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THE EUROPEAN ARREST WARRANT:
PROPOSALS FOR IMPROVED COOPERATION IN CRIMINAL MATTERS WITHIN THE EUROPEAN UNION

TEAM SPAIN
Antonio Coscia
Macarena de Carvajal
Marta Vingut
Tutor: José María Asencio Gallego
I. JUDICIAL COOPERATION IN THE EU

I.1 Introduction

The limitations imposed on the Courts by the principle of territoriality, which mean they cannot formulate lawful procedural acts outside the territory of their jurisdiction, make it necessary to create international cooperation mechanisms. Extradition is the traditional system of international cooperation. Extradition is mostly configured as a mixed governmental and judicial method of collaboration and assistance between the authorities in different countries.

The Council of Europe is a European organisation of intergovernmental cooperation and with general competences, whose main goal is to achieve greater unity among its members. Within the scope of the Council of Europe many international conventions have been produced.

The first convention in criminal matters produced by the Council of Europe was the European Convention on Extradition, which was drawn up in Paris on 13 December 1957 by the members of the Council of Europe, and in force between all of them since 18 April 1960. It is a multilateral Convention whose main goal was to submit all extraditions arising between the parties to the Treaty under the same rules. This Convention became the basic document for all the treaties that would be adopted subsequently. We should remember that the 27 EU members are parties to this Convention, so until the approval of the European Arrest Warrant, this was the only common rule for them all.

By and large, even though the Convention follows the traditional principles in this matter, it involved many innovative features. First of all, reciprocity appears as a basic principle required for granting extradition. Although this principle is not strictly established, it is recognised throughout the text (arts. 1, 2.7, 21.5, 26.3 European Convention on Extradition), and it should be remembered that reciprocity is a reflection of sovereignty, which requires equality among the States in International law. Secondly, the Convention refers to the double criminality system combined with the elimination
system, so the act that generates extradition must be a criminal offence in both the country requesting extradition and the requested country.

On one hand, according to the principle of legality, no reasons for extradition other than those prescribed in statutory law can be admitted. On the other hand, the principle of speciality forbids trying the extradited for a crime different to the one that motivated the extradition.

I.2 The Maastricht Treaty

The Maastricht Treaty was signed on 7 February 1992, and took effect on 1 November 1993. This treaty created the European Union, and represented a radical change to the mechanisms and structures compared to those created by the Foundational Treaties. Since that moment, the organic configuration of the EU was represented as an ancient Greek temple based on three pillars: the community pillar, comprising the European communities, and forms of intergovernmental cooperation in common foreign and security policy, and in justice and home affairs. The third pillar was regulated in articles K to K9 of the VI Title of the TEU. Under the heading “Cooperation in justice matters and home affairs”, the TEU was drafted as an intergovernmental form of cooperation, which showed a certain continuity with the previous situation.

Many significant achievements were attained with the Maastricht Treaty, specifically focused on the individualisation of the legal and institutional systems in matters related to justice and home affairs. Nevertheless, the weak delimitation of the instruments used, the lack of a strong binding effect in relation to common actions and positions, and the slowness and complexity of the path of the conventions between Member States, led the European Commission to suggest in its Opinion for the Intergovernmental Conference in March 1996 that the insufficiencies of the Treaty needed to be remedied, especially its lack of binding effect and the absence of a democratic and judicial control."}

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1 *Aproximación crítica a la orden europea de detención y entrega*, Carlos Miguel Bautista Samaniego.
I.3 The Treaty of Amsterdam

The European Conference that drafted the Treaty of Amsterdam took place in Turin on 29 March 1996. The two essential matters addressed were the reform of the third pillar created in Maastricht and the integration of the Schengen accords into the European Union.

The Treaty of Amsterdam was signed on 2 October 1997 and took effect on 1 May 1999, after being upheld by all the Member States according to their constitutional rules. This Treaty expressly recognises freedom of movement, as well as the need to offer citizens a high level of security, in the area of freedom, security and justice. An important aspect of the matters contained in the third pillar of Maastricht is communitarised and regulated in the IV Title of the TEC, which relates to the first pillar.

