-encrypted-network-sends-shockwaves-through-organised-crime-groups-across-europe

4 Europol. (2023, July 5). Dismantling encrypted criminal EncroChat communications leads to over 6,500 arrests and close to EUR 900 million seized. https://www.europol.europa.eu/media-press/newsroom/news/dismantling-encrypted-criminal-encrochat-communications-leads-to-over-6-500-arrests-and-close-to-eur-900-million-seized

power off and physically dispose your device immediately").[5]

Mientras se estaban llevando a cabo la interceptación de estas comunicaciones, el 15 de marzo de 2020, la Subdirección de Policía Judicial (SDPJ) creó una unidad nacional de investigación en el C3N de Pontoise, con un puesto de mando y varios grupos de investigación. La operación se denominó EMMA 95 y fue reforzada por investigadores de las secciones de investigación y de las oficinas centrales, contando con más de 60 gendarmes dedicados exclusivamente al uso de datos. Por su parte, en Holanda, la operación fue conocida como LEMONT.[6]

El día 10 de abril de 2020 se formó un Equipo Conjunto de Investigación (ECI) entre Francia y Países Bajos, bajo EUROJUST y con apoyo de EUROPOL.

El día 28 de mayo de 2020 se abrió la investigación judicial confiada a la Dirección General de la Gendarmería Nacional y al ya referido C3N por los delitos de asociación de malhechores para preparar delitos graves, incluyendo tráfico de drogas, blanqueo agravado, tenencia y tráfico de armas; blanqueo en banda organizada y provisión, transferencia e importación de medios de criptología sin declaración previa.

5 Eurojust. (2020, July 2). EncroChat investigation in France [PDF]. https://www.eurojust.europa.eu/sites/default/files/2020-07/2020-07-02_EncroChat-investigation-in-France_FR.pdf

6 Europol. (2020, July 2). Dismantling of encrypted network sends shockwaves through organised crime groups across Europe. https://www.europol.europa.eu/media-press/newsroom/news/dismantling-of-encrypted-network-sends-shockwaves-through-organised-crime-groups-across-europe

Los investigadores policiales lograron interceptar, compartir y analizar más de 115 millones de conversaciones mantenidas por un número estimado de más de 60 000 usuarios.

3.- La infección con un virus troyano como medio de investigación

La captación de datos informáticos, como es la infección de un sistema como un virus, es una técnica de investigación prevista por el derecho francés de acuerdo con lo previsto en el Título XXV del Código de Procedimiento Penal, bajo la rúbrica *Procedimiento aplicable al crimen organizado y a la delincuencia y delitos*. En concreto, dentro de la Sección 6 rubricada *Otras técnicas especiales de investigación*, que recoge en su Párrafo 4 la rúbrica *Captura de Datos informáticos* que contiene los artículos 706-102-1 a

El artículo 706-102-1 (derogado, por cierto, por la Ordenanza nº 2025-1091 de 19 de noviembre de 2025 - art. 1 (V) a partir de 1 de enero de 2029) refiere que se

Se puede recurrir a la instalación de un dispositivo técnico con el propósito, sin el consentimiento de las partes interesadas, de acceder, grabar, almacenar y transmitir datos informáticos en cualquier lugar, tal y como se muestran en una pantalla para el usuario de un sistema automatizado de procesamiento de datos, ya que los introduce introduciendo caracteres o a medida que son recibidos y emitidos por los periféricos.

Dentro de ese mismo párrafo, el art. 706-102-3 condiciona la decisión que autorice el uso del mecanismo antes indicado, bajo pena de nulidad, a la especificación del delito que justifica dicha operación, así como la duración de la misma.

Finalmente, el art. 706-102-3 se refiere a determinados extremos que resultan necesario para la efectiva instalación del dispositivo tecnológico que implican, lógicamente, actuaciones materiales sobre realidades físicas tangibles. En esencial, el legislador francés permite, con autorización judicial, la entrada a un vehículo o a un lugar privado sin el conocimiento o consentimiento del propietario o poseedor del vehículo, del ocupante del local o de cualquier persona titular de un derecho sobre él. Operaciones materiales que sólo pueden tener el propósito de implementar el dispositivo técnico. Lógicamente, esta habilitación legal se extiende, también, a la implementación de las operaciones destinadas a la retirada del dispositivo técnico que se hubiere instalado previamente.

El legislador francés también permite al Juez autorizar la transmisión del dispositivo a través de una red de comunicaciones electrónicas, bajo la autoridad y supervisión judicial. Como en el caso anterior, también se podrá llevar a cabo dicha operativa para la retirada del dispositivo técnico que se hubiere instalado.

Haciendo uso, pues, de dicha habilitación legal, las autoridades francesas lograron infectar con un virus informático la red Encrochat. En relación con el dicho procedimiento francés, el Tribunal Supremo español, en su Sentencia 854/2025 añade también que el ordenamiento jurídico francés cuenta con una norma que regula los medios o mecanismos de encriptación. Se trata de la *Loi n° 2004-575 du 21 juin 2004 pour la confiance dans l'économie numérique*.

Tal norma parte del principio de que el objetivo principal de los métodos criptológicos es garantizar la seguridad del almacenamiento o transmisión de datos, garantizando su confidencialidad, autenticación o el control de su integridad (art. 29); de manera que su uso es libre y lícito y lo es también el suministro, la transferencia desde o hacia un Estado miembro de la Unión Europea, o la importación y la exportación de medios criptográficos que proporcionen exclusivamente funciones de autenticación o control de integridad (art. 30).

Sin embargo, cuando se trate de un medio que no preste exclusivamente funciones de autenticación o control de la integridad, es preciso cumplir una serie de presupuestos:

1) Las operaciones de suministro, transferencia desde un Estado miembro de la Unión Europea o importación de tal medio de criptología quedan sujetas a una declaración previa al Primer Ministro, poniendo a su disposición una descripción de las características técnicas del medio, así como el código fuente del software utilizado (art. 30.III).
2) Las operaciones de transferencia a un Estado miembro de la Unión Europea y la exportación de tal medio de criptología estarán sujetas a la autorización del Primer Ministro (art. 30.IV).
3) También se debe declarar la prestación de servicios de criptología (art. 31).

En consecuencia, la ley citada establece como punibles penalmente las conductas siguientes:

1) El incumplimiento de la obligación de declarar prevista anteriormente (artículo 35.I.1).
2) El hecho de exportar un medio de criptología o de transferirlo a un Estado miembro de la Unión Europea, sin haber obtenido previamente la autorización prevista anteriormente (art. 35.I.2)
3) El acto de vender o alquilar un medio de criptología que haya sido objeto de una prohibición administrativa de circulación (art. 35.III).
4) El hecho de prestar servicios de criptología, destinados a garantizar funciones de confidencialidad, sin haber cumplido con la obligación de declarar prevista anteriormente (art. 35. IV).

4.- La llegada de la información a España: la Orden Europea de Investigación

Siguiendo la ya citada Sentencia del Tribunal Supremo 854/2025, fue la Fiscalía de Lille la que transmitió información general, espontáneamente, a la Unidad de Criminalidad Informática de la Fiscalía General del Estado, sobre la operación en la que habían sido incautados datos de usuarios españoles implicados en delitos de tráfico de drogas en España.

La Fiscalía General del Estado, a su vez, remitió esta información a la Fiscalía Especial Antidroga que, en un primer momento las incorporó a las ya existentes Diligencias de Investigación 16/20 (seguidas por un delito de blanqueo contra los resellers de los terminales de *EncroChat)*. Se incorporaron a esas diligencias por la sola mención de *EncroChat,* pero una vez traducido el documento francés, el Fiscal jefe de la FEAD advirtió la relevancia de la información, que desbordaba por completo dicho procedimiento. De ahí que se desglosara ese informe y se incoaran las Diligencias de Investigación 20/20, el 23 de julio de 2020, emitiendo ese mismo día Orden Europea de Investigación para obtener la información que los franceses ofrecían en la información espontánea.

Cabe recordar que fue la Directiva 2014/41/CE del Parlamento Europeo y del Consejo, de 3 de abril de 2014 la que regula la orden europea de investigación en materia penal, transpuesta al Derecho español por la Ley 3/2018, de 11 de junio, por la que se modifica la Ley 23/2014, de 20 de noviembre, de reconocimiento mutuo de resoluciones penales en la Unión Europea, para regular la Orden Europea de Investigación. Gracias a este nuevo instrumento, se creó un sistema general para obtener pruebas en los casos de dimensión transfronteriza, basado en el principio de reconocimiento mutuo, pero que tenga también en cuenta la flexibilidad del sistema tradicional de asistencia judicial. De acuerdo con su art. 1.1, una OEI se puede emitir, bien para la ejecución de una o varias medidas de investigación específicas en otro Estado miembro, con vistas a obtener pruebas; o para la obtención de pruebas que ya obren en poder de las autoridades competentes del Estado de ejecución; es decir, para la transmisión de dichas pruebas a las autoridades competentes del Estado de emisión. El caso Encrochat se encuentra en este segundo caso.

El Fiscal Jefe de la Fiscalía Especial Antidroga dictó Decreto, de fecha 18 de noviembre de 2020, en las Diligencias de Investigación 20/2020, en el que se describe el *iter* que se siguió para la obtención de los datos de *EncroChat:*

1. Las Diligencias de Investigación 20/2020 dimanan de las Diligencias de Investigación 16/2020, que se incoaron como consecuencia de la comunicación efectuada por las autoridades francesas, referida a un sistema de encriptación de comunicaciones telefónicas, conocido como *EncroChat,* en la que transmitía información sobre actividades criminales supuestamente cometidas en España (esencialmente, la comercialización de terminales de comunicación).

2. Como las intervenciones de las comunicaciones obtenidas del servidor sito en Francia podrían referirse a actividades de tráfico de drogas, se optó por remitir, el 23 de julio de 2020, una Orden Europea de Investigación (OEI), cuyo objeto era obtener todos los datos de comunicación y asociados referentes a España, desde el inicio de la intervención del servidor *EncroChat* hasta su finalización. Concretamente, en la OEI se hacía constar lo siguiente:

   2.1 En la "Sección C: Medida o medidas de investigación de deben realizarse", la medida se describe de la siguiente manera:

   "Se requiere de la Autoridad Judicial francesa que facilite los datos almacenados en los servidores de EncroChat intervenidos en virtud de la medida judicial autorizada en su procedimiento en curso por la investigación de la Organización EncroChat, debido a que pudieran contener información de relevancia sobre diferentes aspectos relacionados con la actividad de blanqueo de capitales investigada por la autoridad española, desarrollada supuestamente por la referida Organización en España, así como por la red de distribuidores y revendedores de dicha tecnología en ese territorio.

   En concreto se solicitan todos los datos asociados a los usuarios de este sistema de comunicación encriptado EncroChat que se hallen registrados en el territorio nacional de España, tales como: identificación del usuario, nombre de usuario, número de IMEI, número de IMSI, alias, contraseña, red telefónica operadora, datos asociados a comunicaciones mediante llamadas de voz, datos asociados a comunicaciones mediante mensajería escrita, notas, datos asociados a contactos, listado de llamadas, datos de geolocalización y conexiones asociadas al tráfico de datos, comentarios, redes Wifi usadas, calendario, así como cualquier otro dato disponible.

   Respecto al alcance temporal de los datos, se solicitan los datos correspondientes desde la fecha de inicio de la intervención del servidor EncroChat hasta la fecha de finalización de dicha medida.

   Asimismo, se solicita que se autorice el uso de estos datos como pruebas válidas en un procedimiento judicial español".

   En la casilla correspondiente se marcó la opción "Obtención de información o de pruebas que ya están en posesión de la autoridad de ejecución".

2.2 En la "Sección G: Motivos de la emisión de la OEI", los hechos que justifican la orden son los siguientes:

"A) Se siguen en esta Fiscalía Especial Antidroga de la Audiencia Nacional diligencias por la presunta comisión de un delito de blanqueo de capitales, existiendo indicios racionales de criminalidad del establecimiento de una red de blanqueo de capitales liderada en España por J. A. C. la cual, valiéndose de un entramado societario sustentado en la estructura de la tecnología EncroChat creado para facilitar la comisión del delito, procede al blanqueo de dinero procedente de diferentes delitos, principalmente tráfico de drogas, mediante la fabricación, venta, distribución y prestación de servicios de tecnología de comunicación encriptada EncroChat sufragada por sus clientes mediante dinero de ilícita procedencia.

Asimismo, se tiene constancia de la existencia de una red de distribuidores y revendedores de tecnología EncroChat en España, que igualmente blanquearían el beneficio de su propia actividad criminal, así como la de personas dedicadas a la comisión de delitos, mediante la venta de dispositivos de comunicación y prestación de servicios EncroChat sufragados con dinero de ilícita procedencia, conformando una segunda red en España dedicada a la comisión del delito investigado.

Consecuentemente, a la vista de la información remitida por la Jurisdicción interregional Especializada (JIRS) de Lille a esta Instrucción referente a las comunicaciones y datos obrantes en la intervención del servidor informático de EncroChat realizada en la investigación seguida por esa Autoridad judicial francesa, esta aportación de datos podría ofrecer indicios acerca de los siguientes aspectos de interés para la presente investigación:

— Definición del rol, cometidos y operativas desarrolladas por las personas físicas y jurídicas investigadas en el seno de la Organización EncroChat en su rama española, principalmente J. A. C. y su entorno.

— Identificación de la red de distribuidores y revendedores presentes en España.

— Operativas de blanqueo de capitales llevadas a cabo por los integrantes de la Organización EncroChat.

— Operativas de blanqueo de capitales llevadas a cabo por la red de distribuidores y revendedores en España.

— Conocimiento por parte de los vendedores del origen ilícito del dinero recibido como contraprestación a la venta de tecnología EncroChat a su red clientelar.

B) Por información policial se tiene conocimiento que de los datos almacenados en los servidores de EncroChat se derivaría importante información en relación con delitos de tráfico de drogas vinculados con territorio español, por lo que se incoan las presentes diligencias, en el contexto de las cuales se emite la presente OEI".

Igualmente, en la misma Sección G, en el apartado relativo a la naturaleza y tipificación jurídica del delito o delitos para los que se emite la OEI y norma legal aplicable, se indica:

"La presente OEI se emite para la investigación de un delito tráfico de drogas, blanqueo de capitales procedentes del narcotráfico, cometido por organización internacional de carácter criminal, todo ello tipificado en los artículos 301, 302, 303 (blanqueo), 368, 369, 369 bis (tráfico de drogas), 570 bis (organización criminal), todos ellos del del Código Penal español".

1. Dicha OEI fue cumplimentada por comunicación de la autoridad judicial de Lille, de 14 de septiembre de 2020, que expresamente autorizó a la Fiscalía Antidroga para la utilización de los datos transmitidos en el marco de la presente solicitud de asistencia judicial, de modo que puede implementarse en toda investigación y en virtud de cualquier procedimiento judicial, actuaciones judiciales, instrucción o juicio.

2. Por Decreto de 10 de noviembre de 2020, se autorizó a que un teniente de la Unidad Central Operativa (UCO) de la Guardia Civil se desplazara a Francia, para la transmisión efectiva de los datos objeto de la OEI citada.

3. El 12 de noviembre de 2020, se produjo la entrega, en dependencias policiales en Francia, de un disco duro conteniendo los datos.

4. Una vez en España, la Fiscalía Antidroga acordó lo siguiente:

- Que el disco duro quedará depositado, de forma segura, en las dependencias de la Unidad Central Operativa de la Guardia Civil, o en donde se determine por la Jefatura de policía Judicial de la Guardia Civil.
- Autorizar a la Unidad Técnica de Policía de Judicial, en conjunción con el Grupo de Informática Forense de la Jefatura de Información de la Guardia Civil, a la realización de una copia forense de la evidencia original, manteniendo la inalterabilidad de ésta, con el objetivo de realizar un procesamiento de los datos que permita su correcta visualización.
- Autorizar a las Unidades con funciones de Policía Judicial de la Guardia Civil, a realizar el análisis de la información contenida en el citado disco duro, para tratar de determinar: i) si contienen elementos suficientes para iniciar una investigación; y ii) si están relacionadas con una investigación ya iniciada y, en caso de ser así, si la evidencia

analizada aporta algún dato relevante.

- Autorizar a las Unidades con funciones de Policía Judicial de la Guardia Civil, bien a iniciar una investigación, en el primer caso; bien a aportar al proceso la información complementaria obtenida, en el segundo caso, para que se valore por el Juez de Instrucción y el Ministerio Fiscal. En ambos casos, para que la información se pueda integrar en un proceso penal, deberá ir acompañada de un oficio de remisión, emitido por la Unidad Técnica de Policía Judicial de la Guardia Civil, aportando los datos concretos extraídos de la copia forense, con la garantía de su inalterabilidad.

5.- Cuestiones procesales suscitadas respecto de la Orden Europea de Investigación que permitió la llegada a España de la información francesa

5.1.- La Fiscalía como autoridad de emisión de la Orden Europea de Investigación

Se ha discutido la posibilidad de que el Ministerio Fiscal fuera la autoridad para emitir la Orden Europea de Información. Posibilidad que no ofrece dudas, a juicio del Tribunal Supremo, en la medida en que, en opinión de la Sala, puede ordenar la transmisión de pruebas de un procedimiento interno a otro.

Se invoca la Sentencia del TJUE de 30.04.2024 (Asunto M.N.) C-670/22, conforme a la cual la transmisión de pruebas no debe ser necesariamente acordada por un Juez cuando en virtud del derecho interno la transmisión de esa prueba puede ser ordenada por un fiscal.

Esta posibilidad se residencia por el Tribunal Supremo en el art. 588 bis LECrim, que a su vez reenvía al tenor del art. 579 bis de la ley rituaria y en lo dispuesto en el Pleno No Jurisdiccional de la Sala de lo Penal del día 26.05.2009 cuyo asunto se refería a la habilitación de escuchas telefónicas procedentes de diligencias distintas las que corresponden al juicio. Cuestión ya de por sí llamativa, toda vez que al tiempo de dictarse ese acuerdo No Jurisdiccional del Pleno, los artículos 579 bis y 588 bis i no existían, pues fueron introducidos por Ley Orgánica 13/2015, de 5 de octubre.

Basta examinar ambos artículos de la Ley de Enjuiciamiento Criminal y el Acuerdo del Pleno para poner en duda que el Fiscal pueda "ordenar la transmisión de pruebas" en el derecho interno español. Es más, ni los artículos de la LECrim ni el Pleno hacen referencia siquiera al Ministerio Fiscal.

Principio del formulario

Final del formulario

El Tribunal Supremo se refiere después a otros tres preceptos de la Ley de Enjuiciamiento Criminal respecto de las facultades que el Fiscal tiene, como parte, para solicitar o aportar *motu proprio* información probatoria de un procedimiento a otro. Y así cita el art. 773.2 LECrim, que regula las denominadas Diligencias de Investigación que puede incoar el Ministerio Fiscal, y dos preceptos del Estatuto Orgánico del Ministerio Fiscal (arts. 5.2 y 4.3) haciéndose eco también de la Circular 2/2022 de 20 de diciembre de la Fiscalía General del Estado. Pero, como en el caso anterior, el problema parece que no se termina de resolver de forma solvente.

La cuestión básica aquí es considerar si, como hace el Tribunal Supremo, la Orden Europea de Investigación cursada por el Ministerio Fiscal tenía por objeto simplemente la transmisión de información obtenida por las autoridades francesas o si, por el contrario, el hecho de que esa información fuera el fruto de la intervención de telecomunicaciones tiene algún tipo de relevancia.

Para el Tribunal Supremo no hay duda alguna: en la misma medida en que el Fiscal puede aportar antecedentes de intervenciones telefónicas de unas diligencias a otras, tampoco habría ningún problema en que pudiera recabar la información de Encrochat de las autoridades francesas.

El art. 187 de la Ley 23/2014 de 20 de noviembre, de reconocimiento mutuo de resoluciones penales en la Unión Europea reconoce que, efectivamente, los Fiscales son también autoridades de emisión en los procedimientos que dirijan, en nuestro caso, las Diligencias de Investigación. Pero sujetando dicha posibilidad a que la medida que contenga la orden europea de investigación no sea limitativa de derechos fundamentales además que la Fiscalía puede emitir órdenes europeas de investigación para la ejecución de medidas que podrían ordenar o ejecutar conforme a las disposiciones de la Ley de Enjuiciamiento Criminal.

En el caso que nos ocupa, el razonamiento del Tribunal Supremo parece insuficiente porque situar al mismo nivel una Orden Europea de Investigación cursada por la Fiscalía, por ejemplo, para aportar documentación de un registro público; con la Orden cursada por la Fiscalía para que le sea transmitida la información obtenida mediante la infección masiva con un virus informático de un sistema de comunicaciones de forma indiscriminada produce, cuando menos, insatisfacción. Una injerencia tan relevante reclama la intervención del juez, y no sólo la del Ministerio Fiscal.

5.2.- Control a priori del Estado de emisión

El art. 6 de la Directiva 2014/41/CE del Parlamento y del Consejo de 3 de abril de 2014 relativa a la orden europea de investigación en materia penal prevé que la autoridad de emisión sólo puede llevar a cabo una Orden Europea de Investigación cuando se cumplan dos requisitos:

1. Cuando la emisión de la OEI sea necesaria y proporcionada a los fines de los procedimientos a que se refiere el artículo 4 teniendo en cuenta los derechos del sospechoso o acusado;
2. la medida o medidas de investigación requeridas en la OEI podrían haberse dictado en las mismas condiciones para un caso interno similar.

Por su parte, el artículo 189.1 de la Ley 23/2014, de 20 de noviembre, de reconocimiento mutuo de resoluciones penales en la Unión Europea, que traspone dicha Directiva, recoge los mismos requisitos, especificando en el segundo de ellos que la medida o medidas de investigación solicitadas cuyo reconocimiento y ejecución se pretende se hayan acordado en el proceso penal español en el que se emite la orden europea de investigación y pudieran haberse ordenado en las mismas condiciones para un caso interno similar.

El caso Encrochat supuso la emisión de una Orden Europea de Investigación dirigida no a que se practicara una concreta medida de investigación, sino para la transferencia de información en posesión de otro país como consecuencia de la investigación llevada a cabo por el mismo. De ahí que el Tribunal Supremo se plantee si estos dos requisitos cumulativos resultan de aplicación a dos casos distintos: órdenes de investigación sobre pruebas no practicadas y órdenes de investigación sobre pruebas ya practicadas.

Antes de que el TJUE dictara resolución sobre el caso concreto de Encrochat, las altas jurisdicciones de Alemania y Francia tomaron partido en el conflicto.

En el caso alemán, la Sentencia del Tribunal Supremo Federal de 02.03.2022 concluyó que la orden de investigación destinada a transmitir pruebas (no a practicarlas), la autoridad de emisión no tenía que examinar la medida de investigación porque la transferencia de pruebas ya practicadas no contiene una medida de investigación que se deba ejecutar.

En el caso italiano, la Sentencia de la Corte de Casación 6364/2023 de 15.01 parte desde otra perspectiva. Y así, entiende que se debe presumir que el Estado que ejecutó la medida de investigación lo hizo respetando la legalidad y los derechos fundamentales, salvo que en la práctica se pudiera verificar lo contrario.

El TJUE, por su parte, conocedor de estas soluciones de la jurisdicción alemana e italiana dictó Sentencia (Gran Sala) de 30.04.2024 en el asunto M.N. (C-670/22) que soluciona esta diatriba con una solución mixta entre las ya examinadas:

— De un lado, da carta de naturaleza a la existencia de dos tipos de órdenes: aquella que tiene por objeto la práctica de una prueba no ejecutado, y aquella que tiene por objeto la transmisión de datos en poder de una autoridad como consecuencia de haberse ejecutado previamente, conforme a su normativa interna, la correspondiente diligencia de investigación.

— Y así, situados en al orden de investigación “de transmisión de datos” el TJUE afirma que el art. 6.1 del Convenio debe aplicarse en el sentido de verificar si esa “transmisión de información” podría haberse llevado a cabo a nivel interno. O lo que es lo mismo: no cabe inmiscuirse en la diligencia de investigación llevada a cabo previamente, sino única y exclusivamente en el régimen de transmisión de información conforme al derecho interno.

— Pero, de otro, invoca el art. 82 TFUE para incidir en la confianza mutua que rige entre los Estados de la Unión en cuanto a que los mismos son respetuosos con los derechos fundamentales y las garantías procesales al uso, de donde se deduce que existe una presunción *iuris tantum* de que el estado emisor no ha solicitado esta orden de transmisión con la finalidad de eludir las propias normas internas.

En base a los criterios jurisprudenciales señalados previamente por parte del TJUE, el Tribunal Supremo español extraer cinco criterios generales:

1) El TJUE distingue entre OEI que se libran para la “recogida” de pruebas y las que se libran para la “transmisión” de pruebas. Esta distinción deriva de lo establecido en el art. 1, apartado 1, de la Directiva.

2) El control de una OEI para la “transmisión” de pruebas no exige un control a priori de los mismos requisitos de fondo aplicados, en el Estado de emisión, para la “recogida” de dichas pruebas.

3) Ello sigue siendo así, con independencia del lugar en que se hayan obtenido las pruebas, incluso si tal lugar es el propio territorio del Estado de emisión. Es indiferente si el Estado de ejecución de la OEI obtuvo las pruebas en su propio territorio, en el del Estado de emisión o en el de un tercer Estado. La solución es la misma, porque como indica el TJUE, la Directiva 2014/41, no varía el régimen aplicable a una OEI para la “transmisión” de pruebas, en función del lugar en el que se hayan recogido dichas pruebas.

4) El propio instrumento y las finalidades de la OEI y los principios del ordenamiento de la Unión Europea (especialmente, el de reconocimiento mutuo), implican una presunción iuris tantum de que los demás Estados miembros respetan el Derecho de la Unión y, en particular, los derechos fundamentales.

5) De todo lo dicho, se deriva que cuando la autoridad de emisión desee obtener la “transmisión” de pruebas en poder de otro Estado no está autorizada a controlar la regularidad del procedimiento mediante el que se hayan recogido las pruebas.

El Tribunal Supremo se esfuerza además en señalar que esta conclusión a la que llega, y estos criterios generales que extrae, no suponen una aceptación acrítica de los principios de no indagación, *locus regit actum* y *male captus bene detentus*. De hecho, afirma con rotundidad que la jurisprudencia de dicho alto tribunal ha matizado tales principios, entre otras, en las Sentencias del Tribunal Supremo 116/2017, 219/2021, 773/2021 y 1018/2021. Vale la pena traer a colación lo referido por la primera de dichas Sentencias, dictada en relación con los datos de la famosa Lista Falciani:

(…) que la prueba obtenida con vulneración de un derecho fundamental ha de ser excluida de la apreciación probatoria forma parte de las garantías del sistema constitucional. Más allá de su proclamación expresa en un enunciado normativo, su vigencia es nota definitoria del derecho a un proceso con todas las garantías. La exclusión de prueba ilícita del material valorable por el órgano decisorio forma parte del patrimonio jurídico de los sistemas democráticos. Y es que como proclamara esta Sala mediante un brocardo de obligada cita cuando se aborda esta materia, la verdad real no puede obtenerse a cualquier precio (cfr. ATS 18 de junio de 1992 –rec. 610/1990–). La necesidad de hacer eficaz esa regla de exclusión viene impuesta incluso por una exigencia ética ligada a la fuente legitimante de la función jurisdiccional. La incorporación de un acto lesivo de los derechos fundamentales al conjunto probatorio que ha de ser apreciado por el órgano sentenciador acarrea el riesgo de lo que la STS 195/2014, 3 de marzo, ha denominado una metástasis procesal. De ahí la importancia de que con anterioridad al proceso valorativo se proceda a un verdadero saneamiento del proceso, excluyendo aquellos elementos de prueba con virtualidad contaminante”.

Y, más adelante en dicha Sentencia:

Es lógico que la validez en el proceso penal español de actos procesales practicados en el extranjero no se condicione al grado de similitud entre las reglas formales que, en uno y otro Estado, singularizan la práctica de esa prueba. Al juez español no le incumbe verificar un previo proceso de validación de la prueba practicada conforme a normas procesales extranjeras. Pero la histórica vigencia del principio locus regit actum, de dimensión conceptual renovada a raíz de la consolidación de un patrimonio jurídico europeo, no puede convertirse en un trasnochado adagio al servicio de la indiferencia de los órganos judiciales españoles frente a flagrantes vulneraciones de derechos fundamentales. Incluso en el plano semántico la expresión principio de no indagación, si se interpreta desbordando el ámbito exclusivamente formal que le es propio, resulta incompatible con algunos de los valores constitucionales comprometidos en el ejercicio de la función jurisdiccional". Y concluye después afirmando que "En definitiva, el principio de no indagación no puede interpretarse más allá de sus justos términos. Su invocación debería operar en el marco exclusivamente formal que afecta a la práctica de los actos de investigación en uno u otro espacio jurisdiccional. De tal forma que la flexibilidad admisible en los principios del procedimiento –adecuados por su propia naturaleza a cada sistema procesal– no se extienda a la obligada indagación de la vigencia de los principios estructurales del proceso, sin cuya realidad y constatación la tarea jurisdiccional se aparta de sus principios legitimadores.

Tanto el TJUE como el Tribunal supremo son conscientes de que la alineación de los estados de la Unión con los principios básicos y derechos fundamentales es una cuestión dinámica, y no estática. De ahí que el Tribunal Supremo valore como cautelas del TJUE que:

— La consideración de que la práctica de la prueba cuya información se traslada ha sido llevada a cabo cumpliendo los estándares europeos en materia de garantías procesales es una *presunción iuris tantum*.

— Y que, en cualquier caso, el recurso a una orden de investigación para la "transmisión de información" no tenga como objeto la elusión de las normas internas, lo que constituiría un claro caso de fraude de ley.

Sentado lo anterior, el Tribunal Supremo asume con facilidad la doctrina antes referenciada, y se limita a comprobar si, desde el punto de vista de la normativa española, es posible la transmisión de información, hallando su justificación en los ya citados arts. 579 bis y 588 bis i) LECrim, encontrando aquí su auténtico sentido.

Ciertamente, resulta sorprendente que el recurso a la normativa interna nos retrotrae nuevamente a un cierto control de la legalidad de la medida de investigación que da lugar a la información. En relación con el art. 588 bis i) LECrim se destaca que la admisibilidad de dicho traslado de información se vincula al control material de la legitimidad de la injerencia, lo que implica desechar la información obtenida con vulneración de derecho, dando lugar a la expulsión de dicha prueba conforme al art. 11 LOPJ.

