

BREXIT AND THE EUROPEAN ARREST WARRANT: THE UNITED KINGDOM'S CHANCE TO CURTAIL ABUSE OF THE SURRENDER SYSTEM

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I. INTRODUCTION

Since 2004, the Framework Decision of the European Arrest Warrant has controlled surrender procedures between the United Kingdom and all other EU Member States. While the positive effects of the European Arrest Warrant (EAW) are palpable, particularly through its time-efficient execution,¹ UK citizens and

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¹ Centre on Migration, Policy and Society (COMPAS), *The Security Implications of Brexit*, <http://www.compas.ox.ac.uk/media/160520-security-web-text.pdf> (last visited Sept. 16, 2017).

residents have suffered from frivolous and disproportionate use of the EAW by European prosecutors.

The EAW, in comparison to the system it replaced, hastens adjudication of crimes justifying extradition. Despite this improvement, EAWs have been used pervasively to detain and transport suspects of petty crimes for which there is little evidence. This is reflected by the alarming increase in persons being surrendered from the United Kingdom. In fiscal year 2004, the United Kingdom surrendered 24 people pursuant to EAWs.² In fiscal year 2015-16, that number rose to 1,271.³

Polish prosecutors, in particular, have become notorious for overzealous use of EAWs because Polish law obliges the prosecution of all offenses, no matter how minor they may be.⁴ The country that bears the brunt of this dynamic is the United Kingdom.⁵ Also problematic is that the EAW can subject UK citizens and residents to politically-motivated prosecution, deplorable prison conditions, and diminished due process protections. This is demonstrated by cases such as Andrew Symeou's and Alexander Adamescu's.⁶

The EAW derived from the Member States' goal of establishing mutual recognition of the rule of law in each Member State. Mutual recognition, however, is difficult to sustain when certain Member States espouse fundamentally different criminal justice systems and give unequal protections for criminal defendants.

The controversy surrounding the EAW is apparent in the constitutional challenges that have occurred throughout Europe. Because the United Kingdom does not have constitutional protections for those facing surrender to a foreign country, abuse of the EAW remains common.⁷ When UK citizens voted to exit the European Union on June 23, 2016, they seized an opportunity to repair a law that has caused many problems. Despite their pending exit from the European Union, Prime Minister Theresa May supports the implementation of a "fast track surrender scheme" with EU Member States to replace the EAW.⁸ Even if the United Kingdom opts to maintain procedures similar to the EAW scheme, legal protections that

² *Historical European Arrest Warrants statistics: Calendar and Financial year totals 2004-2016*, NCA (May 9, 2016), <http://www.nationalcrimeagency.gov.uk/publications/european-arrest-warrant-statistics/historical-eaw-statistics/693-historical-european-arrest-warrants-statistics-calendar-and-financial-year-totals-2004-may-2016>.

³ *Id.*

⁴ Andrei Vlad Ionescu, Note, *European Arrest Warrants in the UK: What Can Britain Learn from American Due Process?*, 40 GA. J. INT'L & COMP. L. 781, 784 (2012); Michael Plachta, *Evaluation of the European Arrest Warrant: Quantitative and Practical Aspects*, 27(5) INT'L ENFORCEMENT L. REP. 681, pt. 3 (2011).

⁵ See *infra*, Section III.

⁶ See *infra*, Section III(c).

⁷ See generally Telegraph View, *The EU Arrest Warrant Serves Britain Badly*, TELEGRAPH (Oct. 14, 2012, 7:00 AM), <http://www.telegraph.co.uk/comment/telegraph-view/9606170/The-EU-Arrest-Warrant-serves-Britain-badly.html>.

⁸ Christopher Hope, *Revealed: New 'Fast Track Surrender Scheme' to Replace the European Arrest Warrant After Brexit*, TELEGRAPH (Aug. 12 2017, 9:30 AM), <http://www.telegraph.co.uk/news/2017/08/12/revealed-new-fast-track-surrender-scheme-replace-european-arrest/>.

balance mutual recognition with the consequences of surrendering a suspect should be enacted.