Turning to the topic that concerns us in this Paper, the majority of judicial cooperation in criminal matters remains in the VI Title of the TEU in its new version agreed in Amsterdam. As it is a matter involving the sovereignty of Member States this is a sensitive point. However, these issues are resolved by leaving open the possibility of its transfer to the community pillar, although this process would require a unanimous decision from the European Council, a proposal from the Commission or a Member State, and a previous consultation of the Parliament, with subsequent ratification by all the Member States according to their constitutional rules.

The new VI Title of the TEU, under the heading “Police and Judicial Cooperation in criminal matters” introduces important innovations, mainly spurred on by an increased efficiency of the legal system, in comparison with what had existed in the past. The overall purpose of achieving an area of justice, freedom and security will be pursued using a common action between the States, in the prevention and fight against crime, organised or not, especially terrorism, human trafficking, crimes against children, illegal drug and weapons trafficking, corruption and fraud. This common action must be projected in three different strands: greater police cooperation, more intensive judicial cooperation and an approximation of the rules on criminal matters in Member States. Of particular importance is the establishment of minimum standards on the constituent elements of the offence and the penalties in certain particularly important subjects in the lives of European citizens.
The legal instruments that were scheduled in the TEU to achieve the referred goals have a hybrid nature, remaining between the community and intergovernmental concepts. The common actions disappear, while the common positions, used to express the vision of the Union on a particular matter, and the conventions, which will have to be ratified by all the Member States, remain provided for in the text. Another important innovation is the creation of Framework Decisions, and their addition to the other scheduled instruments. They are conceived as a path towards an approximation of the legal systems of the different States, and, although similar to one of the Directives, they do not have a direct effect, which prevents them from being enforced via court order.²

I.4 The Treaty of Lisbon

In order to understand the relevance of the innovations introduced by the Lisbon Treaty in cooperation in criminal matters between EU Member States, two projects should be mentioned: the Nice Treaty and the failed attempt to create a Treaty establishing a Constitution for Europe.

The Nice Treaty was signed on the 26 February 2001, and took effect on 1 February 2003. It introduced hardly any changes to cooperation between States in criminal matters; however the few innovations that were established by its articles had great significance. First of all, it established a system by which enhanced cooperation was regulated as a free mechanism established for the States, mainly defined by its clarity, systematism and increased effectiveness, particularly with reference to the pursuit of an area of justice, freedom and security. The second innovation consists of recognising Eurojust as a driving force for cooperation between judicial authorities and prosecuting bodies, and essentially to facilitate the execution of letters rogatory and extradition requests so as to organise the persecution of the cross-border crime and to cooperate with the European Judicial Network.

After Nice, the conviction that the EU was entering into a completely new phase in the integration process was taking shape between EU Member States. For this reason

²La protección de los Derechos Fundamentales en la Extradición y la Euroorden, Rafael Alcácer Guirao.
a new ambitious project was created: the Treaty to establish a Constitution for Europe, signed in Rome on 29 October 2004. This project aroused eager anticipation among the EU political supporters, and the belief that the EU was entering a new phase in the integration project. Although the project did not obtain consensus for its ratification to go ahead, it is important to highlight that the proposed articles of the European Constitution made a firm commitment to the EU-wide applicability of elements relating to matters of freedom, justice and security.

The Treaty of Lisbon was signed on 13 December 2007 and came into force on 1 December 2009. While deviating from any formal concept related to the unsuccessful project of the European Constitution, this Treaty maintained the majority of the changes to freedom, security and justice put forward by that failed project. The Lisbon Treaty ventures into the area of freedom, security, justice and the protection of fundamental rights, the suppression of the three pillars, European cooperation in criminal matters and the aim of unifying legislative instruments. It also encouraged the role of the European Court of Justice, created a European Public Prosecution service and promoted increased police cooperation between States. \(^3\)

II. THE EUROPEAN ARREST WARRANT

II.1 The framework decision proposal of 19 September 2001

The framework decision proposal of 19 September 2001 sought to introduce a new simplified system for surrendering people for the purpose of conducting a criminal prosecution or executing a custodial sentence or detention order. It also sought to substitute all the Conventions on extradition that were in force and, consequently, they were all meant to share the same material field. The decision regarding surrender needed to impose some controls, so the Court in the Member State where the arrest took place shall decide whether or not to execute the warrant. That being the case, cooperation should consist of mere practical and administrative support.