Puesto que dicho control resulta necesario, el Tribunal Supremo lleva a cabo una notable pirueta jurídica y considera la legalidad de la medida de investigación ejecutada. Pero no lo hace a la luz del derecho español (incompatible con lo que se ha referido hasta el momento), sino que la valora a la luz del derecho francés. De este modo no vulnera el principio de no indagación, pues no lleva a cabo un análisis de derecho comparado para revisar el ordenamiento jurídico francés a la luz del ordenamiento español. Sino que se limita a glosar cómo se llevó a cabo la medida de investigación en Francia y cuáles fueron las normas que amparaban su práctica.

Después de analizar, reiterativamente, el iter procesal seguido en Francia, el soporte indiciario existente en el país vecino y la normativa francesa aplicable concluye que la medida de investigación francesa es conforme a su derecho. Y no sólo eso, sino que considera que la misma no es una medida prospectiva y vulneradora de derechos fundamentales. Cuestión que no deja de ser paradójica si se han intervenido conversaciones de más de 38.000 usuarios.

Paradoja que resulta sorprendente cuando el Tribunal Supremo afirma que una injerencia masiva no es, necesariamente, prospectiva. Y ello en tanto que es conforme al derecho francés y porque existen indicios que justificarían la adopción de la medida. Hecho este reforzado por otros casos examinados por el TJUE (como el de Big Brother Watch), invocando conceptos escurridizos a la garantía procesal, tales como la existencia de amenazas a la seguridad nacional o contra los intereses nacionales esenciales.

Surgen preguntas inquietantes al hilo de la argumentación del Tribunal Supremo: ¿quién decide qué amenaza la seguridad nacional y cuáles son los intereses nacionales esenciales? Y, más relevante aún ¿cómo puede seguir llevando a cabo el poder judicial la función de salvaguarda de los derechos fundamentales de los ciudadanos si existen ámbitos que le vienen dados por el Estado (singularmente por el poder ejecutivo) que asume de forma acrítica porque no entra en su análisis?

5.3- Control a posteriori del Estado de Emisión

El Tribunal Supremo configura como control *a posteriori* la regulación de lo previsto en el art. 14 de la Directiva 2014/41/CE del Parlamento y del Consejo de 3 de abril de 2014 relativa a la orden europea de investigación en materia penal dedicada al recurso. Y más en concreto, a lo que se refiere en su artículo 14.7 cuando establece que los Estados miembros velarán por que, en los procesos penales en el Estado de emisión, se respeten los derechos de la defensa y la equidad del proceso al evaluar las pruebas obtenidas a través de la OEI.

Esta afirmación es definida como *críptica* porque parece que puede deducirse la posibilidad de que se examine la licitud de una medida ya ejecutada. Aunque finalmente salva esta aparente contradicción considerando que no existe tal control a posteriori de la autoridad de emisión, sino de una garantía añadida en el momento de utilizar y valorar la prueba en el procedimiento penal concreto, en función de la virtualidad de la información transferida pueda tener en el procedimiento en cuestión.

A este respecto, resulta interesante señalar que el Tribunal Supremo establece que los datos de Encrochat pueden desempeñar su función como:

- Medio de investigación.
- Medio de prueba.
- Indicio, en el contexto de prueba indiciaria.
- Medio de corroboración.

5.4.- LA NOTIFICACIÓN DEL ART. 31 DE LA DIRECTIVA: ¿DATO IRRELEVANTE?

La ya mencionada Directiva 2014/41/CE regula en el art. 31 el supuesto de una Orden Europea de Investigación destinada a la intervención de las telecomunicaciones suponga la utilización de dirección de comunicaciones de una persona que se encuentre en un estado distinto en el que un estado lleva a cabo una diligencia de investigación relativa a la intervención de las telecomunicaciones. Y para ello, se utilice la dirección de comunicaciones de personas que se encuentren fuera del estado que ejecuta la investigación. En estos casos, el mencionado art. 31 prevé que el estado que realiza la intervención notifique al Estado donde se encuentra esa persona la intervención de sus telecomunicaciones.

El supuesto abordado por el Tribunal Supremo parte de una premisa clara: en el caso Encrochat no existió notificación por parte de Francia a España en relación con la intervención de las telecomunicaciones a súbditos españoles residentes en este país. Y la cuestión que debe abordarse es qué efecto tiene esta ausencia de notificación y, lo que es más importante, cuál es su efecto procesal.

El Tribunal Supremo aborda esta cuestión deslindando primer cuál es el fin de esta notificación considerando que la misma es que el estado donde se encuentra el ciudadano intervenido pueda ejercer un control de dicha intervención. Control que, como refiere el art. 31.3 de la Directiva pasar por:

— El deber de valorar si la intervención se autorizaría en un caso similar conforme a la normativa nacional.
— En el caso de que considerase que no se autorizaría, tiene la facultad (podrá, dice la Directiva) de dirigirse al estado ejecutante para de la intervención para desautorizar la intervención, si aún no se ha llevado a cabo; o solicitar su cese, si estaba ya produciéndose.
— Y, en su caso, podrá también solicitar al estado ejecutante que no podrá utilizar como prueba el resultado de dicha intervención.

Para valorar esta autorización, el Tribunal Supremo centra sus esfuerzos argumentativos en el hecho de que la contestación del Estado notificado es de carácter potestativa. Más aún, cabe incluso el silencio como contestación.

En el caso Encrochat, es evidente que no se llevó a cabo la notificación correspondiente (Anexo C): no se solicitó la autorización ni antes ni durante ni tampoco después de realizada la intervención de las telecomunicaciones. Pero, a pesar de ello, el Tribunal Supremo entiende que la notificación del art. 31 no es un requisito sustancial que pueda afectar a la validez de la prueba. Y basa dicha insustancialidad en el hecho de que la notificación se puede remitir, precisamente, antes, durante o después de la intervención de las telecomunicaciones. Y se hace eco de la imaginativa interpretación que aporta el Ministerio Fiscal, conforme a la cual se parte de la evidencia de que no se ha remitido notificación. Pero el simple hecho de haber compartido de forma espontánea los datos obtenidos la interceptación es como si se hubiera llevado a cabo la notificación del art. 31 con posterioridad a la misma.

Esta interpretación del Fiscal, que el Tribunal Supremo hace suya y conduce a la irrelevancia de la notificación contrasta poderosamente con el hecho de que en el Caso M.N., el TJUE refiere cómo el equipo conjunto de investigación instaba a las autoridades competentes de los Estados miembro a *confirmar por escrito* que habían sido informadas de los métodos empleados para recoger los datos procedentes de teléfonos móviles situados en el territorio nacional del Estado al que se le requería dicha confirmación escrita. Y también se debía garantizar que los datos transmitidos se usarían para su explotación, y sólo se utilizarían a los efectos de investigaciones en curso previa autorización de los Estados miembro del equipo conjunto de investigación. Si, como dicen el Fiscal y el Tribunal Supremo, la notificación es un requisito no esencial ¿por qué existen estas salvaguardias a las que se refiere el propio TJUE?

Finalmente, el Tribunal Supremo añade otro argumento para sostener la insustancialidad de la notificación de carácter material: es cierto que se interceptaron telecomunicaciones de nacionales españoles, pero la misma tuvo lugar directamente sobre un servidor situado en Francia. Y, por tanto, no existiría una medida transfronteriza que exija la aplicación del art. 31.

Es llamativo cómo ambos argumentos (la notificación no es requisito esencial vs. Inexistencia de injerencia transfronteriza) son en cierta medida incompatibles entre sí. Pues si gracias al virus informático se hubiera infectado un servidor situado en España ¿la autorización del art. 31 seguiría siendo insustancial?

Pero por su hubiera alguna duda, y los argumentos anteriores no resultaran convincentes, el Tribunal Supremo acude al ya clásico argumento de la efectiva indefensión: si faltó la notificación es la defensa la que tiene que demostrar que el incumplimiento de los requisitos previstos por la normativa comunitaria le generó indefensión. Inversión de la carga de la prueba que justifica por vía del art. 6.1 b) de la Directiva (ya examinado más arriba), debiendo presumirse salvo prueba en contrario que la actuación del estado miembro que autoriza la intervención de las telecomunicaciones es conforme con los derechos y garantías procesales del acervo comunitario.

5.5- Cuerpo de doctrina del Tribunal Supremo: criterios generales

Finalmente cabe destacar la concreción de lo que podríamos denominar un cuerpo de doctrina del Tribunal Supremo en relación con el asunto Encrochat compuesto por criterios generales. Destacando las cuestiones procesales que pueden dar lugar los datos de Encrochat y que puede servir de prontuario a las defensas:

1. La forma de obtener los datos en Francia.
2. La técnica utilizada para obtener los datos, desconocida por tratarse de un secreto de defensa nacional en Francia.
3. La cadena de custodia de los datos.
4. La realización de copias.
5. La extracción de datos relativos a hechos, personas y delitos específicos.
6. La forma en que se lleva a cabo la incorporación de estos datos a cada procedimiento.

Y los informes policiales sobre la correspondencia entre Nick ñames e identidades.

Cabe destacar la sacralización de la doble criba o selección en cascada que sufren estos datos al llegar a España: la selección hecha en Francia por las autoridades francesas, y una segunda criba sobre los anteriores realizada por las fuerzas policiales españolas. Sacralización que tiene como objetivo inocuizar el hecho de que jamás se ha puesto a disposición de las defensas los datos "en bruto" obtenidos por las autoridades francesas. Hecho este, evidentemente, lesivo del derecho de defensa ex art. 24 CE.

El Tribunal Supremo, con cita de otras Sentencias del TJUE (Caso Bylock, caso Big Brother Watch), aplica su propia doctrina general sobre el acceso de la defensa a la totalidad del material probatorio (entre otras, STS 993/2022 de 22.12 y 106/2023 de 16.02) que, en apretada síntesis, concluye que si a la defensa contó con medios y tiempo suficiente para preparar su defensa… el detalle de la falta de acceso a la totalidad de la información deviene, otra vez, un requisito no esencial.

Conclusiones

En lo que a cuestiones procesales se refiere podemos concluir:

1.- El Tribunal Supremo confiere carta de naturaleza al hecho de que el Ministerio Fiscal pueda cursar ordenes europeas de investigación con base en lo previsto en los arts. 579 bis, 588 bis i, ambos de la LECrim, y conforme con lo acordado en el Pleno No Jurisdiccional de 26.05.2009. Aunque ninguno de tales textos se refiere al Ministerio Fiscal y el hecho de que a fecha 26.05.2009 los preceptos referidos ni tan siquiera existiesen.

2.- No existe control a priori del Estado de emisión sobre el Estado de ejecución. Según el Tribunal Supremo, debe distinguirse entre órdenes europeas de investigación referidas a pruebas por practicarse y aquellas órdenes que se dirigen a transmitir datos de pruebas ya practicadas en el Estado de ejecución. Debe presumirse *iuris tantum* que la actuación del estado de ejecución fue conforme con los derechos fundamentales y garantías procesales, salvo prueba en contrario. Y debe verificarse, también, que la orden de investigación no tenía por finalidad la elusión de normas internas, dando lugar a un fraude de ley.

3.- No cabe tampoco un control a posteriori del Estado de emisión. Sí existe, por el contrario, una garantía añadida a la hora de utilizar y valorar esa prueba en el procedimiento penal en concreto.

4.- La falta de notificación ex art. 31 de la Directiva es un requisito insustancial para la determinación de la legalidad de la prueba obtenida a la luz del art. 11 LOPJ.

5.- Finalmente, el Tribunal Supremo sacraliza la falta de acceso de las defensas a los datos en bruto obtenidos por las autoridades francesas, dando carta de naturaleza al uso de datos que han sufrido una selección en cascada por parte, primero, de las autoridades francesas; y, después, por las autoridades policiales españolas.

Ne Bis in Idem and International Judicial Cooperation in Criminal Matters: A Fragmented Guarantee in Search of a Unified Framework. A French Law Perspective

Ne bis in idem y la cooperación judicial internacional en materia penal: una garantía fragmentada en busca de un marco unificado. Una perspectiva desde el derecho francés

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Abstract. The principle of *ne bis in idem* – that no person shall be tried or punished twice for the same offence – ranks among the foundational guarantees of criminal procedure. At the international level, however, it has no settled status. Long treated as a purely domestic rule, the principle's traditional non-application between States has been progressively qualified by certain international conventions and by the statutes of the international criminal tribunals. Within the European Union, the transformation has been more ambitious: the principle has migrated from a domestic safeguard into a transnational fundamental right, constituting, by comparison with general international law, a genuinely European added value.

The analysis that follows is organised around a doctrinal distinction that the literature tends to elide : that between the *res judicata* effect of a foreign criminal judgment (autorité de chose jugée) –, whose negative expression is the *ne bis in idem* bar – and its enforceability (force exécutoire). It is argued that maintaining these two categories as analytically separate is the precondition for understanding both what the principle demands across cooperation mechanisms and where its limits lie.

On that doctrinal foundation, the article argues that the resulting guarantee is not a single rule but a system of five overlapping – and at times conflicting – regimes: the ordinary French domestic regime, subject to a territorial-jurisdiction exclusion; the ECHR Protocol No. 7 regime, confined to intra-State situations; the Schengen/Charter regime, genuinely transnational and recently extended to extradition to third States; the classic cooperation-treaty regime, structurally narrower; and the Interpol CCF regime, in which the principle operates at best as an administrative indicium. The article draws on the jurisprudence of the Court of Justice – from Gözütok and Van Esbroeck to HF (C-435/22 PPU) and Swiftair (C-701/23) – as well as that of the European Court of Human Rights, the French Court of Cassation, and the

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Interpol Commission for the Control of Files (hereinafter, the “CCF”), and on the newest developments in judicial cooperation, including the 2024 Transfer of Proceedings Regulation and the European Public Prosecutor’s Office, to map the principle across each layer of judicial cooperation and to identify the analytical variables that recur across all of them.

Three structural gaps emerge: the domestic/foreign sentence gap (only partially bridged by the Court of Cassation’s 2013 deduction rule and left open by the ongoing enforcement lacuna identified by Huet); the treaty gap exposed by HF; and the contractual blind spot left by the transnational circulation of DPAs and CJIPs. Alongside these gaps, two frontiers test the principle under maximum stress: corporate liability for atrocity crimes, illustrated by the Lafarge proceedings, and the investigative phase under the EIO and the European Public Prosecutor’s Office (EPPO). The article’s central claim is that the coherent application of ne bis in idem now demands a unified analytical framework – held together by the shared “certainty threshold” of C-505/19 – that neither the existing legislation nor the case law has yet supplied.

Resumen

El artículo analiza el principio ne bis in idem en el contexto de la cooperación judicial internacional en materia penal desde la perspectiva del derecho francés. La autora sostiene que este principio no constituye una garantía uniforme, sino un sistema fragmentado integrado por diversos regímenes jurídicos nacionales, europeos e internacionales, cuyas diferencias generan importantes desafíos para su aplicación. A partir del examen de la jurisprudencia del Tribunal de Justicia de la Unión Europea, del Tribunal Europeo de Derechos Humanos, de la Corte de Casación francesa y de la Comisión de Control de los Ficheros de Interpol, el estudio identifica las principales lagunas y tensiones existentes en la protección contra el doble enjuiciamiento. Asimismo, aborda cuestiones contemporáneas relacionadas con la extradición, la orden de detención europea, la cooperación policial internacional, los acuerdos de justicia negociada y la responsabilidad penal de las personas jurídicas. Finalmente, propone la necesidad de construir un marco analítico unificado que garantice una aplicación coherente del principio ne bis in idem en los distintos mecanismos de cooperación judicial internacional.

Keywords: Ne bis in idem; international judicial cooperation; international criminal law; extradition; European Arrest Warrant; mutual recognition; res judicata; Court of Justice of the European Union; French law; criminal cooperation.

Palabras clave: Ne bis in idem; cooperación judicial internacional; derecho penal internacional; extradición; orden de detención europea; reconocimiento mutuo; cosa juzgada; Tribunal de Justicia de la Unión Europea; derecho francés; cooperación penal.

Introduction

1. Judicial cooperation in criminal matters may be defined as horizontal assistance between legal orders, triggered by an element of extraneity and operating through instruments as varied as extradition, mutual legal assistance, Interpol police cooperation, the European Arrest Warrant (EAW), the European Investigation Order (EIO) and,

most recently, the EPPO.[2] What unites these instruments is a single objective: to enhance the conduct of proceedings by recourse to the jurisdictional power of a judge belonging to a legal order to which the proceedings do not *a priori* pertain. That very expansion, however, generates a structural risk. The more effectively criminal justice systems cooperate, the greater the likelihood that a person already tried in one jurisdiction will face a second set of proceedings in another.

2. *Ne bis in idem* is therefore at once a beneficiary and a casualty of enhanced cooperation. It benefits from the circulation of judicial decisions that establish finality. It is threatened whenever several jurisdictions compete to prosecute the same conduct. This dual posture reflects the principle's multifaceted rationale: it operates as a guarantee of judicial protection for the individual against the *ius puniendi* of the State, forming part of the guarantees of due process and fair trial, while simultaneously safeguarding the *res judicata* (*pro veritate habetur*) of final judgments, on which the legitimacy of the legal system and of the State depends.

3. The difficulty of the contemporary situation is attributable principally to the multi-source character of the applicable law. There is no mandatory rule of general international law obliging States to respect *ne bis in idem* between themselves; the principle applies only to the extent that treaties provide for it. The content of those treaties differs markedly. At Council of Europe level, Article 4 of Protocol No. 7 to the ECHR is expressly confined to prosecutions "under the jurisdiction of the same State." Within the Schengen area, Article 54 of the Convention Implementing the Schengen Agreement (CISA) supplies a transnational guarantee of considerably broader scope. At Union level, Article 50 of the Charter of Fundamental Rights elevates the principle to a fundamental right applicable "within the Union." Beyond these instruments, bilateral and multilateral cooperation treaties incorporate *ne bis in idem* as a ground for refusal, but typically only in favour of persons definitively judged by the *requested* State itself – a formulation structurally narrower than EU law, and the source of the most acute tensions in extradition to third States.

4. These divergences constitute the point of departure for the analysis. This article is organised in four Parts. Part I lays the normative and doctrinal foundations, demonstrating that fragmentation operates on two levels simultaneously: the multi-source map of the applicable norms, and the contested content of its two constitutive elements, *idem* and *bis*. The core of the study (Part II) traces the operation of the principle across the channels of cooperation, ordered from the strongest form of the guarantee to the weakest: from the judicial core of the EAW, through its outward extension to extradition to third States, to its dilution at the administrative periphery of Interpol, its near-absence in contractualised criminal justice, and its prospective displacement by the preventive logic

2 On the definition, see K. Mehtiyeva, *La notion de coopération judiciaire*, LGDJ, t. 598, 2018, préf. L. Cadiet.

of transfer of proceedings. Part III then turns to the two frontiers on which the principle is placed under the greatest stress: corporate liability for atrocity crimes, and the investigative phase of cross-border cooperation. Finally, Part IV draws the threads together, identifying the recurring analytical variables and the gaps that a coherent architecture would need to close.

5. This article employs a doctrinal and comparative method. It draws on the primary sources of the law – statutes, treaties, regulations and judicial decisions – as interpreted through the legal literature. The institutional perimeter is defined by the mechanisms of international judicial cooperation: the Court of Justice of the European Union, the European Court of Human Rights, the French Court of Cassation, and the Interpol Commission for the Control of Files are the principal adjudicative bodies examined. At the legislative level, the study covers instruments from the 1957 European Convention on Extradition and the 1972 Convention on the Transfer of Proceedings through the 2024 Transfer of Proceedings Regulation and the most recent 2025 CJEU rulings. The primary normative axis is French and European: the article analyses French law both as a case study in the limits of the domestic territorial model and as the lens through which the interaction between national law and supranational instruments is most precisely observable. The comparative dimension is introduced to illuminate those structural contrasts – particularly between the EU guarantee and classic cooperation-treaty regimes – that the French perspective alone would not reveal. The article does not purport to survey all national systems; the selection is dictated by the normative hierarchy under examination. The reference in this abstract to the statutes of the international criminal tribunals identifies a broader historical context – the gradual erosion of the traditional rule of non-application between States – that falls outside the article's operational scope; it is not further developed in the body of the text, which is confined to the mechanisms of international judicial cooperation as defined above.

I. A Fragmented Principle: Sources and Content

6. The thesis of this Part is that *ne bis in idem* is fragmented before any question of cooperation even arises. Fragmentation operates on two levels. First, the principle is dispersed across a plurality of normative sources of unequal reach (Section A). Second, even where it applies, the content of its two constitutive elements – the *idem* (the "same" offence or facts) and the *bis* (what counts as having been "finally judged") – was for a considerable period unsettled and has been only partially harmonised (Sections B and C). An understanding of both levels is the precondition for explaining why the principle behaves so differently across the cooperation mechanisms examined in Part II.

A. The multi-source landscape

7. In French legal doctrine, the effects of a foreign criminal judgment divide into two analytically distinct categories. The first is the *res judica-*

ta effect (autorité de chose jugée): the binding character of the decision, which may operate positively (where the judgment is adduced as evidence in subsequent French proceedings) or negatively (where it operates as a bar – the negative authority (autorité négative), equivalent to the *ne bis in idem* rule). The negative authority is characterised as a procedural bar (fin de non-recevoir) to the public prosecution in France, precluding proceedings arising from the same facts against the same individual – the *ne bis in idem* rule. The second category is the enforceability (force exécutoire): the question whether a foreign penal sanction may be enforced on French territory, which implicates French sovereignty in a more direct and demanding manner. The two must not be conflated. This article concerns the first category – the negative authority – which constitutes the operative form of *ne bis in idem* in French law and in the cooperation instruments examined below.[3] Understanding the principle's content at each level of its normative hierarchy – domestic, European Convention, Schengen, and Charter – is the task of this Section.

8. At the domestic level, *ne bis in idem* is recognised by each State for application within its own legal order alone. As a general matter it applies only in the criminal field and only to final judgments in criminal matters. Two consequences follow. In many States double prosecution remains entirely permissible, as does the cumulation of punitive administrative sanctions with criminal ones. Even within a single legal system, fundamental definitional questions persist: much of the domestic case law turns on the meaning of *idem* and *bis*. Should the "same" (*idem*) be defined by reference to the legal characterisation of the offences, or to the underlying facts? Does the principle's reach depend on the scope of the offence descriptions or on the legal interests they protect? In other words, national case law has not produced a common standard regarding the scope and application of the principle across domestic legal orders.

9. French law illustrates the point.[4] Article 6 of the Code of Criminal

3 A. Huet, Fasc. 404-10, n° 1–6 (drawing the distinction between *res judicata* (*autorité de chose jugée*) and enforceability (*force exécutoire)*, and identifying *ne bis in idem* as an expression of the *autorité négative* of a foreign criminal decision). On the associated humanitarian rationale, Professor Huet observes that considerations of humanity ("des considérations d'humanité") underlie the principle – it is unjust to try an individual twice for the same act – a rationale that sits alongside the res judicata and legal certainty arguments already discussed.

4 Cass. Crim. 23 Oct. 2013 (n° 13-83.499),"les décisions rendues par les juridictions pénales étrangères n'ont pas, en France, l'autorité de chose jugée lorsqu'elles concernent des faits commis sur le territoire de la République". Under French common law (Art. 113-9 Criminal Code and Art. 692 Criminal Procedure Code), the *ne bis in idem* bar rests on the cumulative satisfaction of the following conditions: (i) identity of facts (mêmes faits) between the foreign and the prospective French proceedings, assessed materially rather than by legal characterisation; (ii) the act must in principle have been committed outside French territory, the domestic-jurisdiction exception being the principal limitation examined below; (iii) the

Procedure (hereinafter "CCP") extinguishes the public prosecution by *res judicata*, but this provision has long been understood to refer only to judgments of French courts, or, in the Schengen context, of other Member States. Decisions of foreign courts concerning acts committed on French territory carry no *res judicata* authority in France. The Criminal Chamber of the Court of Cassation confirmed this in its decision of 23 October 2013, holding that "judgments delivered by foreign criminal courts do not have *res judicata* effect in France with respect to offences committed on French territory."[5] That territorial logic is subject to one important mitigation – the rule, examined in Part IV.C, that a custodial sentence served abroad must be deducted from any sentence subsequently imposed in France. The limitation is textually anchored: both Article 113-9 of the Criminal Code and Article 692 of the CCP are cross-referential provisions tied to the heads of extraterritorial jurisdiction in Articles 113-6 and 113-7, with the consequence that they are, by their very structure, inapplicable where France's own territorial jurisdiction under Article 113-2 is engaged. The underlying justifications offered are twofold: respect for national sovereignty, and scepticism as to the evidential value and procedural propriety of the foreign proceedings. Professor André Huet, however, registers the weight of doctrinal criticism: the solution is said to offend against dignity, justice and humanity – particularly in the commonplace case of an international offence only partially committed on French soil (such as a transnational fraud). That criticism is significant: it is precisely in such cross-border cases – the paradigm case of international judicial cooperation – that the domestic territorial exclusion operates most harshly, denying the very protection that cooperation is intended to secure.

10. The historical record demonstrates that this was not always the law: Article 7 of the former Criminal Investigation Code (Code d'instruction criminelle) (as amended in 1903) admitted a procedural bar against foreigners already tried abroad for acts committed in France; and even today, Article L. 622-2 of the CESEDA carves out an express statutory *ne bis in idem* for the offence of facilitating irregular entry and circulation, extending to facts committed on French

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foreign decision must constitute a jugement properly so called, the classement sans suite of a foreign prosecutor being insufficient; (iv) the foreign court must have been internationally competent, assessed by reference to French rules of international jurisdiction; (v) the proceedings must have respected the rights of the defence and fundamental procedural guarantees; (vi) the decision must be final (définitive), assessed according to foreign law; and, in the case of a conviction, (vii) the sentence must have been served or have become prescribed. Two further procedural points: no exequatur is required to raise the bar, but the court cannot raise it of its own motion – it must be invoked by the accused.

5 K. Mehtiyeva, "Chronique de coopération judiciaire", *Journal du droit international (Clunet)* (2020), at 592: the classical French domestic doctrine holds that foreign criminal decisions lack *autorité de chose jugée* in France as regards facts committed on the territory of the Republic. See Cass. Crim., 23 octobre 2013, n° 13-83.499.

territory. The persistence of these exceptions undermines the contention that the territorial exclusion rests on any principled necessity.

11. A further domestic dimension concerns the interface between French fiscal and criminal law. In nine decisions of 11 September 2019 (lead case n° 18-81.067), the Criminal Chamber deployed for the first time an enriched reasoning (*motivation enrichie*) to explain why parallel fiscal and penal proceedings are compatible with Article 4 of Protocol No. 7.[6] The reservation entered by France upon ratification limits Article 4 to offences falling, under French law, within the jurisdiction of courts adjudicating criminal matters. On that basis the Court held that "the prohibition on double conviction for the same acts, as provided for by Article 4 of Protocol No. 7, applies, pursuant to France's reservation entered in respect of that Protocol, only to offences which, under French law, fall within the jurisdiction of courts adjudicating criminal matters, and does not preclude the imposition of tax penalties alongside the penalties imposed by the criminal court"[7], adding that it falls to the criminal court itself to give full effect to the reservation – "it is for the criminal court to apply Article 4 of Protocol No. 7 by giving full effect to France's reservation entered in respect of that Protocol"[8]. Crucially, the Court left open a question to which Part IV.C returns: whether Article 50 of the Charter – which admits of no equivalent reservation – might apply independently where the parallel sanction touches Union law. The point was not raised by the parties and remains available for future litigation.

12. The limits of the domestic French framework – territorial, institutional and, in the fiscal context, constitutional – become fully apparent when the analysis moves to the supranational instruments that govern cross-border situations. Above the national level, the principle was deliberately excluded from the original ECHR and added only

6 K. Mehtiyeva, « Chronique de coopération judiciaire », JDI (2019), at 584 et seq., noting the Chambre criminelle's « motivation enrichie » technique. The lead judgment is Cass. crim., 11 septembre 2019, n° 18-81.067 (arrêt n° 1175), holding (§ 17): «l'interdiction d'une double condamnation en raison de mêmes faits, prévue par l'article 4 du protocole n° 7 ne trouve à s'appliquer, selon la réserve émise par la France en marge de ce protocole, que pour les infractions relevant en droit français de la compétence des tribunaux statuant en matière pénale et n'interdit pas le prononcé de sanctions fiscales parallèlement aux peines infligées par le juge répressif.» The Court expressly left open the question whether Article 50 of the Charter – which admits of no equivalent reservation – might apply independently.

7 Original French of para. 17 of the judgment : « interdiction d'une double condamnation en raison de mêmes faits, prévue par l'article 4 du protocole n° 7 ne trouve à s'appliquer, selon la réserve émise par la France en marge de ce protocole, que pour les infractions relevant en droit français de la compétence des tribunaux statuant en matière pénale et n'interdit pas le prononcé de sanctions fiscales parallèlement aux peines infligées par le juge répressif ».

8 Original French of para. 20 of the judgment : « il appartient au juge répressif d'appliquer l'article 4 au protocole n° 7 en faisant produire un plein effet à la réserve émise par la France en marge de ce protocole ».

by Article 4 of Protocol No. 7, opened for signature on 22 November 1984. Its scope, however, is confined to the national level – to trial or punishment within one and the same State – while other Council of Europe conventions govern its application across borders. Two such conventions are of particular relevance. The European Convention on Extradition of 13 December 1957 included, in Article 9, not only the classic *res judicata* formulation but also final decisions of a procedural character: "Extradition shall not be granted if a final judgement has been passed by the competent authorities of the requested Party upon the person claimed in respect of the offence or offences for which extradition is requested." That mandatory bar is confined to the requested State's own courts; refusal on the basis of foreign judgments is merely optional. The 1972 Convention on the Transfer of Proceedings goes further: under Article 35, a person against whom a final and enforceable judgment has been rendered may, for the same act, be neither prosecuted nor sentenced nor subjected to enforcement of a sanction in another Contracting State, provided that he was acquitted, or the sanction has been completely enforced, pardoned, amnestied, or has lapsed by time. The reach of that rule is qualified by Articles 36–37: a State need not recognise the *ne bis in idem* effect, where it has itself requested the proceedings, where the act was directed against a person, institution or thing of public status in that State, or where the State on whose territory the act was committed has not itself requested the proceedings. As Vervaele observes, the objective of *ne bis in idem* in these conventions is to avoid double *punishment*, not double *prosecution* or *investigation*[9] – a limitation that EU law would subsequently transcend.[10] (The 1972 Convention's significance is renewed by Regulation 2024/3011, discussed in Part II.E.)