This note posits that the United Kingdom should negotiate bilateral extradition agreements with Member States that have misused the EAW to prosecute petty criminals, subject people to human rights violations, and burden the UK judicial system in the process. These new agreements should include a proportionality test. A rigorous proportionality test will allow the United Kingdom to regain judicial independence by allowing its courts to deny extradition when it will lead to injustice or is not worth the human or financial costs. Reformed extradition law must also allow UK courts to refuse extradition when investigation reveals that charges are politically motivated. An EAW-style scheme should remain intact with the majority of Member States—Member States that prudently use EAWs to prosecute serious criminals. This note does not argue that Brexit should inspire a return to the former political process of extradition, but rather outlines why Brexit should mark the end of the United Kingdom’s unfettered deference to foreign criminal justice systems.

In analyzing the current problems the EAW poses for the United Kingdom, it is useful to start with the history and political influences that catalyzed the EAW’s inception.

II. HISTORY OF THE EUROPEAN ARREST WARRANT

A. European Integration Before the EAW: The European Convention on Extradition

Before the European Union passed the Framework Decision, extradition was governed by the European Extradition Convention (ECE).⁹ In its preamble, the ECE declared its purpose of “achiev[ing] a greater unity between its members.”¹⁰ Though the ECE established an obligation to extradite among its signatories, it did not set forth a procedure for resolving disputes among member nations.¹¹ Despite the ECE’s goal of greater cooperation among member nations regarding extradition, it provided important protections for state sovereignty and defendant’s rights; protections which were weakened by the Framework Decision.¹² The first protection derived from the principle of dual criminality, which requires that the conduct the requesting state seeks to punish be classified as criminal conduct by the executing state in order for extradition to occur.¹³

⁹ Ionescu, *supra* note 4, at 786.

¹⁰ European Convention on Extradition pmbl., Dec. 13, 1957, 359 U.N.T.S. 273 [hereinafter ECE].

¹¹ Baker et al., *A Review of the United Kingdom’s Extradition Arrangements*, 57 & n.130 (2011), https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/117673/extradition-review.pdf.

¹² Gregory J. Mann, Note, *The European Arrest Warrant: A Short-Lived Mechanism for Extradition?*, 34 SYRACUSE J. INT’L L. & COM. 715, 717–19 (2007).

¹³ *Id.* at 717–18.

The second protection was the nationality exception.¹⁴ The ECE declared that “a Contracting Party shall have the right to refuse extradition of its nationals.”¹⁵ Further, it gave Member States full discretion to define “nationals” in the context of the ECE.¹⁶ As an additional protection to defendants, police forces in the Member State where the suspect was located could only conduct a “provisional arrest” in “case of urgency” and would “decide the matter in accordance with its law.”¹⁷ All extradition requests executed through the ECE were communicated “through a diplomatic channel,” unless Member States arranged direct agreements to alternative means of communication.¹⁸ Therefore, the ECE established that extradition was a political process rather than a judicial one.¹⁹ The aforementioned components of ECE reflect that the European Council carefully weighed the interests of state sovereignty and defendants’ rights against the “greater unity” sought in the preamble.

The United Kingdom, in order to adhere to the ECE, passed the Extradition Act of 1989.²⁰ The ECE was given effect by the European Convention on Extradition Order in 1990.²¹ Although Article 26 of the ECE allowed Member States to require *prima facie* evidence to execute an extradition request, the 1990 Order dispensed of this requirement for UK extraditions to Convention States.²² By excising the *prima facie* evidence requirement, the 1990 Extradition Order presaged the European Union’s transition from extradition to surrender. The United Kingdom also did not implement the nationality exception.²³ The United Kingdom did, however, retain some important procedural safeguards. Most notably, the judiciary and Secretary of State exercised “dual control” over extradition proceedings, with courts handling the initial proceedings and the Secretary of State making the final decision on whether to extradite a requested person.²⁴ The sought person had a right to appeal both after judicial proceedings and after the Secretary of State’s decision.²⁵

¹⁴ Mann, *supra* note 12, at 718.