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\(^3\)La orden de detención y entrega europea: Los motivos de denegación y condicionamiento de la entrega, Marina Cerdeño Hernán.
In order to protect fundamental rights and to ensure the effectiveness of the procedure, the refusal to execute a warrant should be limited to clearly specified circumstances. Thus, the idea of citizenship of the European Union, contemplated in articles 17 to 22 of the treaty of the European Union, would mean that any European citizen shall be tried in the place where he had committed a crime.

According to this proposal, a consequence of applying the principle of reciprocal recognition is that the principle of double incrimination should be abolished, as well as the rule of specialty. However, if the execution of a warrant for certain conduct violates the fundamental principles of the law of a Member State, it must have the possibility of excluding such crimes. This can be done by giving each Member State the possibility of developing a 'negative' list of crimes for which the execution of the European arrest warrant is excluded. Indeed, article 27 of the proposal provided that every Member State may establish an exhaustive list of conduct that could be considered as constituting a crime in some Member States, but in relation to which its judicial authorities will refuse to execute a European arrest warrant due to it being contrary to the fundamental principles of the legal system of that State.

This proposal also detailed some basic principles such as territoriality, although slightly attenuated, and the principles of non bis in idem, amnesty and immunity as possible grounds for denying the execution of the warrant.

II.2 Framework Decision of 13 June2002

Pursuant to article 1 of Framework Decision 2002/584/JHA, “The European arrest warrant is a judicial decision issued by a Member State with a view to the arrest and surrender by another Member State of a requested person, for the purposes of conducting a criminal prosecution or executing a custodial sentence or detention order.” Therefore, it is a tool for international judicial cooperation between member States of the European Union whose scope is to facilitate the surrender of a person in order for them to be tried or for a sentence to be executed.

As has been explained, FD 2002/584/JHA establishes that an EAW may be issued by a national authority if the sought person is accused of an offence for which the
maximum penalty is at least 1 year of imprisonment, or the sought person has been sentenced to a prison term of at least 4 months.

The EU works to guarantee a fair trial for people suspected or accused of a crime, and for this reason it has adopted specific rules that protect the rights of persons sought under an EAW. These rights involve the right to interpretation and translation during criminal proceedings, the right of suspects to be informed of their rights, the right to have access to a lawyer, the right of persons in custody to communicate with family members and employers, and the right to legal aid.

The surrender of a person who has been claimed by another Member State is subject to some requirements, such as the minimum penalty, and also a few specific listed reasons that allow surrender to be denied or made dependent on the fulfilment of supplementary conditions. It is crucial that these reasons and conditions are defined in law. There should be no room for any political discretion, as occurred under the previous framework.

These stated conditions constitute the basic mainstay of the whole system. In general terms, an EAW can be denied due to two main types of reasons: formal and material. First of all, formal reasons involve those concerning the lapse of the maximum time required by law, uncertainty of the facts that caused the criminal offence, a lack of information in relation to the requested person, the lack of concreteness of the penalties that the offence entails.

Material reasons are those established by law and can be summarised as follows: the prohibition of *bis in idem*, the prescription of the criminal offence, a pardon, or the fact that the criminal offence was committed in a foreign territory.

### II.3 ECJ case-law

*Advocatenvoor de Wereld case*

The judgment of the European Court of Justice of 3 May 2007\(^4\), C-303/05, is the first ruling of the European Court of Justice regarding the European Arrest Warrant. The

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\(^4\)In the preliminary ruling the Belgian Court asked if “is Article 2(2) of [the] Framework Decision ... , in so far as it sets aside verification of the requirement of double criminality for the offences listed therein, compatible with Article 6(2) of the [EU] Treaty ... and, more specifically, with
case was initiated by Advocatenvoor de Wereld, who brought an action before the Arbitragehof in which he sought the annulment of the law transposing the provisions of the Framework Decision into Belgian law. The Belgian court then sought a preliminary ruling from the ECJ on the validity of the Framework Decision.