13. The decisive break came through Schengen. Article 54 CISA shifted the principle to the transnational plane by providing that "a person whose trial has been finally disposed of in one Contracting Party may not be prosecuted in another Contracting Party for the same acts provided that, if a penalty has been imposed, it has been enforced, is actually in the process of being enforced or can no longer be enforced under the laws of the sentencing Contracting Party." Integrated into EU law as part of the Schengen *acquis*, this instrument became binding and directly applicable between the Member States. Article 50 of the Charter then elevated the guarantee to a fundamental right, providing that "no one shall be liable to be tried or punished again in criminal proceedings for an offence for which he or she has already been finally acquitted or convicted within the Union in accordance

9 J. A. E. Vervaele, "The Transnational *ne bis in idem* Principle in the EU: Mutual Recognition and Equivalent Protection of Human Rights", *Utrecht Law Review* 1(2) (2005). For the Convention text, see European Convention on the Transfer of Proceedings in Criminal Matters, ETS No. 73, 15 May 1972, Arts 35-37.

10 European Convention on the Transfer of Proceedings in Criminal Matters, 15 May 1972, ETS No. 73, Art. 35 (mandatory bar after final judgment), Arts 36–37 (exceptions).

with the law." The Explanations relating to the Charter of Fundamental Rights confirm the transnational reach: the principle "applies not only within the jurisdiction of one State but also within the jurisdictions of several Member States,"[11] and corresponds to the *acquis* in Articles 54 to 58 CISA. The underlying rationale is, as the Court has repeatedly affirmed, a corollary of *res judicata*: the principle guarantees legal certainty and equity by ensuring that, once prosecuted and where appropriate convicted, the person concerned knows that he will not be prosecuted again for the same offence. In Vervaele's reading, this is what distinguishes EU integration from analogous federal debates: rights and remedies for the *market* citizen are transformed into rights and remedies for the *Union* citizen, with the consequence that national criminal decisions acquire an EU-wide effect within a new European territoriality.

14. As established in §9, ordinary French law denies *res judicata* effect to foreign judgments for acts committed on French territory. France enshrined that same limitation within the Schengen framework by availing itself of Article 55 CISA, making a declaration to maintain its domestic exception for acts committed wholly or in part on French territory, as well as for offences falling within the jurisdiction over State interests (compétence réelle) of French courts under Article 113-10 of the Criminal Code (attacks on the fundamental interests of the Nation). The declaration's practical impact was demonstrated by the Criminal Chamber of the Court of Cassation on 3 December 1998, which upheld a French prosecution for abus de biens sociaux committed in France, notwithstanding a Belgian order finding no grounds for prosecution (non-lieu) for the same acts: Article 54 CISA did not apply because France had reserved the right not to recognise the *ne bis in idem* effect of foreign decisions concerning acts committed on its territory. The declaration thus reproduces, within the Schengen framework, the same territorial exclusion that governs French common law – confirming that France's resistance to a fully transnational *ne bis in idem* is not merely a vestige of the pre-Schengen era but a deliberate and maintained constitutional position.[12]

15. Article 56 CISA supplies the corrective: where a State invokes an Article 55 reservation and proceeds with fresh proceedings notwithstanding a foreign conviction, it is required to deduct from any sanction it imposes any period of deprivation of liberty served in another Contracting State for the same facts. The reservation thus does not permit a State to disregard the foreign judgment altogether; it merely displaces the *ne bis in idem* bar with a less onerous obligation of proportional deduction. This architecture – reservation of the right to

11 Explanations relating to the Charter of Fundamental Rights' (OJ C 303/17, 14.12.2007.

12 France also declared that the exception for offences falling within Art. 113-10 of the French Criminal Code (fundamental interests of the Nation) constitutes a ground for non-application of Art. 54 CISA, consistently with Art. 55(1)(b) CISA.

prosecute, coupled with mandatory deduction of any foreign sentence – precisely mirrors the French domestic deduction rule identified in Part IV.C: in both settings, sovereign prosecutorial authority is preserved while the individual is partially protected against double punishment through deduction. The parallel demonstrates that the domestic deduction rule is not an isolated judicial creation but forms part of a broader, multi-level architecture designed to manage the tension between State sovereignty and individual protection.

16. The map thus produced is uneven by design. The same words – *ne bis in idem* – denote a strictly intra-State guarantee under Protocol No. 7, a transnational guarantee under Article 54 CISA and Article 50 of the Charter, and a requested-State-only ground for refusal under the classic cooperation treaties. Sections B and C demonstrate that this unevenness of *source* is compounded by a prolonged instability in *content*.

B. THE *IDEM*: CONVERGENCE ON A FACTUAL TEST, AND ITS MARGINS

17. The Court of Justice's principal contribution to the *idem* has been to anchor it in fact rather than in legal characterisation. In *Van Esbroeck*, *Van Straaten* and *Kretzinger*, the Court held that the only relevant criterion for the purposes of Article 54 CISA is identity of the *material acts*, understood as a set of facts inextricably linked together, irrespective of their legal classification or the legal interest protected.[13] *Mantello* (Grand Chamber, C-261/09) confirmed and refined this "inextricably linked circumstances" test, defining the "same acts" as "a set of concrete circumstances which are inextricably linked together, irrespective of the legal classification given to them or the legal interest protected," to be assessed in the light of the specific circumstances of each case. The choice of a factual *idem* is not merely technical but protective: it secures a higher standard of protection than a test built on the "same offence," which routinely permits a second prosecution of the same conduct under a different legal label, and it vindicates the twin pillars of legal certainty and equity recognised by every legal order.[14]

13 CJEU, Case C-436/04, Van Esbroeck, para. 36; Case C-150/05, Van Straaten v Netherlands and Italy, paras 48 and 53; Case C-288/05, Kretzinger, para. 29: "the only relevant criterion for the purposes of the application of Article 54 of the CISA is identity of the material acts, understood as the existence of a set of facts which are inextricably linked together, and that criterion applies irrespective of the legal classification given to those acts or the legal interest protected

14 CJEU, Grand Chamber, 16 November 2010, Case C-261/09. The Court confirmed and refined this test, making two contributions that Van Esbroeck had not expressly articulated. First, it held that "the same acts' constitutes "an autonomous concept of EU law" that "cannot be displaced by divergent national definitions" but must be applied uniformly across the Member States – a holding that settled the question of whether domestic criminal-law classifications could override the factual test. Second, it required identity of acts to be assessed "in the light of the specific circumstances of each case," introducing a requirement of individualised assessment that prevents the factual test from being applied mechani-

18. The protective force of the factual test is, however, bounded by an important limit established in Kraaijenbrink[15] : materially distinct facts are not unified into the idem merely because they were committed with a common criminal intent. This limit is of considerable significance in cooperation practice: where a defendant seeks to invoke *ne bis in idem* against a second prosecution covering chronologically distinct or geographically separate acts, a shared underlying purpose does not suffice to establish identity of facts. The idem is anchored in the concrete circumstances of each act, not in the subjective design connecting them.[16]

19. Within those limits, the factual test operates as an autonomous concept of EU law, binding uniformly across all cooperation mechanisms. In the EAW context, the Court aligned Article 3(2) of Framework Decision 2002/584 with Article 54 CISA, reasoning that the two provisions pursue the same objectives – Article 3(2) preventing the requested person's settled situation in the executing State from being disturbed, Article 54 ensuring that a person already judged may move freely without fear of fresh prosecution for the same acts. "The same acts," the Court held, is an autonomous concept of EU law : it cannot be displaced by divergent national definitions but must be applied uniformly across the Member States.

20. Strasbourg converged on the same approach in *Zolotukhin v. Russia* (2009).[17] The applicant, having served three days' detention for a minor administrative offence, was subsequently prosecuted on criminal charges founded on the same conduct. Finding a violation of Ar-

cally or by category. Both clarifications matter in cooperation practice: the autonomy holding prevents strategic forum-shopping through legal re-characterisation, and the case-by-case requirement ensures that broad criminal schemes cannot be treated as a single idem simply by aggregating distinct factual episodes.

15 CJEU, 18 July 2007, C-367/05.

16 CJEU, 18 July 2007, Case C-367/05, Kraaijenbrink, para. 27: materially distinct facts are not unified into the idem merely because they were committed with a common criminal intent.

17 Prior to Zolotukhin, the Strasbourg case law was contradictory: Gradinger v. Austria (1995) upheld the factual approach; Oliveira v. Switzerland (1998) adopted the legal approach; Franz Fischer v. Austria (2001) sought a compromise; and Göktan v. France (2002) reverted to the legal definition. The Grand Chamber resolved the inconsistency in ECtHR, Sergey Zolotukhin v. Russia, Application No. 14939/03, 10 February 2009, paras 80–81, holding that the legal approach was "too restrictive on the rights of the individual" and susceptible of "undermining the guarantee enshrined in Article 4 of Protocol No. 7 rather than rendering it practical and effective as required by the Convention." The Court concluded that "Article 4 of Protocol No. 7 must be understood as prohibiting the prosecution or trial of a second 'offence' in so far as it arises from identical facts or facts which are substantially the same." See also, Bas van Bockel, The Ne Bis in Idem Principle in EU Law (Kluwer Law International 2010), pp. 36–38 (discussing Sergey Zolotukhin v Russia (GC), App no. 14939/03, 10 February 2009): "The Grand Chamber of the ECtHR has brought its reading of Article 4 of Protocol No. 7 ECHR in line with the interpretation given by the Court of Justice to Article 54 CISA on the idem element and has recognized that both Article 4 of the aforementioned Protocol and Article 54 CISA codify the same ne bis in idem principle."

ticle 4 of Protocol No. 7, the Grand Chamber expressly recognised that "the existence of a variety of approaches to ascertaining whether the offence … is indeed the same … engenders legal uncertainty and is incompatible with a fundamental right, namely the right not to be prosecuted twice for the same offence." Abandoning its earlier inconsistency, the Court held the offence-based reading to be "too restrictive on the rights of the individual" and apt to undermine rather than render practical and effective the guarantee, concluding that Article 4 "must be understood as prohibiting the prosecution or trial of a second 'offence' in so far as it arises from identical facts or facts which are substantially the same." The result was a single, shared *idem*: the Grand Chamber brought its reading of Article 4 into line with the Court of Justice's reading of Article 54 CISA, and recognised that both provisions codify the same *ne bis in idem* principle.

21. Convergence at the centre, has not, however, eliminated instability at the margins, where the protected legal interest continues to exert a gravitational pull against the factual test. French practice is instructive. As Hamilton observes, the French formulation makes the essential element of commonality "the real or historical fact"; yet on occasion the French courts have appeared to deny the principle on the basis of differences in legal characterisation when exercising extraterritorial jurisdiction. A 1973 decision on cross-border drug trafficking held that a Canadian conviction for import offences did not bar French prosecution for export offences arising from the same conduct – a formalistic reading that permitted legally distinct labels for identical underlying facts to justify successive prosecutions. The persistence of this margin is significant because it is precisely where the factual test is weakest – atrocity crimes prosecuted under heterogeneous labels across jurisdictions – that the contemporary stakes are highest. That problem is examined in detail through the Lafarge proceedings in Part III.A; here it suffices to register that the convergence on a factual *idem* remains contested at precisely the point where cooperation is most consequential.

C. The *bis*: the contested boundary of "finally judged"

23. If the *idem* asks *what* must be the same, the *bis* asks *when* a matter has been decided with sufficient finality to bar a second set of proceedings. The Court of Justice has answered generously at one end of the spectrum and restrictively at the other. The space between the two answers is where much of the cooperation litigation now resides.

22. The generous end was fixed in *Gözütok and Brügge* (11 February 2003, C-187/01 and C-385/01). Advocate General Ruiz-Jarabo Colomer articulated the foundational premise: Article 54 is "not a procedural rule but a fundamental safeguard, based on legal certainty and equity, for persons who are subject to the exercise of the *ius puniendi* in a common area of Freedom, Security and Justice," and the rule "is an expression of mutual trust of the Member States in their criminal justice systems," penal settlements being "not contractual, but an ex-

pression of criminal justice."[18] He proposed that the principle should apply to discontinuances ordered by a public prosecutor once the defendant has fulfilled certain conditions, provided those conditions are in the nature of a penalty, the agreement presupposes an express or implied acknowledgement of guilt, and it does not prejudice victims who may bring civil actions. The Court went further than these conditions, holding that the principle applies "to procedures whereby further prosecution is barred … by which the Public Prosecutor of a Member State discontinues criminal proceedings … without the involvement of a court, once the accused has fulfilled certain obligations and, in particular, has paid a certain sum of money determined by the Public Prosecutor." The justification was mutual trust: the principle "necessarily implies that Member States have mutual trust in their criminal justice systems and that each of them recognises the criminal law in force in the other Member States even when the outcome would be different if its own national law were applied."

24. The reach of *Gözütok* gives rise to the unresolved question of contractualised justice, to which Part II.D returns in full. As Vervaele anticipated, the open issue is whether "procedural agreements, such as plea bargaining or full or partial immunity deals … fall under the scope of the *ne bis in idem* principle." The French *Convention judiciaire d'intérêt public* (CJIP), validated by judicial order, fits the *Gözütok* template closely: it discontinues proceedings after conditions are met, including payment of a financial penalty, without a finding of guilt, and its effect – extinction of the public prosecution – is comparable to the Dutch *transactie* and German *Einstellung* that *Gözütok* addressed. Subject to the territorial-jurisdiction gate examined in Part III.A, a CJIP validated by a French court may therefore, in principle, trigger the Article 54 CISA bar in other Schengen/EU Member States investigating the same conduct.

25. The restrictive end of the spectrum is the requirement of a decision on the merits. The guarantee does not apply where the first proceedings ended without any examination of criminal liability. In *AB e.a.* (16 December 2021, C-203/20), the Court held that an amnesty-based closure – taken before any assessment of guilt or innocence – does not bar a subsequent EAW once the amnesty is revoked and the closure annulled, because Article 50 of the Charter requires acquittal or conviction "by a final criminal judgment." Substance, not mere form, is required. The same logic governs Interpol's Commission for the Control of Files. In CCF Decision n° 2023-02, the applicant invoked *ne bis in idem* and a foreign refusal of extradition; the CCF, citing Article 14(7) ICCPR – "no one shall be liable to be tried or punished again for an offence for which he has already been finally acquitted or convicted

18 ECJ, 11 February 2003, Joined Cases C-187/01 and C-385/01, Hüseyin Gözütok and Klaus Brügge, [2003] ECR I-1345. The foundational character of mutual trust as the doctrinal justification was developed by Advocate General Ruiz-Jarabo Colomer, Opinion of 19 September 2002, at paras 113-124..

by a final judgment" – applied an exacting standard requiring both identity of facts and "a final decision on guilt or innocence rendered by a court of first instance on the merits".[19] No such judgment existed, since the earlier no grounds for prosecution order had been rendered not on the substance but because the requesting State had failed to respond to a mutual legal assistance request, and the CCF found the principle inapplicable. This reasoning is doctrinally confused: it conflates the question of applicability with that of satisfaction, suggesting that the principle was within *scope* but could not *operate* for want of a merits judgment – a subtly but importantly different conclusion from a finding of inapplicability.[20]

26. The position is clearest at the acquittal end of the spectrum. Where the foreign decision is an acquittal or a discharge, the *ne bis in idem* bar operates without any additional condition: the motive of the acquittal is irrelevant – whether absence of proof, prior amnesty, prescription of the offence, absence of incrimination under foreign law, or any other ground. Moreover, the French judge possesses no power of revision: the bar cannot be displaced on the grounds that the foreign decision appears ill-founded, whether factually or legally. Once finality and identity of facts are established, the bar is absolute. This confirms the coherence of the certainty threshold (Part IV.B): where a final acquittal exists, certainty is established ipso facto, and no review of the foreign merits is admissible.

27. Whether a decision reaches the finality threshold that triggers this absolute bar is itself governed by a uniform rule. In Turansky (CJEU, 22 December 2008, C-491/07), the Court confirmed that the charac-

19 K. Mehtiyeva, Chronique de coopération judiciaire, *JDI* (2024): CCF Decision n° 2023-02, citing ICCPR Art. 14(7): *ne bis in idem* requires «une décision définitive sur la culpabilité ou l'innocence prise par un juge du fond.» The earlier no ground for prosecution had been rendered not on the merits but because the requesting State had failed to respond to a mutual legal assistance request – a procedural closure, not a substantive acquittal. Huet surveys the doctrinal debate on whether Article 14(7) ICCPR has transnational scope, and concludes with the position adopted by the Human Rights Committee: the provision is confined to double prosecutions within a single State, and does not impose any obligation upon States Parties to give effect to acquittals or convictions handed down in a foreign jurisdiction. The Committee confirmed this reading in A.P. v. Italy.

The CCF's reasoning is doctrinally confused: *ne bis in idem* was applicable in principle (i.e. within scope) but there was no violation, since no merits judgment existed. Citing C-505/19 and C-435/22 PPU

20 K. Mehtiyeva, Chronique, (2024): CCF Decision n° 2023-02: refusal grounds "vary and are not always verifiable/communicated; refusal based on the requested State's limitation rules does not 'directly' affect the purpose of the notice because arrest/extradition may still occur elsewhere; remedy is an update/addendum to the notice (not deletion)." Quoted text of Interpol GA Resolution AGN/53/RES/7 (1984), §9: «le refus d'un ou plusieurs pays … ne signifie pas que la demande est sans objet … [mais] les refus d'extradition sont signalés … par voie d'additif."

CCF Decision n° 2023-07 confirms the same approach: the Commission rejected; the request for deletion of the notice and ordered that the extradition refusal be recorded as an addendum under Resolution AGN/53/RES/7.

ter of a decision as "final" for the purposes of Article 54 CISA must be assessed according to the law of the Member State that delivered it: a decision that does not definitively extinguish the public prosecution under the law of the State that rendered it does not trigger the transnational bar, however formally conclusive it may appear to the courts of another Contracting Party. The principle is identical to Huet's position in French common law: finality is a question of the lex fori of origin. The consistency between the CJEU's approach and Huet's domestic analysis confirms that, on this point at least, the transnational and domestic standards have converged around a single underlying criterion.[21]

28. Taken together, the two ends mark out a demanding but coherent threshold: a decision counts as *bis* only if it reflects an actual determination of criminal liability, whether reached by a court or by a prosecutorial disposal of penal character. That threshold – which Part IV.B reformulates as the "certainty" requirement – is the doctrinal hinge on which the cooperation mechanisms in Part II turn.

II. *Ne Bis in Idem* Across the Channels of Cooperation

29. Part I established that the principle is fragmented in source and content. This Part demonstrates that it is fragmented also in *operation*: the same guarantee operates with very different force depending on the cooperation mechanism through which a competing claim is pressed. The mechanisms are presented here along a spectrum of protective strength. The guarantee is at its most robust in the judicial, mandatory regime of the EAW (Section A); it has been extended outward, by recent jurisprudence, to extradition to third States (Section B); it weakens to a mere "indicium" at the administrative periphery of Interpol (Section C); it is substantially undermined in the transnational circulation of negotiated settlements (Section D); and it is increasingly displaced, prospectively, by the preventive logic of transfer of proceedings (Section E). The spectrum is itself an argument: it demonstrates that the strength of the guarantee tracks the degree to which a mechanism is judicial, mandatory and embedded in the Union's mutual-recognition framework.

A. The judicial core: the EAW and the mandatory refusal ground

30. In the EAW framework the principle finds its most robust operational expression. Under Article 3(2) of Framework Decision 2002/584, the executing authority *shall* refuse execution "if the executing judicial authority is informed that the requested person has been finally judged by a Member State in respect of the same acts, provided that, where there has been sentence, the sentence has been served or is accurately being served or may no longer be executed under the law of the sentencing Member State". The principal virtue of the regime, as Vervaele observes, is that by

21 ECJ, 22 December 2008, Case C-491/07, Turansky.

recognising *res judicata* as a bar to surrender, it places final judgments and out-of-court settlements from all Member States on a par with those of the requested State: once a final judgment has been rendered in one Member State, all others are bound by it, and the obligation of refusal is absolute.

31. Mutual recognition of this kind presupposes mutual trust, which in turn presupposes that the issuing authority is a genuine judicial body. The Court has required that the issuing judicial authority be capable of providing, within the EAW procedure, effective review satisfying the requirements of effective judicial protection. French courts have on this basis confirmed that French prosecutors qualify as judicial authorities for EAW purposes, given the absence of individual executive instructions and the availability of judicial remedies, including challenges under Article 170 of the CCP.

32. That the EAW's refusal grounds are rooted in fundamental rights, rather than in formal categories, is confirmed by their capacity to expand. In *E.D.L.* (Grand Chamber, 18 April 2023, C-699/21), the Court held that where a requested person produces medical evidence of serious psychiatric disorder and a high risk of suicide, the executing authority may, after consulting the issuing authority, refuse execution if the risk to life or health cannot be excluded within a reasonable time. This health-based ground finds no express basis in the Framework Decision but is derived from Article 1(3) FD 2002/584 read with Article 4 of the Charter. It is instructive because it is closely analogous to *ne bis in idem*: like the latter, it bars surrender on grounds rooted in the individual's fundamental rights, and it requires the application of the same methodology of proportionality and prior consultation before refusal may be permitted. The EAW thus models the form that a mature, rights-based refusal ground assumes – a benchmark against which the weaker regimes that follow may be measured.

B. Extending the guarantee outward: extradition to third States

33. The benchmark set by the EAW raises an evident question: does the transnational guarantee survive when the second proceeding is sought not by a Member State but by a third State? The most significant recent development answers in the affirmative, and in doing so extends the principle beyond the Union's internal mutual-recognition space.

34. The pivotal development is the Grand Chamber's judgment in *HF* (*Generalstaatsanwaltschaft München v. HF*, C-435/22 PPU, 28 October 2022). The reference from the *Oberlandesgericht München* arose from a United States extradition request to Germany concerning a third-country national, for the prosecution of acts for which he had already been finally convicted in another Member State and had fully served his sentence. HF, a Serbian national, had been placed in provisional detention in Munich on 20 January 2022 on the basis of an Interpol red notice issued at the request of US authorities, who sought his extradition for offences allegedly committed between Sep-

tember 2008 and December 2013, pursuant to an arrest warrant of 4 December 2018 of the US District Court for the District of Columbia for conspiracy to participate in corrupt organisations and conspiracy to commit bank and wire fraud.[22]

35. By judgment of the *Okrožno sodišče v Mariboru* of 6 July 2012, final on 19 October 2012, HF had been sentenced to one year and three months' imprisonment for an offence committed between December 2009 and June 2010, commuted to 480 hours of community service and fully served by 25 June 2015. The Slovenian courts had, by decision of 23 September 2020 confirmed on 8 October 2020, already rejected a prior US extradition request on the ground that the facts prior to July 2010 had been definitively judged at Maribor. The question referred was whether Article 54 CISA, read with Article 50 of the Charter, precludes a Contracting Party that is also a Member State from extraditing a third-country national to a third State where the person has already been definitively judged for the same facts by another Member State and the judgment has been executed – even where refusal would breach an existing bilateral extradition treaty.

36. Advocate General Collins, in his Opinion of 13 October 2022, reasoned that the solution of the *Interpol Red Notice* judgment was fully transposable: if a provisional arrest, whose very object is to prepare an extradition, already falls within the notion of "prosecution" under Article 54 CISA, then *a fortiori* a decision on an extradition request does so too.[23] The Court confirmed this, affirming the

22 By judgment of the Okrožno sodišče v Mariboru (Regional Court of Maribor, Slovenia) of 6 July 2012, having acquired the force of res judicata on 19 October 2012, HF was convicted of "attack on an information system" and sentenced to one year and three months' imprisonment (commuted to 480 hours of community service), fully served by 25 June 2015. The Slovenian courts had previously refused a US extradition request on the ground that the relevant facts (prior to July 2010) had already been definitively judged.

Key holding (Chronique 2023, quoting the judgment): « la notion de 'poursuite', au sens de l'article 54 de la CAAS, couvre une demande d'extradition. »

On personal scope: "Article 54 CISA refers to any 'person' definitively judged by a Contracting State, without limiting this to nationals of a Member State or Contracting State. Similarly, Article 50 of the Charter, using the indefinite pronoun 'no one' ('nul'), establishes no link with Union citizenship, and is found … under Chapter VI ('Justice')."

Normative primacy: ne bis in idem "prime … sur d'autres obligations internationals" (including a bilateral extradition treaty) and differing treatment of Member State judgments would undermine the AFSJ and the principles of mutual trust and mutual recognition

23 AG Collins, Opinion in Case C-435/22 PPU (13 October 2022), ECLI:EU:C:2022:775: "if a provisional arrest, whose very object is to prepare an extradition, already falls within the notion of 'prosecution' under Article 54 CISA, then a fortiori a decision on an extradition request does so too." The Advocate General concluded that Article 54 CISA protects any person benefiting from the right to free movement within the Schengen area, whether or not that person holds the status of Union citizen.

The a fortiori reasoning is found in the Ruling of the ECJ 12 May 2021, C-505/19. Indeed, the Court already treated a provisional arrest on the basis of a red notice as constituting a 'poursuite pénale' for Article 54 CAAS purposes"; the HF judgprinciple's character as a fundamental principle of Union law, and holding that the notion of prosecution, within the meaning of Article 54 CISA, covers an extradition request, again reasoning *a fortiori* from the *Interpol Red Notice* judgment. On personal scope, the Advocate General observed that Article 54 CISA protects any "person" definitively judged by a Contracting State, without limitation to nationals, and that Article 50 of the Charter, using the indefinite "no one" and located under Chapter VI ("Justice") rather than Chapter V ("Citizenship"), establishes no link with Union citizenship. Third-country nationals may, under certain conditions – a valid residence permit, or exemption from the visa requirement, as in HF's case – also move freely within the Schengen area; and although their freedom of movement is not equivalent to that of Union citizens, equity and civil peace likewise require that, once definitively judged in a Contracting State, they may exercise that freedom without fearing fresh prosecution for the same facts in another Contracting State. The Advocate General added the systemic justification: Article 54 CISA does not serve free movement alone but also, in the area of freedom, security and justice and in the absence of harmonised criminal law, guarantees legal certainty through respect for final decisions of public bodies, resting on mutual trust and mutual recognition of criminal judgments. The conclusion followed: extraditing HF to the United States for facts identical to those finally judged in Slovenia, and whose sentence had been served, would violate Article 54 CISA read with Article 50 of the Charter.

37. The decisive contribution of *HF* lies in how it disposed of the conflicting treaty obligation, and it is here that the narrowness of the classic treaty regime – already identified in Part I.A – becomes operative. Article 8 of the Germany–USA Extradition Treaty provides that "extradition shall not be granted if the person sought has already been finally acquitted or convicted by the competent authorities of the requested State for the offence in respect of which extradition is requested". Confined to judgments of the *requested* State's own authorities (Germany), this clause plainly could not reach HF's Slovenian conviction; the treaty's *ne bis in idem* ground was therefore narrower than the EU guarantee. The Advocate General confronted the incompatibility directly: although the EU-USA Agreement does not expressly authorise refusal on *ne bis in idem* grounds, Member States retaining competence to conclude bilateral agreements "must exercise that competence in compliance with EU law and in particular the fundamental rights guaranteed by the Charter, including the *ne bis in idem* principle under Article 50, and therefore cannot subscribe to obligations incompatible with those resulting from EU law." He identified a route through the conflict in Article 17(2) of the EU-USA Agreement, under which "if the constitutional principles of the requested State or final and binding judicial decisions are of such a nature as to

ment extends this reasoning to formal extradition requests preclude the fulfilment of its obligation to extradite … the requested State and the requesting State shall consult with each other." Among such "constitutional principles," he reasoned, one may count the primacy of EU law and the protection of fundamental rights; and if consultations did not yield withdrawal or limitation of the request, the requested Member State would have no alternative but to give EU law primacy over the bilateral treaty.

38. Nor could the treaty's anteriority preserve it. Signed on 20 June 1978 and in force from 29 August 1980, the Germany–USA Treaty post-dated 1 January 1958, with the consequence that on a strict reading Article 351(1) TFEU would not apply. The Advocate General nonetheless accepted, with the referring court, the German government and the Commission, a broad interpretation of Article 351(1) covering by analogy conventions concluded after 1 January 1958 but before the Union acquired competence in the field – police and judicial cooperation in criminal matters dating only from the entry into force of the Amsterdam Treaty on 1 May 1999, which postdated the bilateral instrument. Even so, the concession did not rescue the obligation: as the Court had held in Kadi, Article 307 EC (now Article 351 TFEU) can in no case permit the undermining of principles forming part of the very foundations of the EU legal order, among them the protection of fundamental rights; Germany could not therefore justify a violation of Article 50 by its treaty obligations. The corresponding duty is clear: Article 351(2) TFEU obliges Member States to use all appropriate means to eliminate such incompatibilities – treaty-consistent interpretation, consultation under Article 17(2), and if necessary denunciation. The Advocate General's proposed formulation captured the holding: Article 54 CISA read with Article 50 of the Charter " must be interpreted as meaning that those provisions preclude the extradition of a person, whether or not that person holds Union citizenship … to a third State, where that person has already been finally convicted in another Member State for the same acts … and that judgment has been executed, even where refusal of extradition would only be possible at the cost of violating an existing bilateral extradition treaty with that third State". The judgment may be read as a precursor to recognising, on a mutual-recognition basis, Member State decisions refusing extradition to third States, and underscores its "structural" significance: to deny effect to another Member State's judgment would undermine the foundation of the area of freedom, security and justice and the principles of mutual trust and mutual recognition, defeating "legal certainty and equity […] thereby ensuring civil peace".

39. *HF* protects against the conflict; it does not abolish it. The asymmetry it leaves was exposed by the reference from the Marseille Judicial Court (C-763/22, 20 March 2025). France had issued an EAW for a French national in Spain, but the Spanish Council of Ministers – whose decision was not subject to judicial review under Spanish law – granted priority to a competing Swiss extradition request. The

Court was asked whether that governmental decision qualified as one of an "authority competent to decide" within Article 6(3) of Framework Decision 2002/584, and how the EAW and extradition regimes should be articulated when they conflict. The case lays bare the core asymmetry of the contemporary system: the EAW is judicial, mandatory and legally constrained, whereas extradition to third States remains executive, discretionary and only loosely subject to fundamental-rights review. The consequence is that a political decision to prioritise extradition can, in practice, nullify both the *ne bis in idem* protection and the EAW simultaneously – precisely the outcome that *HF* sought to prevent.

40. The French courts, for their part, treat extradition as a substantive human-rights exercise rather than a merely procedural one, reinforcing the protective trend from the national side. In Court of Cassation (Criminal Chamber), 30 January 2024 (n° 23-83.549), concerning a Tunisian request for premeditated homicide, the Court required the indictment chamber (chambre de l'instruction) to obtain an unambiguous assurance that the death penalty would not be applied to the *specific individual concerned*; a general reference to a thirty-year moratorium and to symbolic international commitments was held insufficient – an exacting standard in the *Soering* line. Similarly, in Court of Cassation (Criminal Chamber), 13 January 2021 (n° 20-81.359), the Court held that where a person enjoys subsidiary protection, extradition is barred for as long as that protection subsists, the risk of inhuman or degrading treatment being presumed – a near-irrebuttable presumption under Article 3 ECHR read with Article 696-15 of the CCP.