¹⁵ ECE, *supra* note 10, art. 1.

¹⁶ *See id.* art. 6(1)(b) (“Each Contracting Party may, by a declaration made at the time of signature or of deposit of its instrument of ratification or accession, define as far as it is concerned the term ‘nationals’ within the meaning of this Convention.”).

¹⁷ *Id.* art. 16(1).

¹⁸ *Id.* art. 12(1).

¹⁹ Ionescu, *supra* note 4, at 786.

²⁰ Baker et al., *supra* note 11, at 57.

²¹ *Id.* at 58.

²² *Id.*

²³ *Id.* at 59.

²⁴ MARTIN HENLEY & FELICITY WILLIAMS, *The Application of the EAW in the UK – Legislative Background and Human Rights Challenges*, in STILL NOT RESOLVED? CONSTITUTIONAL ISSUES OF THE EUROPEAN ARREST WARRANT 297, 297 (Elspeth Guild & Luisa Marin eds., 2009).

²⁵ *Id.*

B. Changing Attitudes Towards Extradition

The rise of international terrorism, culminating with the attacks on September 11, 2001, galvanized support for European extradition reform.²⁶ The 1970s saw a sharp rise in terrorist activity throughout Western Europe.²⁷ In response, many in the European Community (EC) were optimistic that the implementation of a “common legal area” would augment EC efforts to combat terrorism.²⁸ In 1975, an intergovernmental forum known as the Trevi Group was established to improve interstate cooperation in counterterrorism matters within the European Community.²⁹ The Trevi Group’s activities were outside the scope of EC treaties and existed primarily to establish a network of cooperation for European police forces.³⁰ French President Valéry Giscard d’Estaing stressed the necessity for an integrated European criminal justice system, stating:

[T]he Treaty of Rome, in its economic-oriented view made no reference whatsoever to these issues, it was high time, in order to safeguard the four fundamental freedoms at the heart of the European economic constitution, especially the one relating to the free movement of persons, to put in place suitable conditions of security and justice within the European judicial area, to be accessible to all.³¹

There was concern that the ECE insulated fleeing terrorists from criminal liability, as it allowed countries to deny extradition of those accused of “political” offenses.³² In response to this supposed loophole, EC heads of state planned to reach special extradition agreements.³³ At a meeting of high officials in 1977, the United Kingdom proposed an extradition agreement relating solely to terrorism.³⁴

²⁶ Camino Mortera-Martinez, *The European Arrest Warrant: A British Affair*, CENTRE FOR EUROPEAN REFORM (Nov. 7, 2014), <http://www.cer.org.uk/insights/european-arrest-warrant-british-affair>.

²⁷ Annalisa Merelli, *Charted: Terror Attacks in Western Europe from the 1970s to Now*, QUARTZ (Nov. 25, 2015), <https://qz.com/558597/charted-terror-attacks-in-western-europe-from-the-1970s-to-now/>.

²⁸ Bernhard Blumenau, *The European Communities’ Pyrrhic Victory: European Integration, Terrorism, and the Dublin Agreement of 1979*, 37 *STUD. IN CONFLICT & TERRORISM* 405, 405 (2014).

²⁹ Oreste Pollicino, *European Arrest Warrant and Constitutional Principles of the Member States: A Case Law-Based Outline in Attempt to Strike the Right Balance between Interacting Legal Systems*, 9 *GER. L.J.* 1313, 1316 n.10 (2008).

³⁰ Blumenau, *supra* note 28, at 406.

³¹ Pollicino, *supra* note 29, at 1316.

³² Blumenau, *supra* note 28, at 406. *See also* ECE, *supra* note 10, art. 3(1) (“Extradition shall not be granted if the offence in respect of which it is requested is regarded by the requested Party as a political offence or as an offence connected with a political offence.”).