One of the arguments put forward by Advocatenvoor de Wereld was that the list of more than 30 offences in respect of which the traditional condition of double criminality is abandoned is so vague and imprecise that it breaches, or at the very least is capable of breaching, the principle of legality in criminal matters. In response to that argument the Court states that double criminality is not an exact equivalent to the principle of legality and should not be as exhaustive. Therefore, the fulfilment of the principle of legality is an obligation for the issuing Member State and relates solely to the criminal regulation of the offence, whereas double criminality is a requisite upon which the execution of the European arrest warrant can depend.

We consider this ruling can lead to the conclusion that the double criminality test cannot be in concreto but in abstracto, as it is not possible for it to be as exhaustive as the legality principle. The nature of double criminality itself, without a European regulation defining the elements that comprise criminal offences in every Member State, makes it impossible to assess whether the actions committed in one State would constitute the same criminal offence in another if an exhaustive and specific test was undertaken.

**Aranyosi-Caldararu case**

The judgment of 5 April 2016, *Aranyosi-Caldararu*, cases C-404/15 and C-659/15 is particularly illustrative of the exceptionality of the non-execution of the European arrest warrant. The case was initiated with two arrest warrants issued to Germany, one by Hungary regarding Mr. Aranyosi and another by Romania regarding Mr. Caldaru. Germany refused to execute the warrants on the grounds that prisons and detention centres in both Hungary and Romania were overpopulated according to European reports and therefore in breach of the European Charter of Human Rights, so the execution could be denied pursuant to articles 1.3 and 5 of the Framework Decision.

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the principle of legality in criminal proceedings guaranteed by that provision and with the principle of equality and non-discrimination?"
The Court states that where there is objective, reliable, specific and properly updated evidence with respect to detention conditions in the issuing Member State that demonstrates that there are deficiencies, the executing judicial authority must determine whether there are substantial grounds to believe that the individual subject to a European arrest warrant will be exposed to a real risk of inhuman or degrading treatment, within the meaning of Article 4 of the Charter, in the event of his surrender to that Member State. To that end, the executing judicial authority must request that supplementary information be provided by the issuing judicial authority, which, after seeking, if necessary, the assistance of the central authority or one of the central authorities of the issuing Member State, under Article 7 of the Framework Decision, must send that information. The executing judicial authority must postpone its decision on the surrender of the individual concerned until it obtains the supplementary information that allows it to discount the existence of such a risk and if the existence of that risk cannot be discounted within a reasonable time, the executing judicial authority must decide whether the surrender procedure should be brought to an end.

Grundza case

The European Court of Justice has ruled on the interpretation of the double criminality principle in the judgment of 11 January 2017, Grundza case, C-289/15. This case relates to a Slovak citizen who is convicted in the Czech Republic for thwarting the implementation of the decision of a public authority, more specifically, the breach of a temporary ban on driving. The Czech judgment is sent to Slovakia for implementation, but the Slovakian court states that because offence is not included in art. 7.1 of the Framework Decision, implementation in Slovakia is subject to the fact that the double criminality requisite is met. In the case in question it is not met because Slovakian law sanctions the offence of thwarting the implementation of a decision adopted by a Slovak body and enforceable in Slovak territory, elements not present in this case as the infringed decision was both adopted and enforceable in the Czech Republic.

The ECJ states that when assessing double criminality, the competent authority of the executing State is required to verify whether the factual elements underlying the offence, as reflected in the judgment handed down by the competent authority of the issuing State, would also, per se, be subject to a criminal penalty in the executing State if they were present in that State. It also states the Framework Decision only allows the Member State to decline the recognition and enforcement of a foreign judgment if double
criminality is not met, but this is an exception to the mutual recognition principle that inspires the Framework Decision and should be interpreted strictly.