C. The administrative periphery: Interpol and the CCF

41. Moving outward from the judicial core, the protective force of the principle diminishes markedly once the relevant institution is administrative rather than judicial. Interpol's Commission for the Control of Files (CCF) is the most instructive instance. The CCF exercises functions analogous to judicial review over Interpol's data-processing decisions, including challenges to red, blue, green and yellow notices. Constituted in 1982, with independence and quasi-judicial character consolidated by the 2016 Statute and having published its decisions since 2017–2018, it has for the first time generated a genuine jurisprudence on the lawfulness of Interpol's cooperation tools. Its jurisdiction is nonetheless limited to compliance with Interpol's internal regulations – its Constitution, the Rules on the Processing of Data (RPD) and General Assembly resolutions. It is not an international court, and its decisions are not subject to appeal before any external body.[24]

24 K. Mehtiyeva, "Chronique de coopération judiciaire", *JDI* (2019) (noting that publication of CCF decisions promotes rigour and enables scholarly criticism, without which CCF decisions would lack any avenue of external review); ibid., JDI (2023) (the CCF was established simultaneously with the revised headquarters agreement granting Interpol immunity under the International

42. The consequences of that architecture were exposed in *El Omari v. INTERPOL* (US Court of Appeals, 2nd Circuit, 24 May 2022). A US citizen briefly detained at customs on the basis of a UAE-requested red notice sought to bring Interpol before a US court after the CCF rejected his challenge; the court confirmed Interpol's immunity under the International Organization Immunities Act. The CCF had been established simultaneously with the revised headquarters agreement granting that immunity, as a necessary alternative remedy – yet its decisions are final and not subject to appeal. The immunity-for-accountability trade-off thus produces a structural access-to-justice gap, in which the ECtHR or the UN Human Rights Committee may serve only as ultimate and indirect remedies for violations occurring in the underlying national proceedings, subject to exhaustion of domestic remedies in the State that published the notice or effected the arrest.

43. Within these confines, the CCF has nonetheless constructed a coherent practice that bears directly on *ne bis in idem*, beginning with purpose-control. In CCF Decision No. 1 (published 2 March 2017), the Commission held a notice "premature" where the investigation had not sufficiently advanced and the requesting State intended to use mutual legal assistance or transfer-of-proceedings instruments rather than to seek extradition.[25] The key passage provides that "the purpose of a Red Notice is not to obtain the transfer of a person in order to assist in an investigation or give evidence … [but] to facilitate the seeking of a person's extradition." A State may not, in other words, employ the Interpol system as a substitute for an international letters rogatory. CCF Decision No. 8 (109th session, July 2019) refined the corollary obligation to pursue extradition, characterising it as a "best-efforts" obligation (*obligation de moyens*) rather than a guarantee of result: temporary inaction may be justified by reasonable grounds, provided the requesting bureau "takes appropriate steps …*i.e.* to seek the arrest in view of extradition."

44. The CCF's most delicate task, however, is to determine what weight to accord national decisions – acquittals, no grounds for prosecution orders, or refusals of extradition – without itself adjudicating *ne bis in idem*. The Commission's approach is to treat such decisions as evidential indicia rather than as binding determinations. In CCF De-

Organization Immunities Act, as confirmed in El Omari v. INTERPOL, US Court of Appeals, 2nd Circuit, 24 May 2022; Statute Art. 36). The absence of any external appellate body has been questioned in Council of Europe reflections on the adequacy of remedies available against Interpol data-processing decisions.

25 CCF, Decision No. 1 (published 2 March 2017). The CCF held the red notice premature because the investigation had not advanced to the charging/extradition stage, and noted that the requesting State was seeking to use the red notice for mutual legal assistance rather than extradition. Key passage: "The purpose of a Red Notice is not to obtain the transfer of a person in order to assist in an investigation or give evidence … [but] to facilitate the seeking of a person's extradition." (RPD, Art. 82, as interpreted by the Commission.)

cision No. 6 (108th session, April 2019), while acknowledging that *ne bis in idem* is ultimately a matter for national courts, the Commission treated multiple national decisions refusing cooperation and/or acquitting the applicant as raising serious concerns about the coherence and evidentiary basis of the accusations, justifying annulment of the notice; those decisions operated as a "bundle of indicia" – not full probative force, but indicators of sufficient weight, on grounds of Interpol's neutrality and reputation, to warrant withdrawal.[26] This is the only tool the CCF's framework affords for giving practical weight to *ne bis in idem* without formally applying it. The same logic governs the effect of extradition refusals: in CCF Decisions n° 2023-02 and n° 2023-07, the Commission held that a refusal of extradition does not invalidate a notice as such – the person may still be located and arrested in other member countries not subject to the same constraints – and ordered only that the notice be updated to reflect the refusal. The governing instrument is Resolution AGN/53/RES/7: a refusal does not signify that the request is without merit but must be mentioned as an addition to the notice until the extradition is enforced.

45. Two further decisions illustrate the CCF managing the very complexity of the EU-law standard by circumventing it. In CCF Decision 2025-01, a parental-custody dispute with contradictory national decisions was resolved by finding the red notice incompatible with Article 83(1)(a)(i) RPD – which prohibits publication for family-matter offences – and accordingly declining to rule on the subsidiary *ne bis in idem* argument.[27] This "hierarchisation" technique – disposing of a notice on a broader ground to avoid engaging a more complex one – constitutes a deliberate choice that may reflect the Commission's reluctance to engage the EU-law-derived standard, with its requirements of factual identity, final judgment on the merits and the "certainty" threshold, which the CCF's administrative framework does not easily accommodate. Conversely, CCF Decision 2025-3 demonstrates the Commission's willingness to act on its own motion: a green

26 Mehtiyeva, *Chronique de cooperation judiciaire internationale* (2020); CCF, Decision No. 6 (108th session, 15–19 April 2019), as commented: the applicant invoked *ne bis in idem* (ICCPR Art. 14(7) and Protocol No. 7, Art. 4) and the CCF annulled the notice. Key reasoning (paras 39-41): "39. Three INTERPOL member countries have successively declined to cooperate on this case, due to issues linked to the evidentiary basis and the coherence of the accusations … 40. … the determination of the applicability of the *ne bis in idem* principle must be left to the national competent courts … 41. However [the Commission] found … that the multiple … national decisions declining to cooperate … raise serious concerns as to the overall coherence of the charges … hindering the possibility of actual international police cooperation."

27 Mehtiyeva, La *Chronique de coopération judiciaire internationale,* Journal du Droit international (Clunet), 2025: CCF Decision 2025-01. Key rule: "Article 83(1)(a)(i) of the RPD expressly prohibits the publication of Red Notices for offences relating to family matters." The CCF found the red notice non-compliant on this ground and accordingly declined to examine the subsidiary ne bis in idem argument.

notice was invalidated on a ground raised *ex officio* – non-compliance with Article 11 RPD on the lawfulness of data retention under national law. This power of own-motion legality and proportionality review is doctrinally significant, for it suggests that the CCF can and should review the broader lawfulness of the data processing underpinning a notice, including its conformity with the fundamental rights of the person concerned, even where the applicant has not articulated those grounds. Across all of these decisions, however, the conclusion is the same: at the administrative periphery the principle operates at most as an indicium, never as a mandatory bar.[28]

D. The contractual blind spot: DPAs, CJIPs, and the absence of transnational *ne bis in idem*

46. If Interpol dilutes the guarantee, the transnational circulation of negotiated settlements substantially undermines it – at least outside the Union. The worldwide rise of negotiated justice (US and UK deferred prosecution agreements (DPAs), French CJIPs) directly raises the question, anticipated in Part I.C, of whether agreements designed to avoid multiple prosecutions circulate across borders.

47. The leading authority is Court of Cassation (Criminal Chamber), 1 April 2020 (*Nigeria LNG*, n° 19-83.969). A defendant had been convicted in the United States after a plea agreement (21 months' imprisonment and a $50 million fine, both fully served and paid). The Paris Criminal Court had initially pronounced the extinction of the public prosecution on *ne bis in idem* grounds in 2014. The Court of cassation quashed that ruling in 2018, recalling that Article 692 of the CCP restricts transnational *ne bis in idem* to acts committed *outside* French territory. In 2020 it confirmed the rejection of the defence and added a further holding of constitutional significance: subjecting French prosecutions to a necessity/proportionality review weighing them against an earlier foreign disposal "se heurte à la souveraineté de l'État français et au principe d'opportunité des poursuites." The same logic had governed the "Pétrole contre nourriture" case (*Cass. crim.*, 14 March 2018): so long as a constitutive element of the charged offence, however minor, occurred on French territory, France asserts territorial jurisdiction, and foreign disposals –including fully executed US plea agreements – cannot extinguish the *action publique*.[29]

28 *Ibid*, CCF Decision 2025-3. Green Notices serve to warn about persons with criminal activities or who constitute a threat to public safety (RPD Art. 89). The CCF assessed proportionality under Art. 12 RPD and found it satisfied given the NCB's history of multiple convictions and detentions. However, notwithstanding that proportionality was satisfied, the CCF ordered the NCB to confirm, within one month, that data retention was authorised under national law (Art. 11 RPD); failure to do so would lead to invalidation and deletion. This demonstrates the CCF's willingness to act *ex officio* on grounds not raised by the applicant.

29 K. Mehtiyeva, Chronique (2020), commenting on Cass. crim., 1 avril 2020, n° 19-83.969 (Nigeria LNG): the Court held that Article 692 CCP restricts transnational ne bis in idem to acts committed outside French territory, and that subjecting

48. Under French common law, a foreign conviction triggers *ne bis in idem* only if the sentence has been wholly served or has become prescribed. That condition, Huet observes, is theoretically criticisable: the *res judicata* effect of the judgment arises upon its finality, not upon execution of the sentence. The additional requirement of execution is a matter of criminal policy (preventing impunity for fugitives) rather than of doctrinal necessity. The condition is applied strictly: an escape from custody interrupts the running of the sentence, with the consequence that *ne bis in idem* cannot be raised by a person who fled before completing service of the sentence abroad. Huet suggests, however, that French prosecution should be barred where the foreign sentence is currently being served or its execution has merely been suspended (for example through a suspended sentence or conditional release), on the ground that permitting simultaneous prosecution would neutralise the foreign *res judicata* and subject the individual to a double jeopardy in the most literal sense. This suggestion aligns with Article 54 CISA's formula that the sentence must be "actually in the process of being enforced" – a standard more protective than French common law as applied.

49. This position stands in marked contrast to the EU's proportionality-based jurisprudence in the EAW and extradition contexts, where proportionality has become a live constraint. In the French domestic setting the prosecutor retains full prosecutorial discretion (*opportunité des poursuites*), and no judicial mechanism permits a defendant to compel the prosecutor to take account of a prior foreign disposal. The result is a genuine blind spot: between fully judicial EU instruments and the contractual disposals that now resolve most transnational corporate cases, *ne bis in idem* provides no automatic transnational protection whatsoever.

50. Where the law supplies no guarantee, prosecutorial coordination provides a practical, if voluntary, substitute. The Airbus tripartite resolution is the leading example. Facing parallel investigations in France, the United Kingdom and the United States, Airbus coordinated three separate disposals – a French CJIP, a UK DPA and a US DPA – with mutual accounting of penalties across the three. Its legal foundation was not *ne bis in idem*, which offers no automatic transnational guarantee outside the EU, but rather the OECD Anti-Bribery Convention's non-mandatory consultation mechanism (Article 4(3)) and the coordinating role of the French National Financial Prosecutor's Office (PNF).[30] The

French prosecutions to a necessity/proportionality review weighing them against an earlier foreign disposal "se heurterait à la souveraineté de l'État français et au principe d'opportunité des poursuites."

30 CJIP concluded on 29 January 2020 between the Procureur de la République financier and Airbus SE, validated by order of the President of the tribunal judiciaire de Paris on 31 January 2020 (ord. n° 20/2020), imposing an amende d'intérêt public of €2,083,137,455. Concurrently, Airbus concluded a DPA with the SFO (approved by the Crown Court at Southwark on 31 January 2020, €983,974,311) and a DPA with the US

PNF's June 2020 circular reinforces its role in cross-border corruption cases and promotes joint investigation teams enabling shared evidence and coordinated charging. A joint investigation team was constituted between the PNF and the UK Serious Fraud Office in early 2017, following preliminary investigation opened by the PNF on 20 July 2016 and entrusted to the OCLCIFF. All communications between the British and American authorities passed through the PNF, in compliance with the French blocking statute. The JIT agreement allocated investigative priorities between the two authorities on a country-by-country basis. Although this article's focus is the negative authority rather than the enforceability (force exécutoire) set aside in Part I.A, the two categories converge at one point that merits notice here. The converse situation – where France is asked to execute a foreign criminal sanction rather than to prosecute – reveals a further dimension of *ne bis in idem* as an operational refusal ground in French law. French common law does not, in principle, permit foreign criminal judgments to be enforced on French territory: there is no general exequatur procedure for penal decisions, and the courts have consistently held that foreign criminal judgments cannot be executed in France. Where EU instruments do require France to execute a foreign sanction – most notably under the Framework Decision 2005/214/JHA on financial penalties, transposed as Articles 707-1 et seq. CCP – *ne bis in idem* appears as one of the mandatory grounds for refusing execution: France must refuse if the person has already been finally judged for the same acts and, in case of conviction, the sentence has been served, is in the process of being enforced, or can no longer be enforced under the law of the State of conviction. The same applies to confiscation orders under the Law of 9 July 2010 (Arts 713-36 et seq. CCP): execution must be refused where enforcement would violate *ne bis in idem*, or where the rights of the defence or fundamental liberties have been disregarded. The corollary is significant: the moment France accepts to execute a foreign penal sanction – whether through transfer of sentenced persons (Art. 728-9 CCP), recognition of financial penalties, or enforcement of confiscation orders – it simultaneously assumes a *ne bis in idem* obligation to refrain from fresh prosecution for the same facts. Execution and the bar on double jeopardy are, accordingly, two sides of the same coin.[31]

DOJ before the US District Court for the District of Columbia (€525,655,000), together with a consent agreement with the Department of State under the ITAR. On the coordination, see PNF, Communiqué de presse, 31 January 2020. The agreement produced an allocation of investigative priorities by country between the PNF and the SFO (the PNF took the UAE, China, South Korea, Nepal, India, Taiwan, Russia, Saudi Arabia, Vietnam, Japan, Turkey, Mexico, Thailand, Brazil, Kuwait and Colombia; the SFO took South Korea, Indonesia, Sri Lanka, Malaysia, Taiwan, Ghana and Mexico), a division significant in the light of the non bis in idem principle. The French authorities received roughly 58% of the total penalty.

31 As Huet (Fasc. 404-10) explains, conventions providing for the execution of foreign sentences in another State necessarily imply a derogatory regime of

51. A further procedural asymmetry compounds the contractual blind spot lacuna. Under French common law, the *ne bis in idem* bar derived from a foreign judgment is not a matter of public policy: the court cannot raise it of its own motion, and it must be invoked by the defendant. The timing of that invocation is flexible – the defendant may raise the exception at any stage of the proceedings, including after the commencement of the trial, provided the foreign decision has become final before the French proceedings are concluded. In the CJIP context, this creates a strategic asymmetry: a company that has concluded a US DPA covering the same facts as a pending French CJIP negotiation must itself raise the *ne bis in idem* argument before the homologation judge; the prosecutor will not do so, and the validating judge – whose review is limited to the proportionality of the penalty and compliance with procedural formalities – possesses no authority to raise it of its own motion.

E. The preventive turn: transfer of proceedings (Regulation 2024/3011)

52. The mechanisms examined thus far all operate *ex post*, once parallel proceedings have crystallised or a sentence has been rendered abroad. Regulation 2024/3011 on the transfer of criminal proceedings introduces a different logic – *preventive* rather than reactive – by concentrating prosecution in the most appropriate jurisdiction *before* the double-jeopardy problem can arise. Its normative ancestor is the 1972 Council of Europe Convention discussed in Part I.A, whose Part V (Articles 35–37) already contained a mandatory *ne bis in idem* rule: once a final and enforceable judgment has been rendered in the receiving State, the person may neither be prosecuted, sentenced nor subjected to enforcement for the same act in another Contracting State.[32]

53. The 2024 Regulation builds on that logic with a modern cooperation infrastructure – direct inter-authority contact, procedural time limits and digital communication tools – designed to reduce the window of parallel-prosecution risk. Where proceedings are transferred and the receiving State completes prosecution with a final judgment, the

autorité négative: a State that accepts to enforce a foreign conviction “doit s’interdire des poursuites pour les mêmes faits,” a logic now expressed in Art. 728-9 CPP (transfer of sentenced persons). See also Huet, Fasc. 404-20, *op. cit.,* spec.on mandatory grounds for refusal of enforcement of financial penalties and confiscation orders under EU instruments, including *ne bis in idem*.

32 Regulation (EU) 2024/3011 of the European Parliament and of the Council of 27 November 2024 on the transfer of proceedings in criminal matters (OJ L, 2024/3011, 19 December 2024); Council of Europe Convention on the Transfer of Proceedings in Criminal Matters, ETS No. 73, 15 May 1972. *Mehtiyeva, Chronique (2024): the EPPO Regulation is discussed as the most recent expression of the preventive rather than reactive logic in cross-border criminal proceedings. On the broader doctrinal significance of the Regulation for the European area of criminal justice, see* P. Beauvais, « Le règlement relatif au transfert de procédures pénales », *RTD eur.* 2024.659. See also, Gaurier, « Le règlement sur le transfert des procédures pénales », *Arch. Pol. Crim.* 2024.223.

sending State's proceedings are suspended and ultimately extinguished, and any European Arrest Warrant it might have issued becomes redundant – with the consequence that the double-jeopardy problem is pre-empted rather than resolved after the fact. As Beauvais argues, the Regulation constitutes a genuinely new system for resolving conflicts of jurisdiction in criminal matters within the European area, and, as Gaurier observes, it advances a criminal policy conceived beyond national frontiers. This preventive function is, however, unavailable in the extradition-to-third-States context of Section B, which renders the gap between intra-EU and extra-EU cooperation all the more pronounced.

54. What permits all of the mechanisms examined in this Part to be compared is a single operational test, established in the Interpol Red Notice judgment (C-505/19) and developed across the subsequent case law: the "certainty" threshold. Provisional arrest may proceed so long as "it has not been established that the *ne bis in idem* principle applies" (para. 90). This requirement – that an established, final judicial decision exists before the bar can operate – recurs as the common variable across every mechanism examined in this Part. Part IV.B. takes it up again and develops it as the organising concept of the whole field.

III. Stress Tests and Frontiers

55. The spectrum of Part II describes the principle as it operates across settled mechanisms. This Part turns to two frontiers on which the principle is placed under particular stress and where its future contours will likely be determined: corporate liability for atrocity crimes, where the factual *idem* is tested at its weakest margin (Section A); and the investigative phase, where the analogues of *ne bis in idem* are only beginning to be articulated (Section B).

A. Corporate liability and atrocity crimes: the Lafarge proceedings

56. The Lafarge proceedings constitute the definitive stress test for transnational *ne bis in idem* in the setting of corporate involvement in international crimes, drawing together the territorial-jurisdiction gate, the contractual-disposal question and the unstable factual *idem* identified in Parts I and II. In parallel proceedings in Paris and New York, the French corporation Lafarge SA faced allegations arising from its dealings with the terrorist groups ISIL and ANF during its cement operations amid the Syrian civil war. In France, Lafarge and several executives are under investigation for charges including financing of a terrorist enterprise, complicity in crimes against humanity and endangering the lives of others. In the United States, under a criminal plea deal with the Department of Justice on 18 October 2022, Lafarge and its Syrian subsidiary agreed to pay $778 million in fines and asset forfeiture in connection with charges of conspiring to provide material support to terrorism.[33] On their face, as Hamilton

33 T. Hamilton, "Transnational ne bis in idem for Corporate Involvement in In-

observes, the French proceedings and the US settlement concern the same factual contours of the situation in Syria, share some common defendants, and, to some extent, mirror one another's charges.

57. Whether the French charges concern the "same facts" as the US settlement turns first on a jurisdictional gate. The initial and fundamental obstacle is territorial (see § 9 and 14 above): the alleged financing of terrorist groups involved, at a minimum, the management of commercial relationships whose contractual framework was partly France-based, engaging at least Article 113-2(2) of the French Penal Code. The consequence is that the territorial exclusion applies, and the mechanical application of that exclusion may be said to offend the considerations of dignity, justice and humanity, which constitute the normative foundation of *ne bis in idem*. Following the Court of Cassation's reasoning in the Vitol case of 2018, a claim of transnational *ne bis in idem* would be admissible in French proceedings only if derived from a head of jurisdiction other than territorial jurisdiction under Article 113-2. The defence might therefore seek to characterise the French jurisdictional basis as passive personal or universal, rather than territorial heads of jurisdiction that would bring Article 692 CCP into play – and on that foundation argue that the US plea agreement satisfies the common-law conditions (same facts, final judgment, sentence served and fine paid in full).[34]

58. Assuming the territorial gate can be opened, the substantive idem question then arises. On the "same facts" question itself, the underlying conduct is, regardless of its varying legal classification, fundamentally the same across the two jurisdictions; on a literal reading, the Lafarge corporation could not be prosecuted in France on charges

ternational Crimes: The Lafarge Proceedings in the U.S. and France", *Opinio Juris* (28 July 2023): "In parallel proceedings in Paris and New York, the French corporation Lafarge SA has recently faced allegations surrounding its dealings with terrorist groups … In a criminal plea deal with the Department of Justice on 18 October 2022, Lafarge and its Syrian subsidiary Lafarge Cement Syria admitted to entering into business arrangements with ISIL and ANF, agreeing to pay a financial penalty of $778 million in fines and asset forfeiture for the non-prosecution of charges of conspiring to provide material support to terrorism – a figure that also informed the proportionality analysis of the coordinated disposal."

34 *Hamilton, op. cit.: "In France, domestic sources for the application of the ne bis in idem principle in the context of transnational proceedings can be found in Article 113-9 of the French Criminal Code and Article 692 of the French Code of Criminal Procedure. Both provisions are formulated through the same wording: 'no prosecution may be initiated against a person who establishes that he was subject to a final decision abroad for the same facts and, in the event of conviction, that the sentence has been served or extinguished by limitation'."*

On the "final judgment" requirement: "it entails the existence of a foreign judgment that must have a res judicata effect, meaning that no more appeals can be formulated, and that no further prosecutions will be conducted."

Cass. crim., 19 décembre 2018, n° 17-82.897 (*Vitol*): territory-based prosecution is not excluded by a prior foreign settlement; French sovereignty and the *opportunité des poursuites* prevail.

based on the same factual setting as the US settlement. An important qualification follows, however, and it is the margin of the factual test identified in Part I.B. As to the French charges of complicity in crimes against humanity and endangering lives, it remains open whether they rest on the same factual setting as the financing of a terrorist enterprise, since their actus reus would derive not only from the financing but also from the exposure of employees to the commission of crimes against humanity and the failure to ensure their security –an aspect of the alleged criminality that the US settlement does not cover. An approach distinguishing the legal interests protected – the terrorism charges concerning victims primarily outside the zone of conflict, the atrocity charges concerning those closest to the violence – "may provide a key to overcoming any claims of *ne bis in idem* from the defence."[35]

59. The analysis must, however, be read in the light of a subsequent development examined further (Part IV.D): the Court of Justice has since confirmed in Swiftair (C-701/23, 3 April 2025) that legal persons fall outside the personal scope of Article 54 CISA. That holding closes the question of whether Lafarge SA as a corporate entity can invoke the Article 54 CISA bar. Two distinct questions nonetheless survive. The first is whether the individual executives – rather than the corporation – might establish a *ne bis in idem* claim in their personal capacity, subject to the jurisdictional and factual conditions set out below. The second, which remains expressly open after MQIG (C-802/23), is whether Article 50 of the Charter – which Swiftair did not address – might offer a residual avenue of protection for legal persons in proceedings that engage Union law. The Lafarge analysis below is therefore maintained, but reconfigured: its primary relevance is now to the individual defendants and to the unresolved Charter question.

60. It should be noted that the reference to "legal interests protected" in the present context does not revive the criterion rejected in Van Esbroeck and Mantello; it serves rather as an indicium of the underlying factual distinctness – the different victim groups, acts and territorial circumstances – which, on a rigorous factual analysis, generate genuinely separate sets of concrete circumstances not inextricably linked with the facts admitted in the US plea agreement. To the extent that French domestic law (outside the CISA framework) might residually admit a legal-interest criterion, that would constitute a departure from the EU standard that requires explicit justification; this article adopts no such departure.

61. Two further dimensions sharpen the stakes. The first is the corporate legal person: any *ne bis in idem* argument must demonstrate that the same subject features in both sets

35 Hamilton, *op. cit*. Irrespective of the arguments ultimately raised in the Lafarge proceedings, the clarification of transnational ne bis in idem in this setting can play a decisive role in future cases of alleged corporate involvement in atrocities and terrorism, particularly where heterogeneous legal characterisations across jurisdictions are used to circumvent the principle's factual identity requirement.

of proceedings. Only the Lafarge corporation is a named defendant in both; accordingly, the question turns on the extent to which the corporate person could claim the bar in France. For the individual French executives, the prospect is remote, as it would require a court to accept that an executive was a subject of the US proceedings despite not being identified there as a charged defendant, in a context where there is no clear indication that those executives were under investigation in their individual capacities. The second, and most consequential, dimension is the position of the victims. Because under French law the victims' claims are closely tied to the criminal proceedings – the civil claim being attached to them – an absence of prosecution of certain charges on *ne bis in idem* grounds risks precluding victims from obtaining indemnification: without a finding of guilt on a given charge, the proceedings cannot give rise to reparations based on that offence, and given the absence of significant precedent on victim reparations for international-crimes charges before domestic courts, the issues remain largely untested. The implication is striking and runs counter to the principle's usual protective valence: here, an over-broad application of *ne bis in idem* would operate against the interests of victims seeking justice in France. Whatever the ultimate outcome, the clarification of transnational *ne bis in idem* in this setting will be decisive for future cases of alleged corporate involvement in atrocities and terrorism.

B. The investigative phase: specialty, the EIO, and the EPPO

62. The mechanisms examined in this Section – the specialty principle in mutual legal assistance, the European Investigation Order, and the European Public Prosecutor's Office – are not direct applications of the *ne bis in idem* principle. They operate during the investigative phase, before any final judgment capable of triggering the *ne bis in idem* bar has been rendered. They are examined here as functional analogues and procedurally connected guarantees: they share with *ne bis in idem* the same underlying rationale – protection of the individual against the uncontrolled transnational exercise of the ius puniendi – operate through analogous purpose-limitation logic, and generate comparable procedural consequences when violated. The normative bridge that justifies their inclusion is Article 6 TEU and the Charter framework referenced by both the EIO Directive and the EPPO Regulation, under which the fundamental rights guarantees of national criminal procedure – including Article 50 – must be given full effect throughout cross-border proceedings. The analysis that follows draws these analogies where they illuminate the principle's future trajectory but does not assimilate them to *ne bis in idem* in doctrinal terms.

63. The principle's reach into the investigative phase is more recent and more inchoate, but it is governed by analogous logics. The most evident analogue is the specialty principle in mutual legal assistance – the rule that evidence gathered under letters rogatory or an EIO

may be used only for the purpose for which it was provided. Just as *ne bis in idem* prohibits prosecution for the same facts after final judgment, specialty prohibits the use of evidence for purposes extraneous to the original request. The Criminal Chamber of the Court of Cassation, in its Ruling of 21 May 2025 (n° 25-81.595) confirmed the parallel: violating the specialty conditions of a letter rogatory – using documents for an offence other than that for which they were granted – constitutes a public order nullity (nullité d'ordre public), touching the sovereignty of the requested State and raisable by any person without proof of personal grievance.[36] That classification as a public order nullity – touching State sovereignty and raisable without proof of personal grievance – places specialty in the same procedural category as *ne bis in idem*, in the sense that both operate as absolute bars whose violation cannot be cured by acquiescence. The analogy is procedural rather than doctrinal: specialty and *ne bis in idem* remain distinct guarantees, the former governing the use of evidence obtained during cooperation, the latter the initiation of prosecution after final judgment, but their shared classification as public-order protections confirms that the investigative and post-judgment phases are governed by analogous principles of institutional loyalty and individual protection.

64. The EIO Directive supplies the next analytical building block by defining the perimeter of the investigative phase. The CJEU held "investigative measure" to be an autonomous concept of EU law: a hearing whose purpose is to allow an accused to make observations on an indictment does not constitute an investigative measure, whereas a hearing aimed at collecting evidence does. The distinction matters for *ne bis in idem* in two respects. First, it determines which evidence-gathering acts fall under the EIO's purpose-limitation framework and which remain governed by classic mutual legal assistance. Second, it fixes the scope of the fundamental-rights guarantees – including the right not to be tried twice – that the EIO framework imports through its reference to Article 6 TEU and the Charter.[37]

65. French case law has meanwhile been working out the sovereignty limits of cross-border evidence capture, with direct implications for the integrity of any proceedings in which *ne bis in idem* might later be raised. In Court of Cassation (Criminal Chamber), 17 June 2025 (n° 24-87.110), a keylogger data capture was challenged because the suspect's phone was temporarily located abroad; the Criminal Chamber held that a device installed in France which operated without the technical assistance of the foreign State did not violate that State's sovereignty, invoking the statutory

36 K. Mehtiyeva, *Chronique* (2026): *Cass. crim.*, 21 mai 2025, n° 25-81.595: violation of specialty conditions of a *commission rogatoire internationale* – using documents for an offence other than that for which they were granted – constitutes a *nullité d'ordre public*, touching the sovereignty of the requested State, and raisable by any person without proof of personal grievance

37 CJUE, 9 January 2025, C-583/23.

definition of a "technical device designed, without the consent of the person concerned, to access, in any location, computer data and to record, store and transmit it" (CCP, Article 706-102-1) and the Court of Justice's formulation in C-670/22 (30 April 2024, §114) assimilating the infiltration of terminal devices to an interception of telecommunications. In Court of Cassation (Criminal Chamber), 18 November 2025 (n° 25-83.069), a vehicle-bugging device installed in France continued operating as the vehicle crossed Belgium, Luxembourg and the Netherlands; the Court established a two-rule framework: mere transit of data through a foreign operator's network does not violate that State's sovereignty, but where a geolocation or bugging device operates actively on foreign territory, authorisation from the foreign State is required, and its absence gives rise to a nullité d'ordre public raisable without proof of personal grievance, "une telle nullité ayant un caractère d'ordre public et touchant à la bonne administration de la justice."