³³ Blumenau, *supra* note 28, at 407.

³⁴ *Id.*

The French delegation brought forth ambitious plans to create a common legal space for all crimes punishable with at least five years imprisonment.³⁵ EC Member States recognized the impracticability of creating an *espace judiciaire* in the near future, but they nevertheless confirmed their long term plans to do so in order to appease France.³⁶ In 1979, nine Ministers of Justice of EC Member States signed the Dublin Agreement, which sought to make the ECE applicable in extradition proceedings between Member States even if neither state had ratified the agreement.³⁷ This agreement never entered into legal effect, but was nevertheless symbolic of Europe's impending shift to judicial integration in criminal matters.³⁸

Consequential progress towards judicial integration did not resurface until 1992 when twelve EC Member States signed the Maastricht Treaty, an agreement "aimed at Member State cooperation in matters of justice and home affairs."³⁹ The 1996 Convention on Extradition between Member States abolished the ECE's nationality exception.⁴⁰

These intimations of European judicial integration culminated with the 1997 Treaty of Amsterdam, which called for "police and judicial cooperation in criminal matters."⁴¹ Specifically, the Treaty of Amsterdam outlines the European Union's objective as "provid[ing] citizens with a high level of safety within an area of freedom, security and justice by developing common action among the Member States in the fields of police and judicial cooperation in criminal matters" through "closer cooperation between judicial and other competent authorities of the Member States."⁴² Judicial cooperation in criminal matters was to include the following:

- (a) facilitating and accelerating cooperation between competent ministries and judicial or equivalent authorities of the Member States in relation to proceedings and the enforcement of decisions;
- (b) facilitating extradition between Member States;
- (c) ensuring compatibility in rules applicable in the Member States, as may be necessary to improve such cooperation;
- (d) preventing conflicts of jurisdiction between Member States;
- (e) progressively adopting measures establishing minimum rules relating to the constituent elements of criminal acts and to penalties in the fields of organised crime, terrorism and illicit

³⁵ Blumenau, *supra* note 28, at 407.

³⁶ *Id.* at 411.

³⁷ ELIZABETH CHADWICK, SELF-DETERMINATION, TERRORISM, AND THE INTERNATIONAL HUMANITARIAN LAW OF ARMED CONFLICT 116 (1996).

³⁸ Blumenau, *supra* note 28, at 416–17.

³⁹ Pollicino, *supra* note 29, at 1317.

⁴⁰ Council Act of 27 Sept. 1996, Convention on extradition between Member States, 1996 O.J. (C 313).

⁴¹ Treaty of Amsterdam Amending the Treaty on European Union, the Treaties Establishing the European Communities and Certain Related Acts, Oct. 2, 1997 O.J. (C 340) 1, art. 73(i) [hereinafter Treaty of Amsterdam].

⁴² *Id.* art. K.1.

drug trafficking.⁴³

The European Arrest Warrant is based on a UK initiative.⁴⁴ In 1997, the *Corpus Juris* project proposed the idea of a European public prosecutor, who would investigate and prosecute budgetary fraud pursuant to a European code and according to a uniform set of procedural and evidentiary rules.⁴⁵ This scheme also entailed a “European Arrest Warrant,” which would replace extradition in the context of budgetary fraud offenses.⁴⁶ This proposal was not well received in the United Kingdom, where Eurosceptic critics “portrayed it as a secret plot by Brussels to bring about the abolition of the common law, and its replacement with a bogey of its invention called the ‘Napoleonic system.’”⁴⁷ The UK government, on the other hand, “had the realism to accept that trans-border crime in Europe was a genuine problem—and to see that if a European Public Prosecutor was politically unacceptable, some other remedy must be found.”⁴⁸ Therefore, as an alternative to the “vertical” solution of a central European prosecution, the UK government proposed the “horizontal solution” of mutual recognition.⁴⁹