In the Grundza case, the Court ruled that the condition of double criminality must be considered to be met because the factual elements underlying the offence, as reflected in the judgment handed down by the competent authority of the issuing State, that is, the driving of a motor vehicle notwithstanding the existence a ban imposed by an official decision, would also, per se, be subject to a criminal sanction in the territory of the executing State if they were present in that State. Besides, it is important to note that the Slovakian court also argued that the offence at issue in the main proceedings constituted an infringement of an official decision adopted by a Czech public body and, therefore, an infringement of an interest protected by the Czech Republic, so that the condition of double criminality cannot, in any event, be considered to have been met. Regarding that matter, the ECJ states that the competent authority of the executing State must ascertain, not whether an interest protected by the issuing State has been infringed, but whether, in the event that the offence at issue were committed in the territory of the executing State, it would be found that a similar interest, protected under the national law of that State, had been infringed.

In conclusion, the main idea that can be extracted from the Grundza ruling regarding the double criminality principle is that, as it is an exception to the mutual recognition principle that inspires not only the Framework Decision but also judicial cooperation in general between Member States, it should be interpreted strictly. Accordingly, the executing court should only assess whether the factual elements of the offence would be punishable under the law of the executing State if they had occurred in said State, without making any considerations regarding the interest protected.

Piotrowsky case

Another important judgment concerning the European arrest warrant is the judgment of January 23rd 2018, C-367/16, issued in the Piotrowsky case. In this judgment the European Court of Justice emphasises the exceptionality of denying the execution of a European arrest warrant, and rejects an in concreto assessment of the double criminality principle.
The case concerns a European arrest warrant issued by Poland against Mr. Piotrowsky, a Polish citizen, for the execution of two custodial sentences. Belgium rejects the execution pursuant to article 3.3 of the Framework Decision, on the grounds that one of the sentences was issued when Mr. Piotrowsky was 17 years old and in that particular case the conditions to prosecute a minor under Belgian law were not met. That is, if the assessment of the double criminality requisite was made in abstracto, then the European arrest warrant should be executed as minors can be prosecuted in Belgium under certain conditions. However, if the assessment was made in concreto, the execution should be denied as those particular conditions were not met in the case of Mr Piotrowsky.

The Courts rules that article 3.3 of Framework Decision 2002/584 is to be interpreted as meaning that the executing judicial authority must refuse to surrender only those minors who, under the law of the executing Member State, have not yet reached the age at which they are regarded as criminally responsible for the acts on which the warrant issued against them is based, and that article 3.3 does not support an interpretation to the effect that the executing judicial authority must refuse to surrender a minor who is the subject of a European arrest warrant on the basis of an assessment of that person’s specific circumstances and of the acts on which the warrant issued against that person is based, in the light of the additional conditions relating to an assessment based on the circumstances of the individual to which the criminal responsibility of a minor for such acts is specifically subject in the executing Member State. Therefore, an assessment in concreto of the requisites is rejected.

III. PROPOSALS REGARDING THE EUROPEAN ARREST WARRANT

The general rule established by the Framework Decision Proposal was the removal of the double criminality principle. This decision was made, as is stated in its Memorandum, as a logic consequence of the application of the principle of mutual recognition. The idea was to exclude double criminality as a ground for refusal, but to allow States to prepare a catalogue of criminal offences in respect of which they could allow the execution of a European arrest warrant. This path was designed to include conducts that were not declared offences punishable by law in the executing State.
In **Framework Decision 2002/584/JAI** a positive list of offences is established. This is the one contained in **Article 2.2**, in respect of which surrender must be granted without any verification of double criminality, always provided that the offences carry a maximum sanction of at least three years’ imprisonment. Criminal offences not included in this list, and those punishable with a lesser sanction, may be subject to the double criminality control.

With this decision, the European author has opted for an even-handed approach: neither completely removing double criminality, nor transforming it into a general condition upon which all surrenders must depend. This intermediate solution enables the double criminality requirement to be excluded in serious offences that can badly affect harmony in every society, and leaves it in the hands of Member States to determine the conditions for surrendering a requested person when deciding on the need for a double criminality control in other criminal offences. This legislative policy option, as we will observe, has proved problematic in terms of its transposition into the domestic legislation of States⁵.