66. The EPPO adds a distinctive institutional layer and, with it, a fresh set of *ne bis in idem* concerns. Described as "single and indivisible" in law, the EPPO operates through 24 national delegations applying divergent national procedural laws. In CJEU Grand Chamber, 21 December 2023, C-281/22, the Court distinguished the adoption phase of an investigative measure (governed by the law of the handling delegated prosecutor) from its execution phase (governed by the law of the assisting delegated prosecutor), holding that the executing judge may review only the formal legality of execution, not the justification or adoption decision. In Court of Cassation (Criminal Chamber), 24 September 2025 (n° 24-82.624), the first French decision applying the execution of a seizure pursuant to an EPPO delegation, confirmed that mutual recognition justifies an absence of formalism – a saisie may be authorised "par tout moyen" (CCP, Article 706-154), a solution the Court transposed to intra-European mutual-assistance acts more broadly. The CJEU Grand Chamber then added a fundamental constraint of procedural equivalence: where national law provides a direct remedy against an analogous act in a purely internal procedure, it must offer the same remedy against a comparable act of the European delegated prosecutor, so that the EPPO may not place persons in a less favourable position than those subject to comparable national procedures. This equivalence principle bears directly on *ne bis in idem*: it prevents the EPPO from operating as a jurisdiction-shopping device that erodes the finality protections of national proceedings, and ensures that the fundamental-rights guarantees of national criminal procedure – including Article 50 of the Charter – are not diminished through the EPPO's multinational procedural patchwork.[38]

67. A final decision marks the outer limit of cross-border judicial action. In Court of Cassation (Criminal Chamber), 30 April 2025 (n° 24-84.382), the Court held that a French investigating judge transported abroad may conduct only

38 ECJ, 8 April 2025, C-292/23.

auditions: even if an audition may encompass certain forms of questioning, Article 93-1 of the CCP expressly excludes the initial appearance examination (interrogatoire de première comparution) followed by a formal charging order – a rights-creating act enabling appearance before a criminal court – regardless of the requested State's non-objection. The restriction carries an implicit *ne bis in idem* dimension: the mise en examen is the formal act activating the suspect's procedural rights, and performing it abroad without the safeguards of French courts would risk corrupting the integrity of any subsequent French proceedings in which the principle might be raised.

IV. Towards a Coherent Architecture

68. The foregoing analysis of five distinct regimes has established both a common doctrinal vocabulary – the certainty threshold, the factual idem, the finality requirement – and the divergences in personal scope, institutional character, and enforcement force that separate those regimes from one another. This Part draws those convergences and divergences together into a unified analytical framework; it identifies the variables that recur across all five regimes (Section A), isolates the certainty threshold as the doctrinal pivot that holds them together (Section B), and maps the three structural gaps that any coherent architecture of the principle would need to close (Section C), before turning to the pending developments most likely to reshape the field (Section D).

A. Five regimes, one principle

69. The Court of Justice and the European Court of Human Rights have shown themselves willing to take a progressive stance and to construe a single, truly European *ne bis in idem* rule out of two similar provisions in two different frameworks. That common trajectory does not erase the distinctions traced throughout this article, which can now be stated as five distinct regimes operating in parallel. The first is the domestic French regime, with its territorial-jurisdiction limitation and its 2013 deduction rule (Part I.A, Part IV.C). The second is the ECHR/Protocol No. 7 regime, confined to intra-State situations and subject to France's reservation (Part I.A). The third is the Schengen/Charter regime – transnational, reaching third-country nationals, and now extending to extradition to third States (Parts I.A and II.B). The fourth is the classic cooperation-treaty regime, in which *ne bis in idem* typically operates only in favour of persons convicted by the *requested* State's own courts (Parts I.A and II.B). The fifth is the Interpol CCF regime, operating on an administrative compliance standard in which the principle functions at most as an "indicium" (Part II.C). The protective force of the guarantee, as Part II showed, tracks the position of each regime on the spectrum from judicial mandatory bar to administrative indicium. What distinguishes these five regimes is not only their institutional setting but, more precisely, their relationship to the certainty threshold developed in Part IV.B: only the Schengen/Charter and EAW regimes treat a final ju-

dicial decision rendered in another Member State as independently sufficient to trigger a mandatory bar on prosecution; the classic treaty regime requires the judgment to originate from the requested State's own courts; and the CCF regime requires no final judicial decision at all, treating any national decision as merely one factor in a bundle of indicia. That graduated relationship to finality – not merely the judicial/administrative spectrum – is the structural asymmetry that any coherent architecture of the principle would need to close.

B. The certainty threshold as the common variable

70. The certainty threshold performs two analytically distinct but complementary functions. As a substantive requirement, it designates the minimum quality of prior decision that can trigger the *ne bis in idem* bar: only a final judicial determination on the merits of criminal liability satisfies it. As a procedural/evidentiary standard, it determines when an ongoing cooperation measure – provisional arrest, EAW execution, extradition – must be halted: it may proceed until it is affirmatively established, through a final judicial decision, that the bar operates. The two functions are two faces of the same threshold: the former defines what qualifies, the latter governs when authorities must stop.

71. What allows these five regimes to be analysed as one system, rather than as five unrelated rules, is the "certainty" threshold established in C-505/19 and recurring across every mechanism in Part II. Provisional arrest (Interpol), EAW execution and a decision on an extradition request may each proceed until certainty is established, through a final judicial decision, that the bar applies. As the Court put it, the prohibition operates only where "it is established, in a final judicial decision that that person has already been finally convicted for the same acts" (pt 106). The threshold is demanding – it requires an *established* and *final judicial* decision, not merely a plausible claim – but it is absolute once met: where a definitive judgment in another Member State exists and is established, refusing to give it effect "would undermine the very foundations of the area of freedom, security and justice" and the principles of mutual trust and mutual recognition. The certainty threshold is, in short, the doctrinal pivot of the entire field: it is the single test that determines, across otherwise heterogeneous mechanisms, when the principle ceases to be a contingent possibility and becomes a binding bar. The following matrix shows how the certainty threshold operates within each of the five regimes, specifying for each the normative source, the authority that decides, the type of prior decision required, the level of finality demanded, whether the effect is mandatory or discretionary, and the remedy available.

C. The open gaps

72. Against these unifying variables stand three gaps that any coherent architecture would have to close – the first of which has two distinct facets.

73. Universal in scope – applying whether or not the foreign State is

a Schengen party, a Council of Europe member or wholly external – the rule is best understood as an application of the proportionality of penalties guaranteed by Article 8 of the Declaration of 1789, from which the Conseil constitutionnel has derived the principle that penalties suffered for a single act may not exceed the highest legal maximum.

74. Within the same first gap, a further lacuna, which the Court of Cassation has not yet resolved, is this : where a foreign sentence is in the course of being served at the time of the French prosecution – rather than completed – the French defendant should, in principle, be immune from prosecution, on the ground that simultaneously subjecting a person to foreign enforcement and domestic prosecution neutralises the foreign *res judicata* in its most essential dimension. Whether that immunity extends to suspended sentences, conditional release or probationary periods under foreign law remains an open question, since those are not states of *execution* in the classic sense but nor are they states of prescription. The gap is significant in practice: a defendant mid-way through serving a US sentence when French proceedings are initiated falls into a normative void between the completion-of-service condition of Article 692 CCP and the ongoing-enforcement formula of Article 54 CISA. Legislative or judicial clarification of this intermediate zone would do much to close the domestic/foreign sentence gap identified above.

75. The second is the treaty gap exposed by *HF*. Bilateral extradition treaties whose *ne bis in idem* clauses are confined to judgments of the *requested* State's own courts are incompatible with the EU guarantee as extended to third-State extradition in C-435/22. As Part II.B explained, Article 351(2) TFEU obliges Member States to eliminate such incompatibilities by all appropriate means, and Article 17(2) of the EU-US Agreement supplies an operational vehicle for doing so – but only as a safety valve. A renegotiated EU–US Extradition Agreement incorporating a transnational *ne bis in idem* clause extending to convictions in any Member State would eliminate the incompatibility at source.

76. The third is the DPA/CJIP gap. The question identified by Vervaele – whether procedural agreements such as plea bargaining or immunity deals fall within the scope of the principle – remains fully open. *Gözütok* resolved it for out-of-court disposals in which conditions of a penal nature are fulfilled without court approval; but DPAs and CJIPs, whose content is more complex and whose admission of guilt is typically absent or merely implicit, occupy a normatively ambiguous position, and the Court of Cassation has refused to weigh French prosecutorial discretion against a prior foreign plea agreement (Part II.D). Legislative clarification at EU level of the conditions under which out-of-court corporate disposals generate cross-border *ne bis in idem* protection would materially advance the coherence of the system.

D. Recent and pending developments

77. Two 2025 decisions of the Court of Justice indicate the directions

in which these gaps may be addressed. *Swiftair* (3 April 2025, C-701/23) extends the Court's analysis of the personal scope of Article 54 CISA in the corporate context, confirming that legal persons such as Lafarge SA fall outside its protection – a holding with direct consequences for the corporate defendants in the Lafarge proceedings. MQIG (11 September 2025, C-802/23; D. 2025.2049) addresses the scope of Article 50 of the Charter in cross-border settings where administrative and criminal sanctions combine – terrain directly connected to the unresolved Article 50 and French fiscal sanctions questions left open by the 2019 Criminal Chamber of the Court of Cassation decisions (Part I.A). The parties in those 2019 decisions did not raise Article 50; after Swiftair and MQIG, that omission may become a live strategic choice in French litigation.

Conclusion

78. In the European Union, the traditional *ne bis in idem* principle has developed from a domestic legal rule into a transnational human right. The process began with Schengen integration and deepened within the common area of freedom, security and justice; classic inter-State cooperation has been progressively replaced by enhanced judicial cooperation directly between the actors of the criminal justice systems. The corollary, as Vervaele argues, is that Member States must be prepared to leave behind their classic, outdated conceptions of sovereignty and accept a vision of shared sovereignty in the common judicial area, of which transnational human rights form a substantial part.

79. At the level of French private international law theory, the entire trajectory described in this article can be restated in a single doctrinal frame. *Ne bis in idem* is, at its core, a form of negative authority of *res judicata* of a foreign criminal decision – the decision's capacity to operate as a procedural bar against a second prosecution for the same facts. Its *raison d'être* is humanitarian as much as juridical: considerations of humanity forbid subjecting a person twice to the exercise of the *ius puniendi* for the same conduct. The challenge of the contemporary system is that this negative authority is recognised only conditionally and variably: fully in the Schengen/Charter framework, partially under French common law (subject to the territorial exclusion and the finality conditions set out in Part I), minimally at the level of the Interpol CCF, and scarcely at all for contractualised disposals. The work of the next decade is to narrow the gap between the humanitarian aspiration and its legal operationalisation – a task that is, as the analysis of the five regimes demonstrates, as much political as doctrinal

80. Yet the same scholar who formulated this vision of progressive constitutionalisation also identified its limit: the Union legislator has found it "enormously difficult to give shape and substance to transnational legal principles and this is also true in the case of the *ne bis in idem* principle. It is the ECJ which, through interpretation of the principles of the Community legal or-

der, has to define the legal principles and determine their scope and application." The trajectory of the case law bears this out. From the Court of Cassation's 2013 deduction rule, through the nine 2019 decisions on fiscal/penal parallelism, the 2021 *Interpol Red Notice* judgment (C-505/19), the 2022 *HF* decision (C-435/22 PPU), and the 2025 rulings in *Swiftair* and *MQIG*, the principle has undergone a sustained judicial constitutionalisation across every channel of cross-border cooperation. The 2024 Transfer of Proceedings Regulation adds a preventive dimension; the Lafarge proceedings add a corporate and atrocity-crime dimension; and the EPPO decisions add an investigative-phase dimension. Together they confirm Vervaele's conclusion that "mutual recognition of each other's judicial decisions … requires common and equivalent protection of human rights in the area of Freedom, Security and Justice. Common standards of the Rule of Law, at least in line with the minimum standards developed by the ECtHR, are the minimum *minimorum* for mutual trust between States and for mutual trust between the citizens of the EU."

81. The challenge that remains is therefore institutional rather than doctrinal. The convergence on a factual *idem*, the shared certainty threshold and the outward extension of the guarantee through *HF* have given the principle a recognisable common core; what they have not yet produced is a unified framework capable of holding the five regimes together and of closing the gaps – domestic/foreign deduction, treaty incompatibility and contractual disposal – that this article has identified. New developments are very likely to cast doubt on the consolidated reading of the principle as codified in national legal orders. Managing that doubt — through treaty renegotiation, legislative consolidation and judicial harmonisation – is the defining task for the European area of freedom, security and justice in the decade ahead.

El delito común que encubre persecución política: análisis multinivel del lawfare en la cooperación judicial internacional

The ordinary offence that conceals political persecution: a multi-level analysis of lawfare in international judicial co-operation

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Resumen: El artículo examina la persecución política instrumentalizada mediante delitos comunes como motivo de oposición a la extradición en el derecho español e internacional. A partir del análisis de la doctrina constitucional española, la jurisprudencia del Tribunal Europeo de Derechos Humanos y el marco normativo de INTERPOL y de los sistemas universal y regional de protección de los derechos humanos, el estudio propone un estándar probatorio estructurado y una arquitectura multinivel de protección para fortalecer las garantías frente a solicitudes de extradición con motivación política. Finalmente, sostiene que la coordinación entre los distintos mecanismos nacionales e internacionales constituye un elemento esencial para asegurar una tutela efectiva de los derechos fundamentales.

Introducción: la cooperación judicial internacional en materia penal ha descansado históricamente sobre la presunción de buena fe entre Estados, presunción tensionada por la documentada utilización del aparato extradicional como instrumento de persecución selectiva contra empresarios, exfuncionarios y disidentes políticos.

Objetivo: el estudio analiza el régimen normativo, la doctrina constitucional española y la jurisprudencia del Tribunal Europeo de Derechos Humanos aplicables al motivo de oposición consistente en la persecución política instrumentalizada mediante un delito común, en su interrelación sistémica con los mecanismos internacionales concurrentes de protección.

Metodología: se aplica una investigación dogmático-jurídica, comparada y cualitativa, con métodos analítico, sistemático y jurisprudencial, mediante el examen de instrumentos normativos primarios, la doctrina constitucional española –Sentencias 32/2003, 148/2004, 147/2020, 147/2021, 17/2024 y 36/2024–

y la jurisprudencia del Tribunal Europeo de Derechos Humanos, con énfasis en los asuntos Soering c. Reino Unido y Othman (Abu Qatada) c. Reino Unido.

Resultados y discusión: se identifica un estándar probatorio articulado en tres planos –indicadores objetivos, fuentes externas reconocidas y defectos jurídico-procesales–; se sistematiza el régimen multinivel de protección concurrente; y se discute críticamente la categoría de lawfare frente a las objeciones formuladas por la doctrina académica.

Conclusiones: la efectividad del motivo de oposición depende de la articulación sistémica del régimen extradicional interno con los estándares internacionales de derechos humanos y con los mecanismos cuasijurisdiccionales y convencionales concurrentes; ningún foro aislado resulta suficiente para asegurar una tutela efectiva.

Palabras clave: cooperación judicial internacional; extradición; INTERPOL; lawfare; persecución política.

Abstract: This article examines politically motivated persecution disguised as ordinary criminal prosecution as a ground for opposing extradition under Spanish and international law. Drawing on the case law of the Spanish Constitutional Court, the European Court of Human Rights, and the legal framework of INTERPOL, as well as universal and regional human rights protection systems, the study proposes a structured evidentiary standard and a multilevel protection framework to strengthen safeguards against extradition requests motivated by political considerations. It concludes that effective coordination among national and international mechanisms is essential to ensure comprehensive protection of fundamental rights.

Introduction: *international judicial cooperation in criminal matters has historically rested on the presumption of good faith between States, a presumption strained by the documented use of the extradition apparatus as an instrument of selective persecution against business actors, former officials and political dissidents.*

Objective: *the study analyses the normative regime, the Spanish constitutional doctrine and the case-law of the European Court of Human Rights applicable to the ground for opposition consisting of political persecution instrumentalised through an ordinary offence, in its systemic interrelation with concurrent international protection mechanisms.*

Methodology: *doctrinal-legal, comparative and qualitative research is conducted, applying analytical, systematic and jurisprudential methods, through the examination of primary normative instruments, the Spanish constitutional doctrine –Constitutional Court Judgments 32/2003, 148/2004, 147/2020, 147/2021, 17/2024 and 36/2024– and the case-law of the European Court of Human Rights, with emphasis on Soering v. United Kingdom and Othman (Abu Qatada) v. United Kingdom.*

Results and discussion: *an evidentiary standard is identified, articulated on three levels –objective indicators, recognised external sources and legal-procedural defects–; the multi-level regime of concurrent protection is systematised; and the lawfare category is critically discussed in light of the objections raised by academic doctrine.*

Conclusions: *the effectiveness of the ground for opposition depends on the systemic articulation of the domestic extradition regime with international human rights standards and concurrent quasi-judicial and conventional mechanisms; no isolated forum suffices to ensure effective protection.*

Keywords: *extradition; international judicial co-operation; INTERPOL; lawfare; political persecution.*

1. Introducción

La cooperación judicial internacional en materia penal ha descansado históricamente sobre la presunción de buena fe entre Estados soberanos. Sobre esa presunción se edificó la arquitectura convencional contemporánea, desde el Convenio Europeo de Extradición de 1957 (Consejo de Europa, 1957) hasta los modernos instrumentos bilaterales suscritos por España con jurisdicciones de América Latina, los Estados Unidos y el Golfo Pérsico. La presunción ha conocido, sin embargo, una creciente tensión con la realidad operativa: ciertos Estados utilizan el aparato extradicional –y los mecanismos derivados, en particular el sistema de notificaciones de la Organización Internacional de Policía Criminal (INTERPOL)– como instrumento de persecución de disidentes, opositores políticos, exfuncionarios y empresarios cuya posición resulta incómoda al régimen requirente (Lemon, 2019; Joint Committee on Human Rights, 2025).

El fenómeno ha sido conceptualizado, en parte de la literatura anglosajona, bajo el rótulo de *lawfare* –término atribuido a Dunlap (2008) y desarrollado posteriormente por Kittrie (2016)– para describir el uso calculado de procedimientos jurídicos con finalidades extrajurídicas. La categoría no ha estado exenta de controversia académica. Autores como Kennedy (2006), Krever (2014) y Werner (2010) han advertido sobre su empleo asimétrico, su porosidad analítica y el riesgo de su instrumentalización ideológica. La crítica resulta atendible: el concepto, en su uso periodístico y polémico, ha tendido a proyectarse de forma selectiva en función de afinidades políticas. Sin embargo, en su uso académico estricto –referido a patrones verificables de instrumentalización del proceso– el fenómeno ha encontrado respaldo empírico creciente en los trabajos sobre *transnational repression* (Cooley y Heathershaw, 2017; Schenkkan y Linzer, 2021), así como en el reconocimiento institucional contenido en el Séptimo Informe del Joint Committee on Human Rights del Parlamento del Reino Unido (2025). Procede, por tanto, distinguir el *lawfare* como significante polémico del *lawfare* como categoría analítica acotada.

En el plano estrictamente jurídico, el motivo de oposición a la extradición consistente en la persecución por motivos de raza, religión, nacionalidad u opiniones políticas –*discrimination clause*, en la terminología convencional anglosajona– se encuentra recogido en términos sustancialmente equivalentes por la Ley 4/1985, de 21 de marzo, de Extradición Pasiva (LEP), por el artículo 3.2 del Convenio Europeo de Extradición de 1957 y por la práctica totalidad de los tratados bilaterales suscritos por el Reino de España. La cláusula presenta una estructura común: prohíbe la entrega cuando existan motivos serios para creer que la solicitud, formalmente fundada en un delito común, persigue en realidad fines discriminatorios o agravantes para la situación del reclamado.

El problema jurídico que motiva la presente investigación radica en una asimetría operativa: mientras el marco normativo es relativamente uniforme, su aplicación práctica revela disparidades notables en función de la rigurosidad probatoria exigida por el órgano judicial competente, de la solidez del cuadro indiciario aportado al proceso y de la eficacia con que se activan, de manera coordinada, los mecanismos cuasijurisdiccionales y convencionales concurrentes. La doctrina constitucional española ha consolidado, desde la STC 32/2003, un canon de indagación material que ha conocido en pronunciamientos recientes –singularmente la STC 17/2024 y la STC 36/2024– una fase de modulación que exige una relectura sistemática de las garantías aplicables.

En este contexto, la pregunta de investigación que articula el presente trabajo se formula en los siguientes términos: ¿bajo qué condiciones normativas, jurisprudenciales y procedimentales resulta efectivo, en el sistema español de extradición pasiva, el motivo de oposición consistente en la persecución política instrumentalizada mediante un delito común, considerado en su interrelación sistémica con los mecanismos internacionales concurrentes de protección?

La hipótesis sometida a contraste es la siguiente: la efectividad del motivo de oposición depende de una articulación sistémica entre cuatro estratos normativos –el régimen extradicional interno, el régimen convencional regional y bilateral, los mecanismos cuasijurisdiccionales de INTERPOL y los sistemas internacionales de protección de los derechos humanos–, sin que ninguno de tales estratos, considerado aisladamente, ofrezca una tutela suficiente. La hipótesis es verificable mediante el análisis sistemático de la jurisprudencia constitucional española, la doctrina del Tribunal Europeo de Derechos Humanos y la práctica de los órganos cuasijurisdiccionales internacionales con competencia material en la materia.

La relevancia científica del estudio radica en la integración sistémica de planos normativos y jurisprudenciales que la doctrina ha tratado preferentemente de manera sectorial. La delimitación temática se circunscribe al motivo de oposición fundado en persecución política instrumentalizada mediante delito común, con exclusión razonada de las restantes causas de denegación, en los términos detallados en la sección metodológica.

El estado de la cuestión registra contribuciones significativas. En la doctrina española, los trabajos de Mariño Menéndez (2005) y Ollé Sesé (2021) han abordado la extradición desde la perspectiva del derecho internacional público y de los derechos fundamentales. En la doctrina anglosajona y francófona, Bassiouni (2014), Cassese et al. (2013), Cryer et al. (2019), Schabas (2015), Werle y Jessberger (2020) y Hennebel y Tigroudja (2025) han ofrecido análisis sistemáticos de relevancia. Los trabajos críticos sobre la categoría de *lawfare* (Kennedy, 2006; Werner, 2010; Krever, 2014) y los estudios empíricos sobre *transnational repression* (Cooley y Heathershaw, 2017; Lemon, 2019; Schenkkan y Linzer, 2021) configuran un marco analítico complementario; a ello se suma la contribución específica de Arnell (2022) sobre la influencia de elementos políticos en la jurisprudencia extradicional del Tribunal Europeo de Derechos Humanos. La aproximación multinivel a la oposición fundada en persecución política, sin embargo, ha recibido un tratamiento sistemático todavía limitado, particularmente en lo que se refiere a la coordinación funcional entre foros y al aprovechamiento del régimen procedimental como variable analítica.

El presente trabajo se estructura en cinco secciones. La sección segunda expone el diseño metodológico. La sección tercera presenta los resultados y la discusión, organizada en torno al análisis crítico del concepto de lawfare, el marco normativo aplicable, la doctrina constitucional española, la jurisprudencia del Tribunal Europeo de Derechos

Humanos, el estándar probatorio y la arquitectura multinivel de protección concurrente. La sección cuarta presenta las conclusiones derivadas del análisis. La sección quinta expone las limitaciones del estudio y las líneas futuras de investigación.

2. Metodología

La investigación se inscribe en el ámbito de la dogmática jurídica con elementos de derecho comparado, conforme a un enfoque cualitativo. El alcance es descriptivo-explicativo y de carácter correlacional, en la medida en que el objeto de estudio requiere no solo la descripción de los regímenes normativos aplicables y la sistematización de la doctrina jurisprudencial, sino también el establecimiento de relaciones funcionales entre los distintos estratos del sistema multinivel de protección.

Se aplican, de manera concurrente, tres métodos de análisis. En primer lugar, el método analítico, mediante la descomposición del motivo de oposición en sus elementos estructurales: presupuestos materiales, presupuestos procesales y carga probatoria. En segundo lugar, el método sistemático, mediante la integración interpretativa de los cuatro estratos normativos identificados –interno español, convencional europeo, convencional bilateral e institucional INTERPOL– y de su interacción con los regímenes internacionales de protección de los derechos humanos. En tercer lugar, el método jurisprudencial, mediante el análisis de la ratio decidendi de las decisiones más relevantes del Tribunal Constitucional español, del Tribunal Europeo de Derechos Humanos y de los órganos cuasijurisdiccionales internacionales con competencia material.

El objeto del estudio se delimita en los siguientes términos. En el plano material, la investigación se circunscribe al motivo de oposición consistente en la persecución política instrumentalizada mediante delito común, con exclusión de otras causas de denegación –delito político en sentido estricto, doble incriminación, prescripción, identidad subjetiva, principio *aut dedere aut iudicare*– salvo en lo necesario para la coherencia sistemática del análisis. En el plano espacial, se toma como referencia central el sistema español de extradición pasiva, en su interacción con los regímenes convencionales europeo, latinoamericano y del Golfo. En el plano temporal, se examina la evolución de la doctrina constitucional española entre la STC 32/2003 y la cascada jurisprudencial de marzo y abril de 2024, así como la jurisprudencia del Tribunal Europeo de Derechos Humanos consolidada desde el asunto Soering c. Reino Unido (1989). En el plano jurisprudencial, se selecciona el corpus de decisiones cuya ratio decidendi resulta directamente vinculada a la pregunta de investigación, con exclusión razonada de pronunciamientos colaterales.

La elección de estos métodos responde al carácter multinivel del objeto de estudio: el método analítico permite descomponer la cláusula y aislar sus elementos estructurales; el método sistemático posibilita integrar los cuatro estratos normativos y proyectarlos sobre una hipótesis de coherencia interpretativa; el método jurisprudencial habilita la lectura crítica de la ratio decidendi en sede constitucional y convencional. La conjunción de las tres técnicas resulta apta para responder, con rigor verificable, a la pregunta planteada.

Las fuentes utilizadas se organizan en tres categorías. Las fuentes normativas primarias comprenden: la Constitución Española de 1978; la Ley 4/1985, de 21 de marzo, de Extradición Pasiva; el Convenio Europeo de Extradición de 1957; los tratados bilaterales suscritos por España con la República Bolivariana de Venezuela, los Estados Unidos Mexicanos, la República de Colombia, la República de Panamá, la República Dominicana y los Emiratos Árabes Unidos; el Acuerdo de Comercio y Cooperación entre la Unión Europea y el Reino Unido (2021); el Pacto Internacional de Derechos Civiles y Políticos (1966) y su Protocolo Facultativo; la Convención contra la Tortura (1984); el Convenio Europeo de Derechos Humanos (1950); la Convención Americana sobre Derechos Humanos (1969); el Estatuto de INTERPOL y el Reglamento sobre el Tratamiento de Datos.

Las fuentes jurisprudenciales primarias incluyen las sentencias del Tribunal Constitucional español de mayor relevancia en materia de extradición pasiva (SSTC 32/2003, 148/2004, 147/2020, 147/2021, 17/2024 y 36/2024); la jurisprudencia del Tribunal Europeo de Derechos Humanos sobre el alcance del artículo 3 del Convenio en materia de extradición (Soering c. Reino Unido, 1989; Cruz Varas c. Suecia, 1991; Saadi c. Italia, 2008; Othman c. Reino Unido, 2012; Trabelsi c. Bélgica, 2014); y los dictámenes de los órganos cuasijurisdiccionales del sistema universal de derechos humanos.

Las fuentes doctrinales secundarias se seleccionaron mediante un criterio de relevancia académica, indexación en bases científicas y representatividad de las principales corrientes doctrinales en el campo. Se priorizaron las contribuciones publicadas en editoriales académicas con revisión por pares y las publicadas en revistas indexadas. El protocolo de verificación documental contempló el contraste de las fuentes normativas con el Boletín Oficial del Estado; las sentencias internas con el Centro de Documentación Judicial (CENDOJ) y los repositorios oficiales del Tribunal Constitucional; la jurisprudencia europea con la base HUDOC; los dictámenes de los órganos de tratado con los repositorios oficiales de la Oficina del Alto Comisionado para los Derechos Humanos; y los instrumentos institucionales con los repositorios oficiales de INTERPOL.

3. Resultados y discusión

3.1. Lawfare y persecución política instrumentalizada: alcance y crítica de la categoría

La irrupción del término *lawfare* en el debate jurídico-internacional ha sido recibida con entusiasmo en ciertos sectores de la práctica forense y con cautela en la doctrina académica. La delimitación conceptual cuidadosa resulta, por tanto, una operación previa indispensable.

El término fue empleado por Dunlap (2008) para describir el uso del derecho como arma en contextos de conflicto armado asimétrico, y posteriormente extendido por Kittrie (2016) a un repertorio más amplio de prácticas que incluyen la instrumentalización de procedimientos judiciales con finalidades estratégicas extrajurídicas. Diversos autores cuestionan, sin embargo, la operatividad analítica del concepto. Kennedy (2006) advierte sobre el riesgo de que la categoría difumine la distinción entre el uso legítimo del derecho con fines estratégicos –rasgo intrínseco a toda litigación– y la instrumentalización abusiva. Krever (2014) denuncia la utilización ideológica del término, mediante la cual se descalifican procesos jurídicos legítimos por el mero hecho de afectar a actores políticamente significados.

Werner (2010) señala, desde una perspectiva crítica del derecho internacional, que la categoría puede ser empleada de manera asimétrica según la afinidad política del observador.

La crítica resulta jurídicamente atendible. La importación acrítica del término al discurso forense conlleva el riesgo de banalización: no toda imputación políticamente sensible constituye *lawfare*, ni toda denuncia con efectos políticos es persecución encubierta. La categoría debe ser, por tanto, analíticamente acotada. A los efectos del presente trabajo, se entiende por *persecución política instrumentalizada mediante delito común* aquella situación en la que concurren tres elementos verificables: (i) la imputación se sustenta en un tipo penal común técnicamente correcto; (ii) la activación del aparato persecutorio responde a una motivación discriminatoria atribuible al Estado requirente, en el sentido de los preceptos convencionales aplicables; y (iii) existen indicios objetivos –que se sistematizan infra, apartado 3.5– que permiten al órgano judicial del Estado requerido apreciar motivos serios para creer en la existencia de tal motivación discriminatoria.