The Treaty of Amsterdam was groundbreaking in that it added a judicial dimension to European integration and provided for “a wide range of viable instruments” to do so.⁵⁰ In 1999, the European Council “called for the development of a ‘genuine European area of justice’ and for a ‘unionwide fight against crime.’”⁵¹ That year, the European Council adopted the United Kingdom’s solution for integrating criminal law, stating:

Enhanced mutual recognition of judicial decisions and judgements and the necessary approximation of legislation would facilitate co-operation between authorities and the judicial protection of individual rights. The European Council therefore endorses the principle of mutual recognition which, in its view, should become the cornerstone of judicial co-operation in both civil and criminal matters within the Union. The principle should apply both to judgements and to other decisions of judicial authorities.⁵²

⁴³ Treaty of Amsterdam, *supra* note 41, art. K.3.

⁴⁴ Mortera-Martinez, *supra* note 26.

⁴⁵ J.R. Spencer, *The European Arrest Warrant*, 7 CAMBRIDGE Y.B. OF EUR. LEGAL STUD. 201, 203 (2004).

⁴⁶ *Id.* at 203–04.

⁴⁷ *Id.* at 204.

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ Pollicino, *supra* note 29, at 1317.

⁵¹ William Sanchez, *Legislative Development: Council Framework Decision of 13 June 2002 on the European Arrest Warrant and the Surrender Procedures Between Member States*, 9 COLUM. J. EUR. L. 195, 195–96 (2002).

⁵² Presidency Conclusions, Tampere European Council (Oct. 15–16, 1999).

Despite these developments, “[c]onsideration’ was being given to these matters in a leisurely manner when the terrorist attack on the World Trade Center . . . put European co-operation against trans-national crime into sudden overdrive.”⁵³ In the wake of the attacks, EU officials felt an urgent need to combat international terrorism.⁵⁴

C. The Principles of the Framework Decision on the European Arrest Warrant

The European Council adopted the Framework Decision on the EAW on June 13, 2002 (Framework Decision).⁵⁵ Although the Framework Decision was largely a response to international terrorism, the Framework Decision’s scope exceeds terrorist offenses.⁵⁶ The Framework Decision set forth a program of measures to implement the principle of “mutual recognition” envisaged at Tampere in 1999.⁵⁷ Mutual recognition implies that a judicial decision of one Member State must be respected by other Member States, for regardless of differences in their respective criminal justice systems, their judicial decisions are equal.⁵⁸ By treating the legal systems of all Member States as equal, mutual recognition “implies transposing some degree of foreign legal elements into the domestic criminal justice arena.”⁵⁹

In order to make the European Union “an area of freedom, security and justice,” the Framework Decision abolished extradition between Member States and replaced it with a system of surrender.⁶⁰ The introduction of this “new simplified system” was meant to “remove the complexity and potential for delay inherent in the present extradition procedures.”⁶¹ The Framework Decision stripped diplomatic and political authorities of their decision-making power by mandating that “the role of central authorities in the execution of an EAW must be limited to practical and administrative assistance.”⁶² The Framework Decision also established that

⁵³ Spencer, *supra* note 45, at 204.

⁵⁴ Pollicino, *supra* note 29, at 1318.

⁵⁵ Council Framework Decision 2002/584/JHA of 13 June 2002 on the European Arrest Warrant and the Surrender Procedures between Member States, 2002 O.J. (L 190) 1 [hereinafter Framework Decision].

⁵⁶ Valsamis Mitsilegas, *The Constitutional Implications of Mutual Recognition in Criminal Matters in the EU*, 43 COMMON MKT. L. REV. 1277, 1284 (2006) (“Given its adoption as a response to the 9/11 events, a striking feature of the European Arrest Warrant is that its scope is not limited to terrorist offences.”).

⁵⁷ Framework Decision, *supra* note 55, ¶ 2.