As many authors have pointed out, the current configuration of the European Arrest Warrant entails two main problems:

1. **The prevalence of the most repressive internal criminal order.** As SCHÜNEMANN said, the existence of a catalogue of criminal offences in respect of which a Member State is forced to proceed to surrender its citizens with no control of the reciprocal punishment, abandons an essential principle of the extradition system born centuries ago. Mutual recognition thus becomes a “Trojan horse” which can cause the surreptitious expansion of the most repressive criminal Law in all Europe.

2. **Infringement of the legality principle in criminal matters.** The second main complaint of the critics is that the system causes legal insecurity because of the imprecise nature of the list detailing the criminal offences that are excluded from having to fulfil the conditions of the double criminality system. The fact is that, according to some authors, this imprecision can damage the *nullum crimen sine*  

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⁵ *La orden de detención y entrega europea: Los motivos de denegación y condicionamiento de la entrega.* Marina Cedeño Hernán.
lege principle, which requires criminal rules to describe the criminal conduct in detail in order to ensure their deterrent effect.

III.1 The positive list system

One of the strongest proposals that our team has been considering for establishing a better system consists of creating a positive list in which Member States, by global agreement, could establish those criminal offences that would require a double criminality control in order to decide to execute a European arrest warrant. By using this system it would be accepted that no double criminality control would be necessary for every criminal offence not on the list and the surrender of the person who committed the particular offence would no longer be restricted, as is required by the Mutual Recognition principle. In order to understand the operability of this system, a number of items need to be considered.

The aim of this proposal is, first of all, to facilitate the effectiveness of the Mutual Recognition principle. As this system would significantly reduce the list of those offences requiring a double criminality control and would save this list for the offences that really need this control, it would contribute to streamlining the surrender procedures in order for resolutions promulgated by a Member State to be executed in any other Member State. In addition, the future challenges of creating a harmonious European Criminal Law would be easier to overcome, as any argument would only be in relation to a restricted list of offences in respect of which States could be aware of the differences between other Member States of the EU and consequently change their internal legislation. We would thus be strengthening the Principle of Mutual Confidence, which is the cornerstone of the European judicial area.

Secondly, the Positive List System is aimed to fight against the confusion caused by the fact that every Member State can describe their criminal offences in a different way although they are called the same name. By way of example we can refer to the case of Puigdemont.

On 29 October 2017 Carles Puigdemont fled from the Spanish authorities to Belgium. The following March he went to Germany and was arrested by German authorities in
Schuby, in the state of Schleswig Holstein and on 23 March the Spanish Supreme Court activated the European Warrant Arrest for the crimes of rebellion, sedition and corruption.

The decision regarding the surrender of Mr. Puigdemont was made by the Schleswig Holstein Supreme Court on 26 March and it only granted his surrender for the crime of corruption. As regards the crimes of rebellion and sedition surrender was denied. First of all, the German Court considered that as the crimes for which surrender was required were not included in the list contained in article 2 of the Framework Decision, it was necessary to investigate the double criminality of the act. Regarding these crimes, the German Court found the offence of “high treason” to be equivalent to the crimes of rebellion and sedition, however, they considered that the riots in Barcelona, which, according to the Spanish Criminal Code would be the basis for the rebellion, were not appropriate for giving rise to the German crime of “high treason”. They explained that, according to their precedents (a riot at Frankfurt airport), it was necessary for there to be force and violence strong enough to break the will of the State and they considered that this did not take place in Spain. Accordingly, the double criminality requirement was not fulfilled. Finally, given these circumstances, the Spanish investigating Judge withdrew the European Warrant Arrest because of the principle of speciality, with a view to holding the trial for all the alleged crimes and not only the offence of corruption.

In short, we consider that the German decision seriously undermines the mutual recognition system mainly because the required country should limit itself to verifying whether there is an assimilable crime in their legislation instead of trying to fit events that took place abroad into their Code. As if that were not enough, a provisional trial has been held without any type of evidentiary activity.