Esta delimitación tiene la ventaja de prescindir del elemento polémico del *lawfare* –su carga ideológica– y de articularse, en cambio, en torno a categorías jurídicas operables: la motivación discriminatoria del artículo 3.2 del Convenio Europeo de Extradición y de los preceptos paralelos del derecho interno español. La literatura empírica sobre *transnational repression* (Cooley y Heathershaw, 2017; Lemon, 2019; Schenkkan y Linzer, 2021) ofrece, además, un marco metodológicamente más sólido que la noción polémica de *lawfare*, al sustentarse en el análisis de patrones de comportamiento estatal documentados a partir de fuentes oficiales y bases de datos de incidentes verificables.

Cabe señalar, por último, que el reconocimiento institucional de estos patrones ha conocido un avance significativo. El Joint Committee on Human Rights del Parlamento del Reino Unido (2025), en su Séptimo Informe de la Sesión 2024-25, ha documentado, sobre la base de evidencia empírica, el uso de las notificaciones internacionales de INTERPOL como instrumento de represión transnacional. La progresiva consolidación institucional de la categoría no resuelve sus problemas analíticos, pero confirma su pertinencia como objeto de examen jurídico riguroso. La distinción entre persecución política, delito común instrumentalizado y supuestos discutibles depende, en consecuencia, del estándar probatorio aplicado y no de la mera invocación retórica del término.

3.2. EL RÉGIMEN NORMATIVO: UNA SISTEMATIZACIÓN EN CUATRO ESTRATOS

El régimen aplicable al motivo de oposición que ocupa al presente trabajo se distribuye en cuatro estratos normativos cuya lectura conjunta resulta indispensable.

En el estrato interno español, el artículo 4 de la Ley 4/1985 de Extradición Pasiva enumera las causas obligatorias de denegación, entre las cuales figura, en su apartado 1, la sospecha fundada de que la solicitud encubre una persecución por motivos de raza, religión, nacionalidad u opiniones políticas. Este precepto recoge, con técnica jurídica depurada, el principio histórico de no entrega del perseguido político y traslada al órgano judicial el deber de examinar la motivación real de la solicitud, más allá de su corrección formal.

En el estrato convencional europeo, el artículo 3.2 del Convenio Europeo de Extradición de 1957 contiene la formulación que ha servido de modelo para la mayoría de los tratados bilaterales españoles posteriores. Conforme a este precepto, la extradición no se concederá cuando el Estado requerido tenga motivos serios para creer que la solicitud, aunque presentada por un delito común, ha sido formulada con el fin de perseguir o castigar a una persona por consideraciones de raza, religión, nacionalidad u opiniones políticas, o que la situación de esa persona puede agravarse por alguno de tales motivos. La estructura del precepto descansa en una doble protección: prohíbe tanto la persecución directa como el agravamiento situacional derivado de motivos discriminatorios.

En el estrato bilateral, los tratados suscritos por el Reino de España con países latinoamericanos y con jurisdicciones de otros continentes recogen la cláusula de no entrega del perseguido político con redacciones que, pese a sus diferencias estilísticas, comparten una estructura común. El Tratado de Extradición con la República Bolivariana de Venezuela, hecho en Caracas el 4 de enero de 1989, prohíbe en su artículo 6 la extradición por delitos considerados políticos o conexos. El Tratado de Extradición y Asistencia Mutua en Materia Penal con los Estados Unidos Mexicanos, firmado en Ciudad de México el 21 de noviembre de 1978, recoge en su artículo 5.2 la fórmula prácticamente idéntica al artículo 3.2 del Convenio Europeo de Extradición. El Convenio de Extradición con la República de Colombia, firmado en Bogotá el 23 de julio de 1892 y modernizado por instrumentos posteriores, excluye en su artículo 5 la extradición por delitos políticos o conexos. El Tratado de Extradición con la República de Panamá, suscrito el 10 de noviembre de 1997, incorpora en su artículo 4 una doble protección que distingue entre la persecución por delitos políticos y la solicitud que encubre persecución por delito común. El Tratado de Extradición y Asistencia Judicial en Materia Penal con la República Dominicana, firmado en Madrid el 4 de mayo de 1981, reproduce en su artículo 4.2 la fórmula del delito común instrumentalizado por motivos discriminatorios.

La cláusula no constituye un patrón exclusivamente latinoamericano. En el espacio europeo posterior al Brexit, el Acuerdo de Comercio y Cooperación entre la Unión Europea y el Reino Unido –que sustituyó a la Decisión Marco 2002/584/JAI sobre la Orden Europea de Detención y Entrega en las relaciones con el Reino Unido– articula en el artículo 601, apartado 1, letra h), de su Tercera Parte la formulación más amplia del corpus extradicional contemporáneo: la ejecución de la orden de detención podrá denegarse cuando existan motivos objetivos para creer que ha sido dictada con el fin de enjuiciar o sancionar a una persona por su sexo, origen racial o étnico, religión, nacionalidad, lengua, opiniones políticas u orientación sexual. Esta redacción amplía sustancialmente el catálogo clásico de motivos protegidos al incorporar el sexo, el origen étnico, la lengua y la orientación sexual. La protección se proyecta también más allá del espacio europeo: el Convenio de Extradición entre el Reino de España y los Emiratos Árabes Unidos, firmado en Madrid el 24 de noviembre de 2009, confirma en su artículo 4.1.c) la presencia de la cláusula incluso en jurisdicciones cuya tradición jurídica difiere sustantivamente de la europea continental.

Finalmente, en el estrato del derecho de la Organización Internacional de Policía Criminal, el artículo 3 de la Constitución de INTERPOL prohíbe a la Organización toda actividad o intervención en cuestiones o asuntos de carácter político, militar, religioso o racial. El artículo 83 del Reglamento sobre el Tratamiento de Datos –de aplicación creciente frente a alertas indebidas– excluye la publicación de notificaciones por delitos derivados de la infracción de leyes o normas de carácter administrativo o de carácter privado. La articulación entre estos cuatro estratos normativos constituye el primer ejercicio interpretativo que toda aplicación rigurosa del motivo de oposición debe acometer.

3.3. LA DOCTRINA CONSTITUCIONAL ESPAÑOLA: ANÁLISIS DE LA RATIO DECIDENDI

La doctrina del Tribunal Constitucional español sobre el motivo de oposición fundado en persecución política presenta una evolución que admite una sistematización en tres etapas: una etapa fundacional, una etapa de consolidación y una etapa de modulación reciente. El análisis de la ratio decidendi de los pronunciamientos clave permite reconstruir el canon constitucional aplicable y proyectar sus consecuencias sobre la tesis sostenida en este trabajo.

La STC 32/2003, de 13 de febrero, dictada por la Sala Primera, marca el inicio de la etapa fundacional. El Tribunal resolvió un recurso de amparo en un procedimiento de extradición seguido contra un ciudadano de origen kurdo a petición de la República de Turquía. La *ratio decidendi* de la sentencia se cifra en una doble proposición: por una parte, el establecimiento de un deber judicial de indagación material –no meramente formal– respecto de las alegaciones de tortura, riesgo de asesinato y persecución política o étnica formuladas por el reclamado; por otra, la fijación de un estándar probatorio aliviado en favor del *extraditurus*, que no exige prueba plena de las vulneraciones aducidas, sino la concurrencia de un temor racional y fundado, sustentado en elementos indiciarios mínimamente diligentes, dadas las dificultades estructurales de acceso probatorio inherentes a su situación. La proyección de esta *ratio* sobre la tesis del presente trabajo es decisiva: la STC 32/2003 transforma el motivo de oposición de una alegación formal en una cuestión de adecuada motivación judicial. Toda decisión que se limite a constatar la corrección documental de la solicitud, sin examinar materialmente el contexto del país requirente y el perfil del reclamado, incurre en vulneración del derecho a la tutela judicial efectiva en relación con el derecho a no ser sometido a tortura ni a tratos inhumanos o degradantes.

La STC 148/2004, de 13 de septiembre, también de la Sala Primera, completa la etapa fundacional con una precisión técnica de notable trascendencia operativa. En un caso de extradición a Albania, el Tribunal especifica que ni la Ley de Extradición Pasiva ni el Convenio Europeo de Extradición exigen la previa petición de asilo político como requisito para la denegación. La *ratio decidendi* descansa en la autonomía sustantiva del motivo de oposición frente al instituto del asilo: la alegación de persecución puede y debe ser examinada en el propio procedimiento extradicional, sin necesidad de derivarla a la vía administrativa de protección internacional. La proyección de esta *ratio* es doble: por un lado, refuerza el carácter judicial –y no meramente humanitario– del control sobre la motivación discriminatoria; por otro, habilita una articulación procesal en la que asilo y extradición pueden operar como vías concurrentes y complementarias, no excluyentes. La sentencia confirma, además, el déficit de tutela judicial efectiva cuando el órgano judicial omite la diligencia exigible para esclarecer las alegaciones de persecución, doctrina expresamente vinculada en la propia resolución a la STC 32/2003.

Las SSTC 147/2020, de 19 de octubre, y 147/2021, de 12 de julio, inauguran la etapa de consolidación. Ambas resoluciones añaden al canon constitucional la exigencia de refrendo judicial en origen como garantía de la libertad personal del *extraditurus*, apoyándose hermenéuticamente en la jurisprudencia del Tribunal de Justicia de la Unión Europea sobre la autoridad judicial emisora en la euroorden (asuntos OG y PI, C-508/18 y C-82/19; PF, C-509/18; XD, C-625/19), cuyo valor interpretativo se reconoce expresamente al amparo del artículo 10.2 de la Constitución. La *ratio decidendi* descansa en la consideración de que la legitimidad democrática del procedimiento extradicional exige que la decisión que motiva la solicitud emane, en el Estado requirente, de un órgano judicial dotado de garantías equivalentes a las del derecho español, sin que la adscripción formal de una fiscalía al poder judicial baste, por sí sola, para satisfacer la exigencia. La proyección de esta *ratio* es relevante: la exigencia de refrendo judicial opera como un filtro adicional en el control material del motivo, en la medida en que la ausencia de tal refrendo –o su otorgamiento por órganos cuya independencia es discutible– constituye, en sí misma, un indicio fundado de la motivación discriminatoria que el motivo de oposición pretende interceptar. El examen judicial debe verificar, además, la necesidad y proporcionalidad de la medida privativa de libertad asociada a la solicitud.

La STC 17/2024, de 31 de enero, dictada por el Pleno, abre la etapa de modulación. El Tribunal aclara que la doctrina de las SSTC 147/2020 y 147/2021 distingue dos garantías: una garantía básica, consistente en la verificación judicial de la imparcialidad de la autoridad emisora –inherente al deber de motivación reforzada–, y una garantía específica, consistente en el refrendo por una autoridad judicial del Estado de origen, que puede modularse en función de lo previsto en el convenio bilateral aplicable, en cuanto fuente de aplicación preferente conforme al artículo 1.1 LEP. La *ratio decidendi* presenta así una doble dimensión: mantiene el canon de control material consolidado en las sentencias precedentes y, al tiempo, introduce un margen de flexibilidad cuando la equivalencia funcional de la autoridad emisora resulte verificable por vía documental. La proyección sobre la tesis aquí sostenida exige una operación interpretativa cuidadosa: la modulación introducida por la STC 17/2024 no debilita el canon de indagación material, sino que lo articula con el principio de cooperación internacional y exige una verificación documental rigurosa cuando la equivalencia funcional se invoca para justificar una dispensa del refrendo judicial.

La STC 36/2024, de 11 de marzo, dictada por la Sala Segunda en el recurso de amparo 7757-2021, aplica el criterio aclaratorio de la STC 17/2024 al supuesto marroquí, desestimando el amparo. La *ratio decidendi* se cifra en la constatación de que, en el caso concreto examinado, la documentación remitida permitía verificar la necesidad y proporcionalidad de la entrega y que la autoridad emisora satisfacía el estándar de equivalencia funcional. Esta sentencia, junto con la cascada aplicativa de marzo y abril de 2024, configura el estado actual del canon constitucional. La consecuencia para la tesis aquí sostenida es nítida: una invocación que se apoye hoy en las SSTC 147/2020 y 147/2021 sin diferenciar la STC 17/2024 incurre en desconocimiento de la jurisprudencia actualmente aplicable y compromete la solidez técnica del razonamiento.

La motivación de las resoluciones de la Audiencia Nacional debe ser, en cualquier caso, específica y suficiente respecto de las alegaciones de persecución política, sin que basten fórmulas estereotipadas o remisiones genéricas. Este es el legado consolidado de la doctrina constitucional, tal como ha sido reiteradamente enunciado por el Tribunal y reformulado por la doctrina académica (Ollé Sesé, 2021).

3.4. La doctrina del Tribunal Europeo de Derechos Humanos: de Soering a Othman

La doctrina del Tribunal Europeo de Derechos Humanos en materia de extradición ha desplegado, a lo largo de tres décadas, un cuerpo jurisprudencial cuya integración en la argumentación interna española constituye un recurso sistemáticamente infrautilizado. El examen de la *ratio decidendi* de los pronunciamientos clave permite reconstruir el estándar europeo aplicable y conectar dicho estándar con la tesis sostenida en el presente trabajo (Cryer et al., 2019; Schabas, 2015; Werle y Jessberger, 2020).

La sentencia Soering c. Reino Unido (TEDH, 7 de julio de 1989) constituye el pronunciamiento fundacional. El Tribunal extiende la responsabilidad del Estado parte que entrega a la posible vulneración del artículo 3 del Convenio en el Estado de destino, cuando existan motivos sustanciales para creer que el reclamado se enfrentará en aquel a un riesgo real de tratos prohibidos por el citado precepto. La *ratio decidendi* se cifra en una operación interpretativa de gran alcance: el carácter absoluto del artículo 3 impide al Estado parte sustraerse a su responsabilidad mediante el mecanismo extradicional. La proyección sobre la tesis aquí sostenida es directa: la motivación discriminatoria del Estado requirente, cuando se articula con un riesgo real de tratos contrarios al artículo 3, activa el deber del Estado requerido de denegar la entrega como exigencia derivada del propio Convenio (Arnell, 2022).

La doctrina Soering ha sido confirmada y desarrollada en una jurisprudencia consolidada. La sentencia Cruz Varas y otros c. Suecia (TEDH, 20 de marzo de 1991) extiende el principio a los supuestos de expulsión. La sentencia Saadi c. Italia (TEDH, 28 de febrero de 2008) reafirma el carácter absoluto del artículo 3, declarando que la prohibición de tortura y tratos inhumanos o degradantes no admite ponderación con consideraciones de seguridad nacional, ni siquiera en supuestos de terrorismo. La *ratio decidendi* de Saadi resulta jurídicamente relevante para la tesis aquí sostenida: cuando el riesgo derivado de la motivación discriminatoria del Estado requirente se proyecta sobre el contenido del artículo 3, el Estado requerido no puede invocar consideraciones de cooperación internacional, de relaciones diplomáticas o de seguridad para justificar la entrega.

La sentencia Othman (Abu Qatada) c. Reino Unido (TEDH, 17 de enero de 2012) extiende la doctrina al ámbito del artículo 6 del Convenio. El Tribunal declara que la entrega no procede cuando exista un riesgo real de denegación flagrante de justicia en el Estado de destino. El concepto de *flagrant denial of justice* se concreta, conforme a la sentencia, en supuestos cualificados como la admisión en el juicio de prueba obtenida bajo tortura, la condena en ausencia sin posibilidad efectiva de un nuevo juicio, o la denegación arbitraria del derecho a la asistencia letrada. La *ratio decidendi* de Othman amplía el ámbito material de la protección del Convenio en sede extradicional: la motivación discriminatoria del Estado requirente, cuando afecta a la integridad del proceso debido en el Estado de destino, opera también como factor desencadenante del deber de denegación. La sentencia adquiere especial relieve para la tesis del presente trabajo, en cuanto reconoce que las dificultades probatorias específicas del *extraditurus* –singularmente cuando se invoca el uso de prueba obtenida mediante tortura– exigen un estándar de exigibilidad probatoria adaptado a esa estructural asimetría.

La sentencia Trabelsi c. Bélgica (TEDH, 4 de septiembre de 2014) completa el marco con un pronunciamiento sobre la cadena perpetua sin posibilidad de revisión. El Tribunal declara que la entrega es incompatible con el artículo 3 del Convenio cuando el reclamado se enfrenta a una pena de prisión perpetua sin mecanismo alguno de revisión efectiva. La proyección sobre la tesis aquí sostenida es complementaria: la motivación discriminatoria del Estado requirente puede manifestarse también en la previsión de penas cuya severidad, considerada en el contexto del caso concreto, resulta desproporcionada y revela la finalidad punitiva extrajurídica de la persecución.

La integración de esta doctrina en la argumentación interna española se canaliza por la vía del artículo 10.2 de la Constitución, que ordena interpretar las normas relativas a los derechos fundamentales conforme a los tratados internacionales sobre la materia ratificados por España. El Tribunal Constitucional ha reiterado la fuerza interpretativa de la jurisprudencia del Tribunal Europeo de Derechos Humanos en este ámbito. La consecuencia operativa es relevante: la invocación sistemática de los estándares europeos –Soering, Saadi, Othman y Trabelsi– en la argumentación de la oposición extradicional eleva el nivel de exigencia de la motivación judicial española y refuerza la operatividad del motivo de oposición fundado en persecución política.

3.5. El estándar probatorio operable: una sistematización en tres planos

La principal dificultad técnica del motivo de oposición es probatoria. Por definición, el Estado requirente niega la motivación política y aporta un expediente formalmente correcto. Resulta necesario, por tanto, articular un cuadro indiciario lo suficientemente sólido como para que el órgano judicial aprecie motivos serios –en la fórmula del Convenio Europeo de Extradición– para creer que la solicitud encubre persecución. El análisis de los pronunciamientos relevantes permite identificar tres planos de indicios cuya articulación configura un estándar probatorio operable. Este estándar se inscribe expresamente en una lógica de juicio jurídico fundado en indicios contextuales, no de prueba plena, y se sitúa en la línea consolidada por el TEDH desde Soering hasta Othman.

El primer plano comprende los indicadores objetivos referidos al perfil del reclamado y al contexto del proceso. La sistematización doctrinal permite identificar al menos cuatro elementos probatorios: el perfil político, profesional o asociativo del reclamado en el momento en que se origina el procedimiento; la cronología comparada entre el surgimiento de la imputación y los acontecimientos políticos relevantes –cambios de régimen, denuncias públicas formuladas por el reclamado, conflictos contractuales con entes estatales–; la existencia, frente a hechos similares, de una persecución selectiva que omita a otros eventuales partícipes próximos al poder; y la secuencia procesal anómala –cambio inopinado del juez instructor, traslado de la causa, modificación del cargo, incorporación tardía de imputaciones, intervención de organismos de inteligencia militar, sanciones internacionales sobre los operadores judiciales del país requirente–.

El segundo plano comprende la documentación procedente de fuentes externas reconocidas. La práctica jurisprudencial consolidada permite identificar como fuentes admisibles los informes anuales y especiales en materia de derechos humanos emitidos por organismos internacionales; los informes país de la Comisión Interamericana de Derechos Humanos, del Alto Comisionado para los Derechos Humanos de Naciones Unidas y de las misiones internacionales de determinación de los hechos –entre ellas, la Misión Internacional Independiente de Determinación de los Hechos sobre la República Bolivariana de Venezuela (2024)–; los informes de organizaciones no gubernamentales con metodología auditable –Human Rights Watch, Amnesty International, la Federación Internacional por los Derechos Humanos (FIDH), Freedom House–; las sentencias previas del Tribunal Europeo de Derechos Humanos, del Tribunal de Justicia de la Unión Europea y de la Corte Interamericana de Derechos Humanos referidas al Estado requirente; las resoluciones de los comités de Naciones Unidas; y los dictámenes de organismos parlamentarios internacionales, como el ya citado Joint Committee on Human Rights del Reino Unido (2025).

El tercer plano comprende los defectos jurídico-procesales del propio expediente del Estado requirente. La práctica permite identificar entre tales defectos: la ausencia de control judicial previo en origen –el problema central abordado por las SSTC 147/2020 y 147/2021–, la insuficiencia probatoria, la indefinición del tipo penal aplicable, la ausencia de doble incriminación, la prescripción no advertida, la imprecisión de la identidad subjetiva, las traducciones defectuosas y los antecedentes de procesos paralelos cerrados. Cada defecto técnico opera, además de como motivo autónomo de oposición, como un indicio adicional de la naturaleza instrumental del proceso.

Articulados los tres planos, se desplaza parcialmente la carga argumentativa del expediente: el órgano judicial del Estado requerido no puede limitarse a la constatación de la corrección formal de la solicitud, sino que viene obligado a un análisis sustantivo de la situación. Este es exactamente el canon constitucional consolidado por el Tribunal Constitucional español desde la STC 32/2003, en línea con el estándar que la Observación general n.º 4 del Comité contra la Tortura (2017) ha establecido para el riesgo previsible, real y personal en sede convencional. La sistematización del estándar en tres planos no constituye, por tanto, una construcción meramente teórica: refleja la propia lógica del control judicial impuesta por la doctrina constitucional y por la jurisprudencia del Tribunal Europeo de Derechos Humanos. La distinción entre estándar probatorio, indicios contextuales y juicio jurídico final resulta especialmente relevante para evitar la confusión entre la mera presencia de elementos críticos –que no basta– y la construcción razonada de un cuadro indiciario suficiente.

3.6. La arquitectura multinivel: análisis estructural de los mecanismos concurrentes

El examen sistemático del régimen normativo y de la doctrina jurisprudencial aplicable permite identificar una arquitectura multinivel de protección concurrente, integrada por mecanismos que operan en planos jurisdiccionales y cuasijurisdiccionales diferenciados. La presente sección ofrece un análisis estructural de tales mecanismos, identificando su fundamento normativo, su naturaleza jurídica y su función en el sistema de protección, sin formular prescripciones operativas.

El primer plano lo constituye la jurisdicción interna del Estado requerido. En el sistema español, el procedimiento se desarrolla en dos instancias judiciales –Juzgado Central de Instrucción de la Audiencia Nacional y Sala de lo Penal del mismo órgano– y admite el recurso de amparo ante el Tribunal Constitucional cuando concurren las condiciones de admisibilidad legalmente exigidas. La función estructural de este plano es doble: por un lado, opera el control material del motivo de oposición conforme al canon consolidado por la doctrina constitucional; por otro, fija el estándar interno de motivación judicial cuya insuficiencia activa el control del Tribunal Constitucional.

El segundo plano lo constituye el sistema de control de los datos en INTERPOL. La Comisión de Control de los Ficheros (CCF) es un órgano cuasijurisdiccional independiente con sede en Lyon, cuyo Estatuto vigente le atribuye competencia para emitir decisiones definitivas y vinculantes sobre acceso, rectificación o eliminación de datos personales tratados en los sistemas de INTERPOL (INTERPOL, 2025b). El procedimiento ante la CCF se articula en tres modalidades de actuación: la solicitud preventiva, dirigida a impedir la emisión de una notificación que se prevé contraria a las normas de INTERPOL; la solicitud de eliminación o rectificación de datos ya tratados, cuya argumentación principal puede fundarse en la violación del artículo 3 de la Constitución de INTERPOL –intervención en asuntos políticos–, del artículo 83 del Reglamento sobre el Tratamiento de Datos –exclusión de delitos administrativos– o de los principios de calidad, pertinencia y actualidad; y la solicitud de medidas provisionales –bloqueo cautelar de visibilidad de la notificación–. El examen ante la CCF descansa en un estándar documental riguroso, lo que ha conducido a la propia Comisión a documentar, en sus informes anuales, la presentación abusiva de expedientes con documentación falsificada, con el consiguiente incremento del escrutinio (INTERPOL, 2025c).

El tercer plano lo constituye el sistema universal de protección de los derechos humanos. El Comité de Derechos Humanos, órgano de tratado del Pacto Internacional de Derechos Civiles y Políticos, examina comunicaciones individuales contra Estados parte que hayan ratificado el Primer Protocolo Facultativo y puede solicitar al Estado parte la adopción de medidas provisionales para evitar daño irreparable. El estándar normativo aplicable combina los artículos 7 –prohibición de tortura y tratos inhumanos–, 9 –libertad y seguridad personales–, 14 –garantías del proceso debido– y 26 –no discriminación– del Pacto. La doctrina del Comité, consolidada en pronunciamientos como Kindler c. Canadá (Comité de Derechos Humanos, 1993) y proyectada hermenéuticamente en su Observación general n.º 15 (Comité de Derechos Humanos, 1986), establece la responsabilidad del Estado que extradita por las violaciones previsibles en el Estado de destino. El Comité contra la Tortura, por su parte, opera con lógica similar para los Estados que han aceptado el procedimiento del artículo 22 de la Convención. El estándar fijado por el Comité –riesgo personal, previsible, real y presente, conforme a la Observación general n.º 4 (Comité contra la Tortura, 2017)– se proyecta directamente sobre los procedimientos de extradición y resulta sistemáticamente compatible con el estándar probatorio en tres planos identificado en el apartado 3.5.

El Grupo de Trabajo sobre la Detención Arbitraria, Procedimiento Especial cuyo mandato emana del Consejo de Derechos Humanos, examina comunicaciones individuales relativas a privaciones de libertad presuntamente arbitrarias –incluidas las derivadas de Notificaciones Rojas con fundamento político– y emite opiniones que, sin ser jurídicamente vinculantes en sentido estricto, presentan notable autoridad y son frecuentemente invocadas por tribunales nacionales y por la propia CCF de INTERPOL. Los Relatores Especiales temáticos pueden formular comunicaciones a los Estados implicados, generando un registro público con valor probatorio en otros foros.

El cuarto plano lo constituye el sistema regional europeo. El Tribunal Europeo de Derechos Humanos puede otorgar medidas provisionales conforme al artículo 39 de su Reglamento cuando se acredite la existencia de un riesgo real e inminente de daño irreparable a los derechos protegidos por el Convenio. La doctrina Soering, su evolución posterior y los pronunciamientos sobre el riesgo de violación flagrante del derecho a un proceso justo –Othman c. Reino Unido (2012)– configuran el estándar interpretativo aplicable. Para los casos con extradición desde España, este mecanismo opera como instancia última del sistema multinivel.

El quinto plano lo constituye el sistema regional interamericano. La Comisión Interamericana de Derechos Humanos puede otorgar medidas cautelares en supuestos de gravedad y urgencia para evitar daño irreparable. La práctica de la Comisión incluye la solicitud expresa al Estado de no proceder con la extradición o la expulsión mientras se examina la petición. El procedimiento ante la Corte Interamericana, en los Estados que han aceptado su jurisdicción contenciosa, es subsiguiente y menos frecuente en la práctica extradicional, pero su jurisprudencia sobre garantías y protecciones judiciales –artículos 8 y 25 de la Convención Americana– resulta citable como estándar interpretativo en cualquier foro.

Procede destacar, finalmente, la articulación entre el motivo de oposición extradicional y el régimen de asilo. Conforme a los artículos 5 y 36 de la Ley 12/2009, de 30 de octubre, reguladora del derecho de asilo y de la protección subsidiaria, la solicitud de asilo o de protección internacional, una vez admitida a trámite, conlleva la suspensión de la entrega del reclamado hasta la resolución definitiva del expediente administrativo. Conforme al criterio fijado por la STC 148/2004, asilo y extradición pueden operar como vías concurrentes. La función estructural del régimen de asilo en la arquitectura multinivel es, por tanto, complementaria del motivo de oposición extradicional, sin que su invocación implique renuncia a este último.

3.7. La coordinación funcional entre foros: análisis de las sinergias y restricciones

El análisis estructural precedente permite identificar la función diferenciada de cada mecanismo de protección. Una cuestión analítica adicional, sin embargo, exige consideración: la interacción funcional entre los distintos foros y los efectos de tal interacción sobre la efectividad del sistema multinivel. El examen sistemático de la práctica de los órganos relevantes permite formular tres proposiciones.

La primera proposición es que la activación de un mecanismo de protección puede generar efectos probatorios y normativos en otros foros del sistema. Una opinión del Grupo de Trabajo sobre la Detención Arbitraria que califique como arbitraria una privación de libertad derivada de una notificación de INTERPOL puede operar como elemento indiciario en el procedimiento ante la CCF y, recíprocamente, una decisión de la CCF que ordene la eliminación de datos puede invocarse ante los órganos jurisdiccionales internos. El sistema multinivel presenta, por tanto, una lógica de integración funcional que la práctica jurisprudencial ha venido reconociendo.

La segunda proposición es que la activación simultánea o sucesiva de los distintos mecanismos está sujeta a restricciones procesales que deben ser identificadas. El Comité de Derechos Humanos, conforme a su doctrina consolidada, inadmite comunicaciones cuando el mismo asunto está siendo examinado por otro procedimiento internacional de examen o arreglo. La reserva española al artículo 5.2.a) del Primer Protocolo Facultativo del Pacto matiza, en sentido análogo, esta articulación. El conocimiento técnico de tales restricciones –y de las exclusiones que cada órgano admite o no admite– resulta decisivo para evitar litispendencias internacionales no deseadas.

La tercera proposición es que la coherencia narrativa del expediente entre foros constituye un factor de eficacia. La presentación de los hechos debe ser sustancialmente consistente en todos los procedimientos abiertos, sin perjuicio de las adaptaciones técnicas que cada órgano exige conforme a su mandato y a su estándar de admisibilidad. Las contradicciones entre presentaciones en distintos foros, además de afectar a la credibilidad procesal del reclamado, pueden ser invocadas argumentativamente por el Estado requirente o por el Estado requerido en sus respuestas.

El sistema multinivel presenta, en suma, una lógica de integración funcional que opera por sinergia y no por mera adición. Esta característica no resulta de una reconstrucción doctrinal, sino que se desprende del propio diseño normativo de los mecanismos relevantes y de la práctica consolidada de los órganos competentes. La tesis sostenida en el presente trabajo –que ningún foro aislado ofrece tutela suficiente– encuentra en este punto su confirmación analítica.

4. Conclusiones

El análisis desarrollado en las secciones precedentes permite responder afirmativamente a la pregunta de investigación planteada y confirmar la hipótesis sometida a contraste. Las conclusiones se sistematizan en cuatro proposiciones.

Primera, la categoría jurídica de la persecución política instrumentalizada mediante delito común admite una delimitación analítica precisa, que prescinde de los elementos polémicos del término *lawfare* y se articula en torno a tres elementos verificables: la corrección técnica del tipo penal aplicado, la motivación discriminatoria del Estado requirente y la existencia de indicios objetivos que permitan al órgano judicial del Estado requerido apreciar motivos serios para creer en tal motivación. La importación acrítica del concepto de *lawfare* al discurso forense queda desplazada por las objeciones doctrinales –Kennedy (2006), Werner (2010), Krever (2014)–, en favor de una categoría jurídica acotada y verificable.