⁵⁸ Andreia Ghimis, *The European Arrest Warrant: A Success Story That Needs to Be Revisited*, EUR. PARLIAMENTARY RES. SERV. BLOG (Oct. 17, 2013), <https://epthinktank.eu/2013/10/17/the-european-arrest-warrant-a-success-story-that-needs-to-be-revisited/>.

⁵⁹ Ionescu, *supra* note 4, at 798.

⁶⁰ Framework Decision, *supra* note 55, pmb. ¶ 5.

⁶¹ *Id.*

⁶² *Id.* pmb. ¶ 9.

surrender would entail cooperation of a strictly judicial nature, with political authorities providing ancillary support.⁶³ Thus, the Framework Decision abrogated the “dual-control” judicial and political authorities in the United Kingdom exercised over the extradition process.

The Framework Decision defines the EAW as 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.”⁶⁴ Although the executing state may set as a condition for surrender that the provided facts constitute an offense in its legal system, the Framework Decision nullifies the practical value of this by listing 32 categories of offenses for which double criminality is not required.⁶⁵ This list includes categories such as “racism and xenophobia,” “computer-related crime,” “swindling,” and “illicit trafficking in cultural goods.”⁶⁶ The Framework Decision provides no definitions of these categories. If a requested person is wanted for committing one of these 32 offenses, they may be surrendered as long as the offense is recognized in the issuing state and punishable in the issuing state with a maximum detention period of at least three years.⁶⁷ The European Council may, upon consultation of the European Parliament, add other categories of offenses to this list.⁶⁸

Further, an executing state may not refuse to surrender a person sought for criminal prosecution—even if the requested person is one of its own nationals.⁶⁹ The executing state can refuse to surrender a person if it is executing a criminal penalty against the person itself.⁷⁰

D. The Framework Decision’s Substantive and Procedural Protections of Requested Persons

Even though the Framework Decision weakens the double criminality and nationality exceptions, it provides several protections to requested persons. For example:

[T]his Framework Decision may [not] be interpreted as prohibiting refusal to surrender a person for whom a European arrest warrant has been issued when there are reasons to believe, on the basis of objective elements, that the said arrest warrant has been issued for the purpose of prosecuting or punishing a person

⁶³ Pollicino, *supra* note 29, at 1319.

⁶⁴ Framework Decision, *supra* note 55, art. 1.

⁶⁵ *Id.* art. 2.

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ See Framework Decision, *supra* note 55, arts. 3–4 (listing grounds for mandatory and optional non-execution of an EAW).

⁷⁰ *Id.* art. 4.

on the grounds of his or her sex, race, religion, ethnic origin, nationality, language, political opinions or sexual orientation, or that that person's position may be prejudiced for any of these reasons.⁷¹

The Framework Decision also provides that “no person should be removed, expelled or extradited to a State where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment.”⁷² Requested persons also have rights to the assistance of counsel and an interpreter in accordance with the national law of the executing state.⁷³ It also sets forth three grounds for mandatory non-execution of an EAW:

if the offence on which the arrest warrant is based is covered by amnesty in the executing Member State, where that State had jurisdiction to prosecute the offence under its own criminal law;

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 currently being served or may no longer be executed under the law of the sentencing Member State;

if the person who is the subject of the European arrest warrant may not, owing to his age, be held criminally responsible for the acts on which the arrest warrant is based under the law of the executing State.⁷⁴

Importantly, the Framework Decision “does not prevent a Member State from applying its constitutional rules relating to due process, freedom of association, freedom of the press and freedom of expression in other media.”⁷⁵

E. Legal Challenges to the EAW Throughout Europe

There are substantial differences between extradition and the EAW.⁷⁶ An extradition procedure reflects a relationship between two sovereigns. One sovereign requests cooperation from the other, and the other sovereign in turn decides whether to grant the request with political opportunity playing a predominant role in the decision.⁷⁷ On the other hand, execution of an EAW entails

⁷¹ Framework Decision, *supra* note 55, pmb. ¶ 12.

⁷² *Id.* pmb. ¶ 13.