This case clearly shows that “rebellion” has unequal meanings in some States, such as Spain and Germany. In Germany it requires an extremely qualified violence, or a threat of it, able to bend the will of a Constitutional Institution, in order to fulfil the conditions for it to be a criminal offence. This condition is not required in Spain, and as it is one of the criminal offences that are not on the “negative list” currently in force, the Regional Court of Schleswig-Holstein refused to surrender Carles Puigdemont to Spain, despite the fact that the control carried out by the German court did not include an exhaustive background check. This point is addressed in another of our proposals.
According to what has been said, we consider that having a restricted list of criminal offences requiring a double criminality control by the judicial authorities in Member States would contribute to facilitating the development of the Mutual Recognition Principle, because we will no longer be discussing how each State interprets a non-defined number of criminal offences, but just a small group of them, those that due to their severity or the particularities in the way they are conceived in the different Member States, need this extra control.

III.2 abolishing the double criminality principle

Abolishing the double criminality control is another way of evolving European relationships in criminal matters. As we could see before, double incrimination does not require identical norms in both legal systems of the requesting and the required state, but that an identity exists in each legal system to allow a subsumption to resolve the case.

We also explained above that controlling double criminality is a traditional principle of extradition, and is meant to be a resource for the protection of the legality principle. However, since each and every one of the European Union countries are parties to the European Convention on Human Rights and the Charter of Fundamental Rights of the European Union, this aim of safeguarding the principle of legality no longer has the importance it did previously. Therefore, in order to promote greater cooperation in criminal matters, we propose abolishing the double criminality control as the European Union gets closer to a single substantive criminal law.

III.3 Formal control of the double criminality principle

However, another approach is to maintain the double criminality principle but limiting its extent, that is, the executing court should only verify that the offence for which the European arrest warrant is issued also exists under its national law, without examining whether the factual elements of the offence would be punishable under the law of the executing State should they have occurred there.
There are several reasons in favour of this system.

Firstly, maintaining the double criminality principle might be necessary as criminal law changes between Member States and is heavily influenced by the history and cultural background of the State in question; resulting in the fact that what constitutes a criminal offence in one country may be the exercise of a fundamental right in another. For instance, the German criminal code contemplates denial of the Holocaust as an offence, whereas that same offence was withdrawn from article 607.2 of the Spanish criminal code as the Spanish Constitutional Court ruled that denying an act of genocide was a demonstration of freedom of speech (Ruling 235/2007, of 7 November), and the aforementioned article was therefore unconstitutional. Another example is the offence of humiliating victims of terrorism, contemplated under article 578 of the Spanish criminal code, which may not exist in other countries and may even be considered freedom of speech, but whose existence is justifiable in Spain due to over 50 years of terrorist activity by ETA, which has had a profound influence on Spanish law. If the double criminality principle were to be removed, then a Spanish court would be compelled to surrender a person to Germany for denying the Holocaust, even if under Spanish law such actions constitute a manifestation of freedom of speech, and, vice versa, a German court would have to surrender a person to Spain for humiliating victims of terrorism even if such action is not punishable under German law. In these cases, maintaining the double criminality principle is necessary as it fulfils its primary function: to ensure that a State does not surrender a person as a result of actions that, under its law, constitute the exercise of a fundamental right.

Those in favour of abolishing the double criminality principle may argue that, in order to avoid cases such as the ones mentioned above, we should build a European criminal law, regulating the same offences in every Member State. However, that may not be advisable, as we cannot ignore the fact that every State has a different background and context, so it is perfectly possible for an action that may be harmless in one country to be dangerous in another, depending on its context, and should constitute a criminal offence. Taking the examples already given, denying an act of genocide can be considered harmless in Spain, and so, pursuant to the ultima ratio that is criminal law, should not be regulated as an offence, while in Germany, due to its 20th century history, it is perfectly justifiable for such action to constitute an offence. The same occurs with other speech related offences. This point of view is consistent with the “imminent lawless action”
standard used by the United States Supreme Court to determine when words fall outside the limits of protected speech. According to such doctrine, speech may be punishable if the speaker intends to incite a violation of the law that is both imminent and likely, and this likelihood relies heavily on the background and history of the particular country.