Segunda, el régimen normativo aplicable al motivo de oposición se articula en cuatro estratos –interno español, convencional regional europeo, convencional bilateral e institucional INTERPOL– cuya lectura sistemática resulta indispensable para una aplicación rigurosa. La doctrina constitucional española, examinada en su evolución desde la STC 32/2003 hasta la STC 36/2024, configura un canon de control material cuya vigencia, modulada por la STC 17/2024, exige una operación interpretativa cuidadosa. La jurisprudencia del Tribunal Europeo de Derechos Humanos, articulada desde la sentencia Soering (1989) y consolidada en pronunciamientos como Saadi (2008) y Othman (2012), fija un estándar europeo cuya integración en la argumentación interna española resulta técnicamente exigible.

Tercera, el estándar probatorio aplicable al motivo de oposición admite una sistematización analítica en tres planos: indicadores objetivos sobre el perfil del reclamado y el contexto del proceso, documentación de fuentes externas reconocidas internacionalmente y defectos jurídico-procesales del expediente del Estado requirente. La articulación rigurosa de los tres planos desplaza parcialmente la carga argumentativa y obliga al órgano judicial a un análisis sustantivo, en plena consonancia con el canon constitucional consolidado y con la jurisprudencia del Tribunal Europeo de Derechos Humanos.

Cuarta, la arquitectura multinivel de protección concurrente integra cinco planos diferenciados –jurisdicción interna, control de los datos en INTERPOL, sistema universal de derechos humanos, sistema regional europeo y sistema regional interamericano–, cuya articulación funcional opera por sinergia y no por mera adición. La hipótesis sometida a contraste –que ningún foro aislado ofrece tutela suficiente– resulta confirmada mediante el análisis sistemático del régimen normativo y de la práctica jurisprudencial de los órganos relevantes. La lógica de integración funcional entre foros se desprende del propio diseño normativo de los mecanismos y de la doctrina consolidada de los órganos competentes.

El trabajo no agota los desarrollos posibles. La progresiva consolidación del fenómeno de la represión transnacional, documentada por instancias parlamentarias y académicas con credibilidad ascendente, anuncia una fase de litigio extradicional crecientemente complejo. La efectividad del motivo de oposición consistente en la persecución política instrumentalizada mediante delito común dependerá, en años venideros, de la capacidad doctrinal y jurisprudencial para articular el régimen interno con los estándares internacionales convergentes. La tesis sostenida en el presente trabajo ofrece, en este sentido, una contribución sistemática al análisis del problema.

5. Limitaciones del estudio y líneas futuras de investigación

El presente trabajo presenta tres limitaciones cuya identificación resulta exigible al rigor académico. En primer lugar, la delimitación espacial centrada en el sistema español de extradición pasiva implica la exclusión, salvo en lo necesario para la coherencia sistemática del análisis, de los regímenes de otros Estados europeos cuya doctrina jurisprudencial podría enriquecer la perspectiva comparada. En segundo lugar, la delimitación temporal, articulada en torno a la evolución de la doctrina constitucional española hasta la cascada jurisprudencial de marzo y abril de 2024, deja fuera del análisis los pronunciamientos posteriores que, en su caso, hayan podido modular adicionalmente el canon constitucional. En tercer lugar, el estudio se concentra en el motivo de oposición consistente en la persecución política instrumentalizada mediante delito común, con exclusión de otras causas de denegación cuya interacción con dicho motivo merecería un análisis diferenciado.

Tres líneas futuras de investigación se desprenden del análisis desarrollado. La primera línea se refiere al examen comparado de la doctrina constitucional o suprema de otros Estados europeos sobre el motivo de oposición fundado en persecución política, con el objetivo de identificar convergencias y divergencias en la articulación del canon de control material. La segunda línea se refiere al estudio empírico de los patrones de comportamiento de los órganos cuasijurisdiccionales internacionales –singularmente la Comisión de Control de los Ficheros de INTERPOL y el Grupo de Trabajo sobre la Detención Arbitraria– en supuestos de extradición política, con metodología cuantitativa que complemente el análisis dogmático aquí desarrollado. La tercera línea se refiere a la articulación entre el régimen extradicional y el régimen de sanciones internacionales –GLOMAG, sanciones de la Unión Europea, sanciones de la Oficina de Control de Activos Extranjeros del Departamento del Tesoro de los Estados Unidos–, cuya creciente interacción con los procedimientos de cooperación judicial penal exige un análisis sistemático específico.

Agradecimientos

Se agradece a las personas que han revisado versiones previas del manuscrito por las observaciones que contribuyeron a la maduración del análisis aquí expuesto. Cualquier error subsistente es de exclusiva responsabilidad del autor.

Conflicto de intereses

El autor declara la ausencia de conflictos de intereses en relación con el objeto del presente estudio.

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The Right to Liberty and Security enshrined in Article 5 of the ECHR as a Limitation on Extradition

El derecho a la libertad y a la seguridad consagrado en el artículo 5 del CEDH como límite a la extradición

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Abstract

This paper examines the role of Article 5 of the European Convention on Human Rights as a limit to extradition procedures, focusing on the protection against arbitrary deprivation of liberty in the context of international judicial cooperation. The objective of the research is to analyse whether the risk of unlawful or disproportionate detention following extradition may constitute a ground for refusing surrender under European human rights standards. The study employs a doctrinal and jurisprudential methodology, based on the analysis of the case law of the European Court of Human Rights and the Court of Justice of the European Union, as well as relevant provisions of Romanian legislation on international judicial cooperation in criminal matters. The results indicate that Article 5 ECHR rarely operates as an autonomous ground for refusing extradition but may become decisive when detention results from a manifestly unfair trial or when previously executed custodial measures are not properly taken into account. The study concludes that although Article 5 plays mainly a subsidiary role compared to Articles 3 and 6 ECHR, it remains a relevant safeguard against excessive or arbitrary deprivation of liberty in extradition proceedings.

Keywords: extradition, Article 5 ECHR, deprivation of liberty, European arrest warrant, fundamental rights

Resumen

El presente estudio analiza el papel del artículo 5 del Convenio Europeo de Derechos Humanos como límite a los procedimientos de extradición, centrándose en la protección contra la privación arbitraria de libertad en el contexto de la cooperación judicial internacional. El objetivo de la investigación es examinar si el riesgo de una detención ilegal o desproporcionada tras la extradición puede constituir un motivo para denegar la entrega conforme a los estándares europeos de derechos humanos. La metodología utilizada es de carácter doctrinal y jurisprudencial, basada en el análisis de la jurisprudencia del Tribunal Europeo de Derechos Humanos y del Tribunal de Justicia de la Unión Europea, así como de la legislación rumana relevante en materia de cooperación judicial internacional en materia penal. Los resultados muestran que el artículo 5 del CEDH rara vez opera como motivo autónomo de denegación de la extradición, pero puede adquirir relevancia cuando la detención deriva de un proceso manifiestamente injusto o cuando no se tienen en cuenta adecuadamente medidas previas de privación de libertad ejecutadas en el extranjero. Se concluye que, aunque el artículo 5 tiene un papel principalmente subsidiario en comparación con los artículos 3 y 6 del CEDH, sigue siendo una garantía relevante contra la privación arbitraria o excesiva de libertad en los procedimientos de extradición.

Palabras clave: extradición, artículo 5 CEDH, privación de libertad, orden de detención europea, derechos fundamentales

Introduction

The protection of the right to individual liberty enshrined in Article 5 of the European Convention on Human Rights ("the Convention") constitutes one of the fundamental guarantees of the rule of law and acquires particular relevance in the field of international judicial cooperation in criminal matters, especially in extradition proceedings. Although the assessment of the compatibility of extradition with the Convention is traditionally carried out by reference to Articles 3 and 6 thereof, the case law of the European Court of Human Rights demonstrates that Article 5 of the Convention may also constitute, in certain exceptional circumstances, a legal obstacle to the surrender of the requested person.

This paper seeks to examine the role of Article 5 of the Convention as a limitation on extradition, aiming to highlight the manner in which the standards developed in the case law of the European Court of Human Rights and of the Court of Justice of the European Union influence the interpretation of domestic rules concerning international judicial cooperation.

In this context, the issue of delineating between measures involving deprivation of liberty and those involving restriction of liberty acquires particular practical importance, since the legal classification of such measures influences both the lawfulness of extradition and the manner of calculating periods previously served in other jurisdictions. The case law of the European Court of Human Rights and of the Court of Justice of the European Union emphasises that the notion of "deprivation of liberty" has an autonomous and contextual character, requiring a concrete assessment of the intensity of the restrictions imposed upon the individual, rather than a formal evaluation based solely on the classification provided by the domestic law of the states concerned.

Methodology

The present research is predominantly doctrinal and jurisprudential in nature, being based on the analysis of relevant provisions of the Convention, of national legislation concerning international judicial cooperation in criminal matters, and of the legal instruments of the European Union applicable to surrender and extradition procedures.

The methodology employed consists in the systematic examination of the case law of the European Court of Human Rights relating to Article 5 of the Convention, particularly in cases concerning extradition or the transfer of persons to other jurisdictions, as well as the case law of the Court of Justice of the European Union concerning the notion of detention and the calculation of periods of deprivation of liberty in the context of the European arrest warrant. The analysis is complemented by the interpretation of Romanian domestic provisions, in particular those of Law No. 302/2004, the Criminal Code and the Code of Criminal Procedure, with a view to identifying the legal limits of extradition from the perspective of the protection of individual liberty.

The comparative method has been employed in order to highlight the convergences between conventional standards and those of European Union law, as well as to assess their impact on the practice of national courts.

1. THE STANDARD OF PROTECTION CONFERRED BY ARTICLE 5 OF THE CONVENTION

As is well known, the provisions of Article 5 of the Convention protect the physical liberty of the individual against arbitrary detention.

The notion of "deprivation of liberty" within the meaning of Article 5 of the Convention has an autonomous meaning, independent of the classification given by domestic law. The Court is not bound by the assessment of national courts and conducts its own evaluation of the concrete situation of the individual, on the basis of the specific circumstances of the case (see, for example, *Khlaifia and Others v Italy,*[1] §71; *H.L. v the United Kingdom,*[2] §90; *Creangă v Romania,*[3] §92).

In order to determine whether a person has been deprived of liberty, the Court starts from the concrete situation and examines a set of criteria such as the type of measure, its duration, the effects produced, and the manner of its execution (*Guzzardi v Italy,*[4] §92; *De Tommaso v Italy,*[5] §80; *Medvedyev and Others v France,*[6] §73). The analysis also takes into account the context in which the measure is applied, since in modern societies there may be legitimate restrictions on freedom of movement which do not amount to detention (*Nada v Switzerland,*[7] §226; *Austin and Others v the United Kingdom,*[8] §59).

The Court has emphasised that the distinction between a mere restriction on freedom of movement and a deprivation of liberty depends on factors such as the individual's situation, the applicable legal framework, the duration of the measure, and the actual degree of the restrictions imposed (*Z.A.*

1 *Khlaifia and Others v Italy* (GC), no. 16483/12, ECHR 2016.

2 *H.L. v the United Kingdom*, no. 45508/99, ECHR 2004-IX.

3 *Creangă v Romania* (GC), no. 29226/03, 23 February 2012.

4 *Guzzardi v Italy*, 6 November 1980, Series A no. 39.

5 *De Tommaso v Italy* (GC), no. 43395/09, ECHR 2017.

6 *Medvedyev and Others v France* (GC), no. 3394/03, ECHR 2010.

7 *Nada v Switzerland* (GC), no. 10593/08, ECHR 2012.

8 *Austin and Others v the United Kingdom* (GC), nos. 39692/09, 40713/09 and 41008/09, 15 March 2012.

and Others v Russia,[9] §138; *Ilias and Ahmed v Hungary,*[10] §217). Even measures adopted for protective purposes or in the interest of the individual may constitute a deprivation of liberty if they produce a sufficient level of constraint (*Khlaifia and Others v Italy*, §71).

The concept traditionally includes two elements: an objective element, consisting in the confinement of the person in a limited space for a significant period of time, and a subjective element, namely the absence of valid consent to that situation (*Storck v Germany,*[11] §74; *Stanev v Bulgaria,*[12] §117). In assessing the objective element, the Court takes into account factors such as the possibility of leaving the space in question, the level of supervision over the person's movements, and the degree of social isolation (*Guzzardi v Italy*, §95).

Furthermore, the Court has held that the relatively short duration of a measure does not exclude the existence of a deprivation of liberty where the circumstances indicate a real constraint upon the individual (*Rantsev v Cyprus and Russia,*[13] §317; *Iskandarov v Russia,*[14] §140). Nor is the absence of classical forms of detention –such as placement in a cell or the use of handcuffs– decisive for this classification (*M.A. v Cyprus,*[15] §193). In the Strasbourg Court's case law, issues under Article 5 also arise in relation to house arrest (*Buzadji v the Republic of Moldova*[16] (GC), 2016; *Dacosta Silva v Spain,*[17] 2006).[18]

Consequently, the notion of deprivation of liberty within the meaning of Article 5 of the Convention is a flexible and contextual one, determined through a global assessment of the effective restrictions imposed upon the individual and their impact on his or her personal liberty.

The applicability of Article 5 of the Convention in the context of extradition proceedings may be analysed in two principal contexts: (i) the lawfulness of detention during the extradition procedure and (ii) the risk of a violation of the right to liberty of the person following surrender to the requesting state. Whereas the first hypothesis directly engages Article 5 as a procedural safeguard, the second raises the more complex issue of the existence of a substantive human rights obstacle to the extradition of the requested person.

Proceeding from these premises, the present paper seeks to analyse the impact of Article 5 of the Convention in extradition proceedings, with particular attention given to the latter hypothesis–namely, the situation in which the risk of a violation of guarantees relating to individual liberty may constitute a

9 *Z.A. and Others v Russia* (GC), no. 61411/15 and others, 21 November 2019.

10 *Ilias and Ahmed v Hungary* (GC), no. 47287/15, 21 November 2019.

11 *Storck v Germany*, no. 61603/00, ECHR 2005-V.

12 *Stanev v Bulgaria* (GC), no. 36760/06, 17 January 2012.

13 *Rantsev v Cyprus and Russia*, no. 25965/04, ECHR 2010.

14 *Iskandarov v Russia*, no. 17185/05, 23 September 2010.

15 *M.A. v Cyprus*, no. 41872/10, ECHR 2013.

16 *Buzadji v the Republic of Moldova* (GC), no. 23755/07, ECHR 2016.

17 *Dacosta Silva v Spain*, no. 69966/01, ECHR 2006-XIII.

18 European Court of Human Rights, Guide on Article 5 of the European Convention on Human Rights. Right to liberty and security, updated on 28 February 2025.

ground for refusing extradition, as a limitation derived from European human rights protection standards.

2. Relevant Case Law of the European Court of Human Rights

In its case law, the European Court of Human Rights ("the ECtHR") has established that a state may breach its obligations under the Convention where it orders the extradition or expulsion of an individual to another state in which there exists a real risk of a serious or flagrant violation of the fundamental rights guaranteed by the Convention. This principle was first enshrined in the Court's case law in *Soering v the United Kingdom,*[19] in which it was held that a Contracting State cannot absolve itself of responsibility merely because the violation would occur on the territory of a third state. The rationale of this case law lies in the fact that the obligations arising under the Convention are incumbent upon the state ordering the removal or surrender measure. Accordingly, responsibility for compliance with Convention rights lies with the state deciding upon extradition, and not with the requesting state, even where the latter is not a party to the Convention.

Consequently, in extradition proceedings, the courts of the Romanian state, acting as the requested state, are called upon to examine also whether the surrender of the person might foreseeably lead to a situation incompatible with the guarantees of the Convention, without there being any exception as regards the verification of the risk of deprivation of liberty contrary to Article 5 of the Convention, even where the requesting state is a third state which has not ratified the Convention.

In such circumstances, the courts of the requested state must verify whether extradition could lead to a deprivation of liberty lacking a legal basis, to excessive or disproportionate detention, or to a situation in which the person would not benefit from effective guarantees of judicial review of detention.

Where there exists a real risk that such situations may occur, extradition may become incompatible with the obligations of the requested state under the Convention, irrespective of whether the requesting state is or is not a party to the Convention (*Othman (Abu Qatada) v the United Kingdom*).[20]

Specifically, in *Othman (Abu Qatada) v the United Kingdom*, the ECtHR held that Article 5 of the Convention may constitute a basis for preventing extradition in situations where the applicant has already been convicted in the state of residence following a flagrantly unfair trial and there is no possibility of reopening those proceedings upon return. In such circumstances, the applicant could not rely on Article 6, as he would not be at risk of a flagrant denial of justice, such that it is reasonable for him to rely on Article 5 (para. 232). Accordingly, the Court held that a Contracting State would violate Article 5 if it extradited an applicant to a state where he would be exposed to a real risk of a flagrant breach of that provision. A flagrant violation of Article 5 will occur only where, for example, the receiving state would detain the applicant arbitrarily for many years without any

19 *Soering v the United Kingdom*, 7 July 1989, Series A no. 161, ECHR.

20 *Othman (Abu Qatada) v the United Kingdom*, no. 8139/09, judgment of 17 January 2012, ECHR.

intention of bringing him to trial. A flagrant breach of Article 5 may also arise where an applicant would be at risk of being imprisoned for a significant period in the receiving state following a conviction obtained in a flagrantly unfair trial (para. 233).

The absence of specific regulation in this field in Romanian law is all the more relevant given that Romania itself may face issues regarding compliance with Article 5 of the Convention where it submits extradition requests in its capacity as a requesting state. In such situations, the manner in which periods of deprivation or restriction of liberty previously served in other jurisdictions are recognised and taken into account, in particular measures such as house arrest, may raise questions as to the lawfulness and proportionality of the deprivation of liberty following extradition.

As a party to the Convention, Romania is required to organise its criminal procedures and detention regime in such a way as to comply with the guarantees of Article 5 of the Convention. Accordingly, when requesting extradition of a person, the Romanian state must be able to demonstrate that the detention which will follow surrender has a legal basis, is proportionate, and is subject to judicial review. This obligation arises from the consistent case law of the ECtHR according to which deprivation of liberty must be lawful and foreseeable, and its duration must not exceed that which is justified by the purpose of detention (see, for example, *Mooren v Germany*[21]).

In particular, the question may arise whether the failure to take into account such measures executed abroad does not lead, after extradition, to the execution of a total period of deprivation of liberty greater than that justified by the legitimate purpose of detention.

From the perspective of the Convention, such a situation could raise issues concerning the lawfulness and proportionality of the deprivation of liberty, since the total duration of detention must remain within the limits permitted by Article 5 of the Convention, an aspect which may become particularly relevant for the courts of the requested state, which may examine whether extradition would lead to detention incompatible with the Convention. In such a context, the requesting state must be able to explain how periods of deprivation of liberty previously served, including those served in other jurisdictions, will be treated.

On the other hand, the assessment of the compatibility of such a situation with the guarantees of Article 5 of the Convention becomes relevant not only for the requested state, called upon to decide on extradition, but also for the requesting state, which must ensure that the subsequent execution of custodial measures does not lead to arbitrary or disproportionate detention, having regard to the measures already executed by the individual in other jurisdictions. Thus, where a person has previously been subject to severe restrictive measures affecting physical liberty, such measures may constitute a genuine deprivation of liberty within the meaning of Article 5.

The case law of the ECtHR reveals arguments supporting the view that, in the context of extradition, the failure to recognise or to deduct from the senten-

21 *Mooren v Germany* (GC), no. 11364/03, judgment of 9 July 2009, ECHR.

ce to be served the period during which the individual was subjected abroad to restrictive measures affecting physical liberty may lead to excessive deprivation of liberty, contrary to Article 5 of the Convention.

In *Mooren v Germany*, the Court established the principle that deprivation of liberty complies with the protection standards under Article 5 of the Convention only if it is not only in accordance with domestic law, but also free from arbitrariness, in the sense that the legal basis of detention must be clear, foreseeable, and subject to effective judicial review.

In *Buzadji v the Republic of Moldova* (paragraphs 85-86), the Court held that pre-trial detention represents one of the most frequently applied forms of deprivation of liberty and, at the same time, an exception to the general rule laid down in Article 5 § 1, according to which everyone has the right to liberty. The relevant period begins at the moment of arrest or placement in pre-trial detention and ends upon release or when the charge is determined, even at first instance. The Court also reiterated the principle that the duration of pre-trial detention must not exceed a reasonable time. The reasonableness of such duration cannot be assessed in the abstract, but must be examined in light of the circumstances of each case. Continued detention is justified only if there are genuine indications that the public interest outweighs the right to liberty, without infringing the presumption of innocence. Factors such as the risk of absconding, the character and conduct of the individual, his or her assets, and connections with the state or with other countries may be taken into account (paragraph 90).

In *Del Río Prada v Spain,*[22] the Court established, as general principles, the prohibition of retroactive application of a more severe penalty, the foreseeability of punishment, and the limits of judicial interpretation in criminal matters. Under Article 7 of the Convention, the principle of legality of offences and penalties prohibits not only the retrospective criminalisation of conduct, but also the subsequent application of rules or interpretations which have the effect of aggravating the execution of the sentence. Thus, any change occurring after conviction which leads to an effective extension of detention is incompatible with the requirements of Article 7. The principle of legality entails the obligation that the convicted person must be able reasonably to foresee the legal consequences of his or her conviction, including the effective duration of deprivation of liberty, in the light of the legal rules applicable at the time of conviction. Although national courts have the competence to interpret and develop domestic law, such interpretation cannot lead to a retrospective aggravation of the criminal situation of the convicted person. To the extent that a change in case law leads, in an unforeseeable manner, to an extension of the duration of detention, this may constitute a violation of Article 7 of the Convention. Finally, where a convicted person continues to be deprived of liberty after the moment at which, under the previously applicable legal framework, he or she ought to have been released, the detention no longer has a sufficient legal basis. Such a situation may lead to a finding of a violation of Article 5 of

22 *Del Río Prada v Spain* (GC), application no. 42750/09, judgment of 21 October 2013, ECHR.

the Convention concerning the right to liberty and security.

Relevant for the Member States of the European Union are also the principles deriving from the case law of the Court of Justice of the European Union ("the CJEU"), which are binding on national courts. In particular, reference is made to the judgment of the Court (Fourth Chamber) of 28 July 2016, "Reference for a preliminary ruling – Urgent preliminary ruling procedure – Police and judicial cooperation in criminal matters – Framework Decision 2002/584/JHA – Article 26(1) – European arrest warrant – Effects of surrender – Deduction of detention served in the executing Member State – Concept of 'detention' – Measures involving restriction of liberty other than detention – House arrest accompanied by electronic monitoring – Charter of Fundamental Rights of the European Union – Articles 6 and 49", delivered in Case C-294/16,[23] *Sąd Rejonowy dla Łodzi – Śródmieścia w Łodzi*, in the field of the European arrest warrant.

Thus, in *Sąd Rejonowy dla Łodzi – Śródmieścia w Łodzi*, the CJEU established, as a matter of principle, that in the procedure relating to the European arrest warrant, the notion of "detention" refers to an actual deprivation of liberty comparable to imprisonment, and not to any measure restricting freedom of movement. Consequently, measures such as house arrest, electronic monitoring, or other similar restrictions cannot automatically be regarded as detention for the purpose of deducting the period served in the executing Member State from the sentence imposed by the issuing state. Nevertheless, it is for the national court to assess, in concreto, the nature and intensity of the restrictions imposed, in order to determine whether they are equivalent, in their effects, to an actual deprivation of liberty.

This case law is also relevant in the field of extradition because, although the two legal mechanisms are distinct, they pursue the same functional objective, namely the surrender of a person to another state for prosecution or the execution of a sentence.

Firstly, both extradition and the European arrest warrant involve the deprivation of liberty of the requested person and raise similar issues regarding the observance of fundamental rights, in particular the right to liberty and the right to a fair trial. Accordingly, the interpretations of the CJEU concerning the notion of "detention", the proportionality of measures, or the deduction of periods of deprivation of liberty may be used as interpretative benchmarks in extradition proceedings as well.

Secondly, the interpretative case law in the field of the European arrest warrant contributes to clarifying European standards concerning judicial cooperation in criminal matters. Even though extradition is generally conducted on the basis of international conventions, the principles developed within European Union law may influence the manner in which national courts interpret those instruments, particularly where they are required to ensure compliance with fundamental rights protected and guaranteed at European level. In this context, Member States, which are bound to comply with the case law of the Court of Justice of the European Union, should not apply substantially different standards or criteria where the surrender procedure concerns a third

23 https://eur-lex.europa.eu/legal-content/RO/TXT/HTML/?uri=CELEX:62016CJ0294

state, since the obligation to guarantee an adequate level of protection of fundamental rights subsists independently of the legal framework of judicial cooperation.

Lastly, the European arrest warrant is regarded as a simplified and enhanced form of extradition between the Member States of the European Union, and the solutions of the CJEU in this field may provide useful criteria for the interpretation and application of rules concerning deprivation of liberty in extradition proceedings, particularly as regards the duration and nature of measures restricting liberty.

3. Extradition and the Protection of Fundamental Rights: between the Standards of the Convention and the Limits of Romanian Domestic Law

3.1. The indirect application of Article 5 of the Convention in extradition proceedings and its subsidiary role in refusing the surrender of the requested person

The Romanian legislation currently in force, namely Article 21 of Law No. 302/2004 on international judicial cooperation in criminal matters,[24] expressly includes non-observance of fundamental rights and freedoms among the mandatory grounds for refusing an extradition request. These provisions represent no more than the transposition into domestic law of limits imposed by international human rights law, intended to prevent judicial cooperation where it would lead to the violation of fundamental rights, thereby establishing a domestic mechanism for guaranteeing the conformity of extradition with Convention standards.

The protection of fundamental rights may constitute, under Romanian extradition law, a subsidiary ground for refusing the surrender of the requested person, such refusal being capable of being displaced only if the requesting state provides sufficient guarantees regarding observance of those rights. The relevant normative framework is laid down principally by the provisions concerning mandatory and optional grounds for refusal, as well as by the regulations relating to capital punishment.

In practice, human rights may prevent extradition in four principal situations: (i) the risk of an unfair trial or of trial before a tribunal which does not afford minimum procedural guarantees; (ii) the risk of persecution or of aggravation of the person's situation on protected grounds; (iii) the risk of torture or inhuman or degrading treatment, including through detention conditions; and (iv) in the case of judgments delivered in absentia, where the right of defence has been infringed and there are no real guarantees of a retrial.

In addition to these hypotheses, extradition is excluded in the case of persons benefiting from international protection where surrender would expose the person to serious risks to life, liberty, or integrity. Likewise, the law permits refusal of extradition where surrender would have consequences of exceptional gravity for the requested person, the courts interpreting this provision extensively, including in situations where there exists a risk of treatment contrary to the standards of the European

24 Law No. 302/2004 on international judicial cooperation in criminal matters, republished in the Official Gazette No. 411 of 27 May 2019.

Convention on Human Rights. Taken as a whole, these mechanisms operate as filters for the protection of fundamental rights in extradition proceedings.

It should be noted that, having regard to the scheme of Law No. 302/2004, a violation of Article 5 of the Convention, governing the right to liberty and security or "unlawful detention", does not appear as an autonomous, express ground –whether mandatory or optional– for refusal of extradition. According to the wording of the statute, "unlawful detention" could be relevant only indirectly, in so far as the factual situation which it describes would in reality overlap with a legal ground already provided for by Law No. 302/2004, for example the absence of fundamental procedural guarantees and of the right of defence, trial before a tribunal not affording minimum guarantees, trial in absentia without sufficient guarantees of retrial, or a real risk of torture or inhuman or degrading treatment.

Even so, in practice, the optional ground in Article 22(2), concerning a significant risk of violation of fundamental rights, has been interpreted extensively chiefly in respect of risks falling within Article 3 of the Convention, namely torture, inhuman or degrading treatment, detention conditions incompatible with Convention standards, and other consequences of exceptional gravity for the extraditable person.

In cases in which the High Court of Cassation and Justice of Romania has refused extradition, the argument has been constructed around the real and credible risk of serious impairment of fundamental rights, particularly under the standard of Article 3, and not as a mere autonomous violation of Article 5 of the Convention.

In situations in which Article 5 of the Convention has been analysed by the Romanian courts in extradition proceedings, that analysis has been situated within the first hypothesis previously set out, namely on the plane of reviewing the lawfulness and necessity of the measure of provisional arrest in Romanian extradition proceedings. Thus, where revocation of provisional arrest is sought or its lawfulness is challenged,[25] Article 5 § 1(f) and Article 5 § 4 of the Convention become applicable. In other words, Article 5 operates here as a standard governing deprivation of liberty in extradition proceedings, and not as an autonomous ground for refusing extradition. Similarly, the existence of intervention by the ECtHR or of an impediment to enforcement has not been treated as a "ground for refusal" of extradition, but as an impediment to the enforcement of the extradition decision, capable of being relied upon by way of an enforcement challenge.[26]

In conclusion, in Romanian law, a violation of Article 5 of the Convention does not, as such, fall within the mandatory or optional grounds for refusal of extradition provided for by Law No. 302/2004. It may be relevant only indirectly, if the facts relied upon in reality support another express legal ground of refusal, or separately, for the purpose of challenging provisional arrest or establishing an impediment to the enforcement of extradition.

25 Dan Lupașcu, *Passive extradition. Theoretical and practical aspects*, available at www.juridice.ro

26 Camelia Sutiman, *High Court of Cassation and Justice. Filing an application before the ECtHR in connection with extradition proceedings constitutes an impediment to enforcement of the extradition request*, available at www.juridice.ro.

Of relevance, however, the risk of violation of Article 5 of the Convention through the surrender of the requested person, as a ground for refusal of extradition, was retained in at least one well-known case in which Romania had the status of requesting state, namely *Popoviciu v Curtea de Apel București*, decided by the courts of the United Kingdom.[27]

Specifically, in the extradition proceedings, the requested person relied upon the risk of violation of Article 5 of the Convention, contending that his surrender to the requesting state, Romania, would lead to the execution of a custodial sentence resulting from a conviction pronounced following a fundamentally unfair trial. In those circumstances, the subsequent detention would constitute an arbitrary deprivation of liberty, incompatible with the Convention standard. This Convention ground was relied upon in conjunction with Article 6 of the Convention, the requested person arguing that he had been the victim, in the requesting state, of a flagrant violation of the right to a fair trial culminating in his conviction, and that detention resulting from such a conviction becomes arbitrary.

In the case under consideration, the British court examined whether there were substantial grounds for considering that the previous criminal trial had constituted such a violation and, finding that there was a real risk that such grounds were engaged in the case analysed,[28] held, in accordance with Article 5(1)(a) of the Convention, that there existed a risk of a complete denial of the rights conferred by Article 5 of the Convention,[29] since, in the event of surrender to Romania, the subsequent detention of the requested person would be based upon a conviction pronounced in breach of fair trial standards.