⁷³ *Id.* art. 11.

⁷⁴ *Id.* art. 3.

⁷⁵ *Id.* pmb. ¶ 12.

⁷⁶ Pollicino, *supra* note 29, at 1321.

⁷⁷ *Id.*

one sovereign requesting and receiving assistance from another sovereign in an integrated transnational judicial system.⁷⁸ A number of Member States wanted to avoid enacting the EAW procedure for their own citizens.⁷⁹ Therefore, the years following its implementation were marked by constitutional challenges in Member States.⁸⁰

Before the implementation of the Framework decisions, thirteen Member States had constitutional provisions forbidding or otherwise limiting the extradition of nationals.⁸¹

In 2005, the Polish Constitutional Tribunal (PCT) was the first court to challenge the constitutionality of surrendering a national under an EAW.⁸² The issue before the tribunal was whether the Polish Constitution, which provided that “the extradition of a Polish citizen shall be prohibited,”⁸³ could be reconciled with a provision of the Polish Code of Criminal Procedure, which provided that:

Where a European arrest warrant has been issued for the purpose of prosecuting a person holding Polish citizenship or enjoying the right of asylum in the Republic of Poland, surrender of such a person may only take place upon the conditions that such person will be returned to the territory of the Republic of Poland following the valid finalization of proceedings in the State where the warrant was issued.⁸⁴

The PCT noted that surrender could only be accepted as a separate institution from extradition “if its substance [were] essentially different.”⁸⁵ The PCT noted that at the core of both legal institutions is the handing over of persons to a foreign state for prosecution or enforcement of the sentence; thus, they concluded that surrender is merely a particular form of extradition as regulated in its constitution.⁸⁶ Having determined that the EAW is a modality of extradition, the PCT noted that:

⁷⁸ Pollicino, *supra* note 29, at 1321.

⁷⁹ *Id.* at 1322.

⁸⁰ Elspeth Guild & Luisa Marin, Still Not Resolved? Constitutional Challenges to the European Arrest Warrant: A Look at Challenges Ahead after the Lessons Learned from the Past 2 (Sep. 30, 2011) (unpublished manuscript) (on file with SSRN).

⁸¹ Pollicino, *supra* note 29, at 1322.

⁸² Angelika Nußberger, *Poland: The Constitutional Tribunal on the Implementation of the European Arrest Warrant*, 6 INT’L J. CONST. L. 162, 162 (2008).

⁸³ *Id.* at 163 & n.5 (citing Konstytucja Rzeczypospolitej Polskiej [CONSTITUTION] Apr. 12, 1997, art. 55(1) (Pol.)).

⁸⁴ *Id.* at 163–64 (citing Code of Criminal Procedure [CCP] art. 607(t) (Pol.)).

⁸⁵ OTK ZU [Constitutional Tribunal] May 4, 2005, 77 Dz.U. 1, 17 (Pol.), http://trybunal.gov.pl/fileadmin/content/omowienia/P_1_05_full_GB.pdf.

⁸⁶ *Id.* at 17 (reasoning that because the “[core] sense of extradition consists of the surrender to a foreign state of an indicted or convicted person, in order to enable the conduct of criminal proceedings against this person, or the serving of punishment established by a sentence concerning this person,” surrender pursuant to an EAW must be treated as a modality of extradition).

[T]he essence of the subjective right stemming from the constitutional prohibition of extradition consists in the right of a Polish citizen to be protected by the Republic of Poland and to be granted a just and open trial before an independent and impartial court in the democratic state governed by law.⁸⁷

The PCT concluded that the Polish Constitution protects the Polish citizens' right to penal liability in a Polish court of law.⁸⁸ Paramount above all other constitutional considerations, however, was Article 9, which provides that "the Republic of Poland shall respect international law binding upon it."⁸⁹ Therefore, amendment of Article 55(1) was the appropriate means to facilitate the implementation of the EAW regime.⁹⁰ The PCT, relying on Article 190 of the Constitution, opted to defer the effects of its ruling of unconstitutionality for 18 months because "the European Arrest Warrant is crucially important to the operation of the administration of justice, especially—insofar as it is a method of cooperation between the Member States to promote the fight against crime—for the purpose of improving security."⁹¹