Secondly, the reason why the double criminality principle should only be met from a formal point of view, without examining the facts, is because when a European arrest warrant is issued before the trial, all the facts are not yet known. It is very common that, when the criminal procedure starts, a person is charged with one crime and, by the time the trial finishes, he is convicted of another, provided that both the legality and accusatory principles are met. For example, a person might be charged with sexual assault and then, once the court verifies that there was no intimidation or violence, convicted of sexual abuse. Would it be reasonable to deny a European arrest warrant because a court in another State considers that, given the facts stated in the warrant, there is no offence, when all the facts have not yet been investigated, there has been no trial and no evidence has been presented before that court? By doing this, is the Court not examining the merits of the case, beyond its competence? In order to execute a European arrest warrant, would it not be sufficient that the offence for which a person is sought is also regulated in the State that has to execute that warrant?

In conclusion, maintaining the double criminality principle but limiting it to a formal test of whether the offence is contemplated under the criminal law of both States constitutes a reasonable solution for two reasons: firstly, because it allows the double criminality principle to be maintained as a guarantee of protecting human rights; secondly, because the executing court is forbidden to examine the merits of the case, which is the competence of the issuing court. This clear separation of competences assures the execution of a greater number of warrants, therefore fortifying the mutual recognition principle, which constitutes one of the fundamental pillars of judicial cooperation among European countries.

IV. CONCLUSIONS

We consider that, although the European Arrest Warrant has brought many benefits in criminal cooperation, its current configuration presents many flaws that defeat
its original purpose, which was to ensure a fluent judicial cooperation between Member States. In fact, in 2017, only 6,317 European Arrest Warrants of the 17,491 issued were executed.  

One of the problems is the possible breach of the legality principle, due to the lack of definitions of the offences that are not required to fulfil the double criminality principle. This flaw could be solved by either establishing definitions for those offences or by creating a European Criminal law, common to all Member States. However, those solutions seem neither likely nor easy to put in place. Regarding the definitions, it is unlikely for the 27 Member States to reach an agreement on them. Concerning the European criminal law, although it is a beautiful project, it would entail a loss of sovereignty that Member States are unlikely to accept and may not be advisable from a criminal policy perspective, as the regulation of criminal offences is closely linked to the historic and cultural context of a country.

Another problem is the extent to which the double criminality principle is controlled, which results in the denial of multiple warrants. The problem may lay with the regulation provided by the Framework Decision, the transposition made by certain States, or how this requisite is interpreted by the Courts, as there is only one ECJ ruling (the Grundza case) on this precise principle. In order to solve this problem, two solutions could be drafted: to either remove the double criminality principle, or to maintain it, but only to a formal extent. Regarding the first of those solutions, that is, eliminating the double criminality principle, it would be a very pro-European measure, and could be justifiable from a legal point of view given that double criminality is a principle arising from the traditional extradition system in order to guarantee the protection of human rights, so a country would not have to extradite a person for an act that, under its regulation, constitutes the exercise of a legitimate right. However, this aim is pointless between Member States, as they have all signed the European Convention of Human Rights. Nevertheless, as we have seen, maintaining the double criminality principle may be useful as there are important differences in criminal law among Member States that are justifiable according to their context.

Therefore, in order to maintain the double criminality principle, which is useful for those offences that do not have an equivalent in the laws of another country, but in

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such a way that it does not obstruct the execution of warrants, a more suitable solution would be to limit its verification to a formal extent, which is the executing court should only verify a similar offence exists under the criminal law of its State, but without examining the merits of the case.

Finally, an intermediate solution between our current system and the total abolition of the double criminality principle would be to establish a positive list of offences that should fulfil this principle, instead of the negative one that currently exists. If this list included crimes that are not common to all Member States, such as those related to terrorism or to the Holocaust, the main aim of the double criminality principle would be maintained, but the execution of the European Arrest Warrant would be notably facilitated, as this requisite would be removed in respect of the majority of crimes. We consider this system would be the most suitable given the current situation, provided that the double criminality principle in respect of the offences on the “positive list” would only be examined from a formal point of view.