Accordingly, the court concluded that there were substantial grounds for considering that the requested person had not been tried by an impartial tribunal, which is equivalent to a radical violation of the guarantees of a fair trial. In those circumstances, the execution of the sentence resulting from such a conviction would constitute arbitrary detention.

Thus, the court's analysis focused principally on Article 6 of the Convention, the substance of the reasoning being devoted to the assessment of the existence of the risk of a flagrant violation of the right to a fair trial, according to the balance of probabilities standard of proof applied by the British court. Article 5 was examined only as a consequence of that analysis, the argument based on Article 5 being treated as a corollary of the findings concerning Article 6 of the Convention. Therefore, the judgment confirms that, in extradition proceedings, Article 5 may be invoked indirectly, as a consequence of a flagrant violation of the right to a fair trial.

For these reasons, the British appellate court quashed the extradition order previously made by the court of first

27 *Popoviciu v Curtea de Apel București* (Romania) [2021] EWHC 1584 (Admin), High Court of Justice (Queen's Bench Division, Divisional Court), 11 June 2021.

28 The British court found that there were credible indications of an improper relationship between the trial judge and the prosecution's main witness, a relationship that had not been disclosed during the proceedings. This circumstance was considered capable of fundamentally affecting the impartiality of the tribunal.

29 *Popoviciu v Curtea de Apel București* (Romania) [2021] EWHC 1584 (Admin), § 167.

instance. The judgment was regarded as particularly important because it represents one of the rare situations in which the British courts found that the execution of a conviction pronounced in a Member State of the European Union could lead to a flagrant violation of the rights guaranteed by the Convention.

The updated ECtHR guides on Article 5 and the relevant case law confirm that this provision may have extraterritorial application in the extradition context, although it is rarely relied upon successfully as an autonomous ground, as compared with Articles 3 (prohibition of inhuman or degrading treatment) and 6 (right to a fair trial). For example, in situations where detention following surrender would result from a profoundly unfair trial, leading to arbitrary imprisonment, Article 5 may be examined in parallel with Article 6.

3.2. The application of Article 5 in the context of extradition to third states and in relation to European Union law

In the case of extradition from a Member State of the European Union to a third state, the state surrendering the person must comply with the obligations arising under the Convention. National courts routinely examine risks relating to fundamental rights, including those which may arise under Article 5. Where the situation falls within the scope of European Union law –in particular in the case of Union citizens– the CJEU has established additional safeguards.

In *Petruhhin* (C-182/15) and subsequent case law, such as *Raugevicius* and *S.M.*, the CJEU has held that Member States must protect Union citizens against discrimination and must ensure observance of the fundamental rights laid down in the Treaties and in the Charter of Fundamental Rights of the European Union. Although those judgments focus principally on the principle of non-discrimination on grounds of nationality and on the mechanism *aut dedere aut judicare*, they confirm that extradition cannot take place if it would lead to a violation of the fundamental rights guaranteed by the Charter, including the right to liberty.

Accordingly, the existence of a real risk of flagrant arbitrary detention in the third state could justify refusal of extradition, especially in the absence of sufficient guarantees from the requesting state. However, the Court of Justice has not developed a specific test concerning "flagrant violation" in relation to Article 6 of the Charter or Article 5 of the Convention, comparable to the standard developed in the case law relating to Article 4 of the Charter (for example, in the field of detention conditions). In practice, refusals of extradition are founded more frequently on the risk of ill-treatment or on violation of the right to a fair trial.

In the reverse situation, namely extradition from a third state to a Member State of the European Union, the receiving state must ensure that detention following surrender complies with the requirements of Article 5 of the Convention and Article 6 of the Charter. This hypothesis is, in general, less controversial, since Member States are presumed to comply with Convention standards, although systemic problems –such as excessive duration of pre-trial detention– might, theoretically, give rise to challenges.

Although Article 5 may, in theory, constitute an obstacle to extradition, cases in which it has been successfully relied upon are rare. The high threshold of a "flagrant violation" requires proof of arbitrary detention of a systemic or extreme nature (for example, detention for an indeterminate period without judicial review), which is difficult to establish in the absence of extensive and documented evidence. In cases of extradition to third states, arguments based on Article 3 of the Convention (such as the risk of torture) or on the issue of capital punishment are invoked far more frequently. There are, however, situations of overlap, where a profoundly unfair trial may lead to arbitrary detention; notwithstanding this, courts generally prefer analysis under Article 6, the case law on which is more developed.

Furthermore, the harmonisation of procedures within the European Union and the use of diplomatic or judicial assurances further reduce the scope for reliance on Article 5. Even so, in cases involving states in which there are documented practices of arbitrary detention, such as cases of politically motivated imprisonment, Article 5 remains a possible legal ground, albeit an exceptional one.

In continuation of the analysis of the protection of the right to liberty in the context of international judicial cooperation, it is necessary to clarify the domestic conceptual framework concerning the delineation of custodial measures, particularly by reference to the criteria developed in national and European case law.

3.3. The classification of custodial measures in Romanian law: criteria, applicability, and the particular features of house arrest

3.3.1. The Convention and European criteria for classifying a measure as involving deprivation of liberty

In order to determine whether a person is deprived of liberty within the meaning of Article 5 of the Convention, account must be taken of his actual situation in relation to the execution of the measure imposed, as well as the type, duration, effects, and manner of execution of the measure in question.

According to the case law of the CJEU (Case C-294/16 PPU[30]), it is held that: "In this regard, as the Polish Government and the European Commission stated both in their written observations and at the hearing, the liberty-depriving effect, a constitutive element of detention, may characterise both imprisonment and, in exceptional cases, other measures which, without constituting incarceration in the strict sense, are nevertheless so constraining that they must be assimilated to such incarceration.

That would be the case for measures which, because of their type, duration, effects and methods of implementation, have such a degree of intensity that they deprive the person concerned of his liberty in a manner comparable to incarceration. It follows that Article 26(1) of Framework Decision 2002/584 cannot be interpreted as limiting itself to requiring the issuing Member State

30 https://curia.europa.eu/juris/document/document.jsf?text=&docid=182300&pageIndex=0&doclang=en&mode=req&dir=&occ=first&part=1&cid=3882490.

of the European arrest warrant to calculate only periods of incarceration served in the executing Member State, to the exclusion of periods during which other measures were applied that involve a deprivation of liberty with effects comparable to those of incarceration."

Ultimately, the Court concludes as follows: "Having regard to the foregoing considerations, and in particular the distinction which must be drawn between measures restricting liberty, on the one hand, and those involving deprivation of liberty, on the other, the concept of 'detention', within the meaning of Article 26(1) of Framework Decision 2002/584, must be interpreted as covering, in addition to incarceration, any measure or any set of measures imposed on the person concerned which, because of their type, duration, effects and methods of implementation, deprive that person of his liberty in a manner comparable to incarceration."

The CJEU has held that measures such as house arrest limited to short periods during the night, coupled with electronic monitoring, the obligation to report periodically to a police station at pre-determined times, and the prohibition on applying for travel documents, are not, in principle, sufficiently constraining to attain the threshold of a deprivation of liberty comparable to detention in the classic sense. Nevertheless, the European court emphasised that such classification cannot be made automatically, but requires a rigorous, case-by-case analysis of all relevant circumstances, national courts being under an obligation to verify in detail whether the measure in question attains, in concreto, the level of "detention", beyond any reasonable doubt.

Consequently, for a person to suffer a deprivation of liberty, there must be a restriction of that person's relations with third parties, as well as the temporary but constant impossibility of leaving a certain defined area, together with the subjective aspect, namely the feeling of isolation and the inability to live a normal life.

3.3.2. The regulation of custodial and restrictive preventive measures in Romanian law

At the level of Romanian domestic law, according to Article 15 of Law No. 302/2004 on international judicial cooperation in criminal matters, "The duration of penalties and of measures involving deprivation of liberty, in the fulfilment of a request made by the Romanian authorities pursuant to this Law, shall be taken into account in the Romanian criminal proceedings and shall be deducted from the duration of the sentence imposed by the Romanian courts."

Likewise, pursuant to Article 72(1) of the Romanian Criminal Code, the period during which a person has been subject to a custodial preventive measure is deducted from the duration of the sentence of imprisonment imposed, and pursuant to Article 73(1) of the Criminal Code, the same procedure applies in the case of custodial preventive measures executed outside the country.

Thus, in domestic law, preventive measures are procedural measures which concern, directly, either the state of liberty of a person, in the case of detention, pre-trial detention, and house arrest, classified as custodial preventive measures, or other fundamental rights or freedoms, in the case of judicial control and judicial control on bail, classified as preventive measures restrictive of liberty.

As regards the definition of house arrest in Romanian criminal procedural legislation, it consists in the obligation imposed on a person, for a specified period of time, not to leave the building in which he lives without the permission of the judicial authority and to be subject to certain restrictions, while according to Article 399(9) of the Code of Criminal Procedure, "The duration of the measure of house arrest shall be deducted from the sentence imposed by equating one day of house arrest with one day of sentence."

Moreover, according to Decision No. 22 of 12 October 2009 delivered by the High Court of Cassation and Justice of Romania in the appeal in the interests of the law concerning the determination of the solution to be given by the court in the event of a request for deduction of house arrest executed abroad, in application of the provisions of Article 15 of Law 302/2004, it held that "The duration of house arrest, executed abroad, a custodial preventive measure, within the meaning of Article 5 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, must be taken into account תרגסמב the Romanian criminal proceedings and deducted from the duration of the imprisonment imposed by the Romanian courts."

Likewise, regard must also be had to Article 129(2) of Law 254/2013, which provides for the possibility of leaving the home: "After consulting the defendant, the supervisory authority shall draw up a programme including the manner of execution of house arrest, the obligation to provide information in the event of leaving the home in urgent cases, as well as, where appropriate, the conditions of leaving, travel and return to the home, which shall be communicated to him forthwith, against signature."

As regards the classification of a preventive measure as amounting to a mere restriction of freedom of movement, and not to a genuine deprivation of liberty, a rigorous delineation requires reference also to the legal regime of judicial control, the sole liberty-restricting measure enshrined in Romanian criminal procedural legislation.[31]

Thus, according to Article 215(1) of the Code of Criminal Procedure, while under judicial control, the defendant must comply, mandatorily, with the following obligations:

(a) to appear before the criminal investigation body, the preliminary chamber judge, or the trial court whenever summoned;

(b) to inform without delay the judicial authority which ordered the measure, or before which the case is pending, regarding any change of residence;

(c) to present himself before the police authority designated for his supervision by the judicial authority which ordered the measure, in accordance with the supervision programme drawn up by the police authority or whenever summoned.

Likewise, the following paragraph of the same provisions provides that the judicial authority which ordered the measure may impose upon the defen-

31 Although the Code of Criminal Procedure also regulates the institution of judicial supervision on bail, the specific difference lies exclusively in the mechanism for posting bail, the other elements being, in essence, subject to the same provisions applicable to judicial supervision.

dant (thus, on an optional basis) that, while under judicial control, he comply with one or more of the following obligations:

(a) not to exceed a certain territorial limit, fixed by the judicial authority, except with its prior approval;

(b) not to travel to places specifically designated by the judicial authority or to travel only to the places designated by it;

(c) to wear permanently an electronic monitoring device;

(d) not to return to the family home, not to approach the injured party or members of his family, other participants in the commission of the offence, witnesses or experts, or other persons specifically designated by the judicial authority, and not to communicate with them directly or indirectly, by any means;

(e) not to exercise the profession, trade, or activity in the exercise of which he committed the offence;

(f) to communicate periodically relevant information about his means of subsistence;

(g) to submit to measures of control, care, or medical treatment, especially for the purpose of detoxification;

(h) not to participate in sporting or cultural events or other public gatherings;

(i) not to drive vehicles specifically designated by the judicial authority.

From a comparison of the applicable legal texts relating to the measure of house arrest with the domestic law rules relating to the measure of judicial control, it may be observed that among the obligations which may be imposed where the liberty-restrictive preventive measure of judicial control is ordered, there is no prohibition on leaving the residence or domicile.

That obligation not to leave the home is provided for only by Article 221 of the Romanian Code of Criminal Procedure, where it is stated that the measure of house arrest consists in the obligation imposed upon the defendant, for a specified period, not to leave the building where he resides without the permission of the judicial authority which ordered the measure or before which the case is pending and to submit to restrictions established by it.

In national law, the measure of house arrest may be imposed for a specified period of 30 days; however, differences of regulation as to duration and manner of execution, by comparison with other legal systems, may raise issues of compatibility at the stage of deduction by the national courts, particularly as regards classification as custodial or restrictive measures, there being situations where, under the legislation of other states, the prohibition on leaving the home may be imposed for certain hours only.

In the same vein, domestic regulation itself relativises the continuous nature of the measure, since criminal procedural legislation allows the person under house arrest to leave the home for the purpose of carrying out professional activity, which, in practical terms, may lead to a configuration of the measure similar to a prohibition limited to those time intervals during which work is not performed.

Thus, according to Article 221(6) of the Romanian Code of Criminal Procedure, upon the written and reasoned request of the defendant, the judge of rights and freedoms, the preliminary chamber judge, or the trial court may, by interlocutory order, permit him to leave the building for the purpose of attending the workplace, educational or vocational training courses or other similar activities, or for obtaining essential means of subsistence, as well as in other duly justified situations, for a specified period of time, if this is necessary for the exercise of legitimate rights or interests of the defendant.

By Decision No. 650/2014, the Constitutional Court of Romania held that the essential differentiating element between a custodial measure and a mere restriction of the exercise of the right to freedom of movement lies in the intensity of the measure imposed and the concrete manner of its execution.

Thus, unlike pre-trial detention, which involves placing the person in a detention centre, in conditions of isolation and under permanent supervision, house arrest has the effect of the person remaining in his own home. Even so, leaving the home is permitted exclusively for appearing before judicial authorities, at their request, or in other situations only with the prior authorisation of the preliminary chamber judge or of the trial court.

Having regard to those elements, the Romanian Constitutional Court held that, by its manner of regulation, house arrest represents a measure which, by its intensity and by the manner of its execution, affects the liberty of the person.

Now, a comparative analysis would reveal that the essential elements of these measures are, in reality, convergent both with the regulations of the law of other states and with those of domestic law.

Thus, Article 221(6) of the Romanian Code of Criminal Procedure expressly enshrines the possibility of leaving the home in the case of house arrest for the exercise of professional activity, for obtaining means of subsistence, or for other justified situations, without this aspect altering the classification of the measure as one involving deprivation of liberty.

Similarly, Article 399(9) of the Romanian Code of Criminal Procedure does not distinguish, in relation to deduction of the duration of preventive measures, according to the intervals during which the defendant leaves or does not leave the domicile under the conditions permitted by law, thereby confirming that the essential element is the legal nature of the measure, and not the specific modalities of its execution.

Although, under Romanian criminal procedural legislation, custodial preventive measures may be imposed for specified periods of 30 days, with the possibility of successive extension by the judge for the same duration, while the equivalent measure ordered by the requested state in extradition proceedings may have a duration expressed in hours, this difference should not, in itself, constitute an impediment in the process of recognition or deduction, in so far as that measure is capable, in concreto, of being classified as a deprivation of liberty, both within the meaning of Article 5 of the Convention and under national legislation.

Moreover, although the execution of custodial sentences is regulated by its own mechanisms of individualisation and deduction, and within the framework of international judicial cooperation procedures the measures and forms of execution ordered by other states may present peculiarities of duration, intensity, or manner of implementation, these differences should not, in themselves, constitute an impediment to recognition or assumption of execution, the Romanian state being under an obligation to respect the decision of the competent executing state, which has effectively undertaken to ensure enforcement of the criminal sanction.

3.4. Issues Arising in the Case Law of the Romanian courts

3.4.1. Practical difficulties concerning the classification of the duration of preventive measures expressed in hours and ordered by foreign judicial authorities in relation to the provisions of Romanian law

In one case,[32] following the conclusion of extradition proceedings to Romania (acting as requesting state), the extradited person lodged an enforcement challenge by which he sought the deduction of a period of 1 year, 5 months and 22 days from the sentence fixed by the conviction judgment. In the enforcement challenge, the extradited person relied on the fact that, following the communication of the European arrest warrant to the British authorities, Westminster Magistrates' Court had ordered his house arrest under the following conditions: he was not to leave his home address for 23 hours per day, namely during the period 16:00–15:00, from 23 September 2020 until 17 February 2021. Subsequently, from 18 February 2021 until 17 March 2022, he was not to leave his home address for 20 hours per day, namely during the period 16:00–12:00. Consequently, he contended that there should be deducted, from the duration of the sentence to be served in Romania, the period of house detention already served in the United Kingdom.

In essence, the Romanian judge entrusted with determining the case held, by reference to the relevant national articles, that the duration of arrest carried out abroad in fulfilment of a request made by the Romanian authorities is taken into account in the Romanian criminal proceedings and deducted from the duration of the sentence imposed by the Romanian courts, and that the duration of the measure of house arrest is deducted from the sentence imposed by equating one day of house arrest with one day of sentence.

Thereafter, following analysis of the conditions of the house arrest measure as imposed by the authorities of the United Kingdom and detailed in the communications of Westminster Magistrates' Court, by reference to the national provisions comprising the conditions for imposing the measure of house arrest, the judge found that they were similar and, accordingly, held that the applicant had been subject to a custodial preventive measure and ordered deduction of the entire period claimed.

What should be noted from the court's reasoning is the fact that the judge did not conduct a detailed analysis of all the conditions laid down by the British authorities in order to conclude whether or not the applicant had been under a form of detention capable of being classified as a custodial measure, but held exclusively that, during that period (even though it was quantified in hours, in a manner apparently difficult to reconcile with the national system based on days) the applicant had been subject to the measure of hou-

32 Criminal Judgment No. 1106 of 11 May 2022 delivered by the District Court of Bucharest, Sector 5, in case no. 6732/302/2022.

se arrest and, having regard to the legal provisions requiring deduction of any custodial measure executed abroad, ordered the full deduction of that period.

In practice, other national courts have considered that the measures to which persons subject to extradition proceedings are subjected, where these are quantified by hourly intervals, do not attain the threshold of a deprivation of liberty, being classified predominantly as mere restrictions on the exercise of rights. That interpretation may be regarded as prevailing in Romanian domestic law.

In this context, it has often been held that the measure applied in the requesting state, namely the notion of "bail", would correspond, from the perspective of the domestic authorities, to a form of "security" or placement under judicial control, although such an institution has no direct terminological or conceptual counterpart in domestic law, the notion being taken over and interpreted through an approximate translation, without the support of official documents objectively clarifying the legal nature of the measure imposed pursuant to the European arrest warrant.

This approach sometimes leads to the conclusion that the requested person would be "at the disposal of the authorities" or in a form of "custody", but the reasoning thus constructed proves problematic, since it proceeds from a formal equation, without a complete analysis of the concrete content of the measure.

Thus, it is frequently concluded that the measure in question would have no counterpart in domestic law, being closer to judicial control than to house arrest, a conclusion which does not always faithfully reflect the real content of the obligations imposed.

By way of illustration, in another case,[33] the judge dismissed the applicant's challenge, holding that the period during which the applicant had been released on bail (*released on bail* – 30 March 2022) until the date on which he was incarcerated in Romania (11 July 2024) did not represent a custodial measure, but only a liberty-restricting measure, considering that the provisional measure (*conditional bail*) which imposed the prohibition on leaving the domicile for a number of 5 hours (at various intervals and with variations of +/- 30 minutes) could not be assimilated to the preventive measure of house arrest.

In the case, the applicant argued that the national court should not have regard only to the most severe restriction, namely the prohibition on leaving the home for 5 hours, but also to his personal situation, in the sense that, in order to support himself, he had to work 60 hours per week, while the distance to the workplace was approximately 4 hours round trip, so that, in concrete terms, his social life had been affected and he had experienced a feeling of isolation. The applicant also relied on section 240A of the Criminal Justice Act 2003, which provides for the possibility of deducting from a custodial sentence periods spent under certain forms of "bail", but only in situations where these involve significant restrictions, such as compliance with a "curfew", as a rule during the night, combined with electronic monitoring. In such hypotheses, British law permits the granting of cre-

33 Criminal Judgment No. 324 of 26 March 2025 delivered by the Bucharest Tribunal – First Criminal Section in case no. 20686/302/2024.

dit in the individualisation of the duration of the sentence, by transforming the period of restriction into an equivalent number of days of detention, without operating an automatic day-by-day deduction, but by means of a mechanism of calculation established by the court, according to the concrete intensity and duration of the measures.

The Romanian court held that the prohibitions imposed on the applicant, following his release by the British authorities and until determination of the request for surrender to the Romanian authorities, constituted a much less serious interference with his right to private life than those specific to house arrest under domestic law. Consequently, there was no justification whatsoever for deducting the period of approximately 2 years and 4 months, this not having the legal nature of a period effectively served from the duration of the sentence.

Thus, the national court considered that it did not follow that the applicant's private life had undergone any radical change as a result of his inability to carry out certain social, professional, or family activities in those particular intervals (07:00–12:00), that this obligation was not determinative for the overall measure imposed on the applicant and could not be subsumed within house arrest, which requires that the determinative obligation be represented by the prohibition on leaving the building and by no means by the requirement that daily life be conducted only under the effect of obligations restrictive of rights.

Accordingly, the applicant's arguments that the court's analysis ought not to be confined exclusively to the most restrictive component of the obligation, namely the prohibition on leaving the home for a 5-hour interval, but ought to incorporate his concrete personal context (i.e., the need to carry out professional activity of approximately 60 hours per week, coupled with travel time of approximately 4 hours round trip, impacting social life and a claimed feeling of isolation, as well as the obligation imposed to live and sleep, every night, at the home address) were not accepted, and the court identified no obligations sufficiently constraining to be capable of being equated with a custodial measure such as the measure of house arrest provided for by national legislation.

Equally, the Romanian court considered that no substantial impairment or radical alteration of private life could be found, in the sense of the impossibility of pursuing social, family, or professional activities within the intervals in question (07:00–12:00), since that obligation did not have a determinative character in shaping the measure as a whole, which cannot be equated with house arrest, the latter presupposing, as its defining element, the prohibition on leaving the premises, and not the conduct of daily activity under the incidence of simple obligations restrictive of rights.

3.4.2. Practical difficulties concerning the recognition in Romania of forms of execution ordered by the authorities of other states

In another case,[34] the difficulty of recognising the execution procedure ordered by another state was identified, the national courts being placed in the position of analysing its compatibility

34 Criminal Judgment No. 25 of 20 January 2022 delivered by the District Court of Bucharest, Sector 1, in case no. 14756/299/2021.

with the forms and effects regulated by domestic law, as well as the extent to which the assumption of execution by the foreign authority produces direct effects upon forms of execution previously issued on Romanian territory.

Thus, following the imposition of a sentence of 1 year and 6 months' imprisonment upon a French national, the execution documents for enforcement of the sentence were issued, namely the warrant for execution of the sentence of imprisonment, the request for international tracing, and the European arrest warrant.

In examining the request for execution of the European arrest warrant, the Chambre de l'instruction of the Paris Court of Appeal refused, by its decision delivered on 24 March 2021 in file No. 2020/00072, the surrender of the applicant to the Romanian authorities, he having been placed under judicial control from 8 January 2020, and ordered enforcement, on French territory, of the sentence imposed by the Romanian courts.

The decision of the French court was founded on Article 4(1)(6) of Framework Decision 2002/584/JHA, which provides that the executing judicial authority may refuse to execute a European arrest warrant where it has been issued for the purposes of executing a custodial sentence or detention order, where the requested person remains in the executing Member State, is a national or resident thereof, and that state undertakes to execute that sentence or detention order in accordance with its domestic law.

The Office for Criminal Enforcement within the court which had delivered the conviction judgment referred the matter to the court seeking withdrawal of the execution documents, making reference to Article 598(1)(c), second limb, of the Romanian Code of Criminal Procedure, concerning the existence of a ground impeding enforcement of the sentence which no longer justifies maintaining the execution documents issued by the Romanian judicial authorities.

The first-instance court ordered dismissal of that referral concerning withdrawal of the execution documents, reasoning, in essence, that the French authorities had not confirmed that the respondent had actually commenced execution of the sentence on the territory of the foreign state, despite the fact that they had allegedly been requested by numerous communications to reply on that issue.

Thus, the court held merely that the French state had refused surrender, had recognised the judgment of the Romanian courts, and had agreed to assume execution of the sentence, but that those elements did not represent an impediment to enforcement of the sentence imposed by the Romanian court, so long as the French state had not communicated information regarding the commencement or completion of enforcement of the sentence on French territory.

Against that background, the convicted person lodged an appeal and sought withdrawal of the execution documents issued by the Romanian authorities, contending that there existed a ground impeding enforcement. He submitted that refusal of surrender pursuant to Article 4(6) of Framework Decision 2002/584/JHA is conditional upon the effective assumption of execution of the sentence by the executing state, which, in the present case, had occurred through the judgment of the Paris Court of Appeal of 24 March 2021, that act representing the determinative moment of the transfer of competence in matters of execution.

He further contended that the first-instance court had misinterpreted the effects of that judgment, since the existence of recognition and the undertaking by the French state to execute the sentence removes the basis for maintaining the execution documents previously issued by the Romanian authorities, those documents no longer being justified in the circumstances of the assumption of execution.

In support of the appeal, he further submitted that, according to the applicable European normative framework, namely Article 8(1) of Framework Decision 2008/909/JHA, competence in matters of execution and all aspects relating to the concrete manner of execution belong exclusively to the executing state, and recognition of the Romanian judgment produces binding effects in that state.

Consequently, he submitted that the decision of the Romanian first-instance court dismissing the request for withdrawal of the execution documents was unlawful, since it had failed to give effect to the decision of the French judicial authorities and to the mechanism of mutual recognition, ignoring the effect of the assumption of execution of the sentence and the existence of a current impediment to enforcement.

To date, this issue has remained unresolved, the national appellate court having ordered, pursuant to Article 267 of the Treaty on the Functioning of the European Union (TFEU), with reference to Article 19(3)(b) of the Treaty on European Union (TEU) and Article 2(2) of Law No. 340/2009, the stay of proceedings and the referral of questions to the Court of Justice of the European Union for a preliminary ruling on the following questions:

"1. Must the provisions of Article 4(6) of Framework Decision 2002/584/JHA, read together with Article 25 and Article 8(2) and (3) of Framework Decision 2008/909/JHA, be interpreted as meaning that refusal to execute a European arrest warrant issued for the execution of a custodial sentence and recognition of the conviction judgment, without actual enforcement through the incarceration of the convicted person, as a result of ordering execution of the sentence under house arrest according to the law of the executing state and without obtaining the consent of the sentencing state in the course of the sentence adaptation procedure, entails the loss of the right of the sentencing state to proceed with enforcement of the sentence, in accordance with Article 22(1) of Framework Decision 2008/909/JHA?

2. Must the provisions of Article 8(1)(c) of Framework Decision 2002/584/JHA and Article 22(1) of Framework Decision 2008/909/JHA be interpreted as meaning that a conviction judgment imposing a custodial sentence, on the basis of which a European arrest warrant was issued and refused under Article 4(6), with recognition of the judgment, but without actual enforcement through incarceration of the convicted person, as a result of adaptation of the sentence according to the law of the executing state and without obtaining the consent of the sentencing state in the course of the sentence adaptation procedure, loses its enforceable character?"

In this context, the difficulties generated by the delineation of competence in matters of execution between the sentencing state and the executing state, as well as the uncertainties regarding the legal effects of recognition of the criminal judgment under the mechanisms of European judicial cooperation, demonstrate the need for a uniform interpretation of the applicable standards, aspects which justify the formulation of conclusions concerning the role of Article 5 of the Convention in configuring the limits of execution and recognition of custodial measures in a transnational context.

4. Conclusions

Article 5 of the Convention may prevent extradition to or from third states within the legal framework of the European Union, particularly where surrender would expose the person to a real risk of flagrant arbitrary detention in the requesting state. The case law of the ECtHR, in particular *Othman*, confirms the extraterritorial application of that standard, and European Union law reinforces it through the Charter of Fundamental Rights and the protection conferred by European citizenship.

Even so, the practical impact of this doctrine remains limited. The very high threshold of a "flagrant violation", the preference of courts for arguments founded on Articles 3 and 6 of the Convention, and the role of assurances provided by the requesting state reduce the frequency with which Article 5 is invoked successfully. Thus, Article 5 of the Convention operates rather as a residual safeguard against extreme violations of individual liberty than as an ordinary obstacle in extradition proceedings. Nevertheless, in a changing geopolitical context, marked by the increase of extradition requests to states with rule of law deficiencies, its potential to prevent extradition could become more relevant, albeit only in truly exceptional situations.

The analysis carried out demonstrates that Article 5 of the Convention does not ordinarily constitute an autonomous ground for refusal of extradition, but may acquire legal relevance in situations where surrender of the requested person would lead to arbitrary, disproportionate, or judicially unreviewable detention.

Accordingly, Article 5 of the Convention performs a subsidiary, yet significant, role in reviewing the compatibility of extradition with fundamental rights, contributing to ensuring the lawfulness and proportionality of deprivation of liberty in the framework of international judicial cooperation.

The analysis further shows that failure to recognise periods of deprivation of liberty previously executed in other jurisdictions may lead to an excessive duration of detention, incompatible with Convention standards.

The analysis of the criteria for classifying measures involving deprivation of liberty in Romanian law, correlated with the standards developed in the case law of the ECtHR and the CJEU, shows that determining whether a measure is custodial or restrictive cannot be carried out formally, solely by reference to its legal designation or to its duration expressed in days or hours, but requires a concrete assessment of the type, intensity, duration, and manner of execution. In this respect, the case law of the CJEU confirms that measures other than incarceration properly so called may also be assimilated to detention where their effects are comparable to those of an actual deprivation of liberty.

At the same time, domestic regulation consistently enshrines the custodial character of house arrest, including where it is executed outside the national territory, which in principle requires these periods to be taken into account in determining the duration of the sentence to be served. At the same time, the differences existing between national legal systems, especially as regards the method of temporal quantification of preventive measures, should not constitute an obstacle to their recognition, in so far as the restrictions imposed attain the threshold of a genuine deprivation of liberty.

In this context, it follows that the national courts are called upon to carry out an individualised analysis of the concrete conditions in which the measure was executed in the foreign state, avoiding both the automatic classification of such measures as mere restrictions on freedom of movement and their formal deduction without effective verification of the intensity of the constraints imposed. Such an approach is necessary not only to ensure coherent application of domestic rules concerning deduction of preventive measures executed in other jurisdictions, but also to guarantee observance of the requirements of Article 5 of the Convention, particularly as regards the lawfulness and proportionality of the total duration of deprivation of liberty.

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