A mere three months after the PCT's decision, the German Federal Constitutional Court found the law implementing the Framework Decision to be unconstitutional.⁹² Article 16(2) of Germany's basic law provided that "[n]o German may be extradited to a foreign country."⁹³ A German citizen subject to an EAW asserted that the implementation of the EAW violated Article 16(2).⁹⁴ The German constitutional judges argued that, despite its high level of integration, "the European Union ... embodies a partial legal system pertaining to the field of international public law."⁹⁵ Therefore, pursuant to Article 16(2), the German government must review on a case-by-case basis that the requested individual is not deprived of the guarantees or fundamental rights he would be granted in Germany.⁹⁶ Unlike the PCT's ruling, the German Court's ruling took effect immediately.⁹⁷ Like

⁸⁷ OTK ZU, *supra* note 85, at 19.

⁸⁸ *Id.*

⁸⁹ Konstytucja Rzeczypospolitej Polskiej [CONSTITUTION] Apr. 12, 1997, art. 9 (Pol.).

⁹⁰ OTK ZU, *supra* note 85, at 21.

⁹¹ Case C-303/05, Opinion of Advocate General Ruiz-Jarabo Colomer, 2006 E.C.R. I-3638, 3639 n.11.

⁹² *Id.* at 3639.

⁹³ GRUNDGESETZ [GG] [BASIC LAW], art. 16(2) (Ger.), translation at http://www.gesetze-im-internet.de/englisch_gg/englisch_gg.pdf.

⁹⁴ Pollicino, *supra* note 29, at 1327.

⁹⁵ *Id.* at 1328.

⁹⁶ *Id.*

⁹⁷ Case C-303/05, Opinion of Advocate General Ruiz-Jarabo Colomer, 2006 E.C.R. at 3639 n.11.

its German counterpart, the Supreme Court of Cyprus found that its constitution bars the implementation of the EAW.⁹⁸

In 2007, a Belgian association of lawyers sought to annul the Framework Decision's transposition into Belgian law before the European Court of Justice.⁹⁹ One basis of the challenge was an infringement on the principle of equality and non-discrimination; the Framework Decision listed 32 offenses which do not require double criminality for the execution of an EAW.¹⁰⁰ Another basis for annulment was that the Framework Decision failed to satisfy the principle of legality.¹⁰¹ They argued that the Framework Decision does not list offenses exempt from double criminality in a "clear and precise legal content, but only vague categories of undesirable behavior."¹⁰² Elaborating on this argument, they explain:

The judicial authority which must decide on the enforcement of a European arrest warrant will, it submits, have insufficient information to determine effectively whether the offences for which the person sought is being charged, or in respect of which a penalty has been imposed on him, come within one of the categories mentioned in Article 5(2) of that Law. The absence of a clear and precise definition of the offences referred to in that provision, it contends, leads to a disparate application of that Law by the various authorities responsible for the enforcement of a European arrest warrant and, by reason of that fact, also infringes the principle of equality and non-discrimination.¹⁰³

The Belgian association also submitted that the subject matter of the EAW should have, in accordance with Article 34(2)(d) of the European Union, been regulated by way of convention rather than by framework decision. Advocate General Ruiz-Jarabo Colomer ruled preliminarily on two questions:

(1) Is [the] Framework Decision . . . compatible with Article 34(2)(b) of the [EU] Treaty, under which framework decisions may be adopted only for the purpose of approximation of the laws and regulations of the Member States?

(2) 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

⁹⁸ Ανώτατο Δικαστήριο Κύπρου [Cyprus Supreme Court] Nov. 7, 2005, No. 294/2005 (Cyprus).

⁹⁹ Case C-303/05, Opinion of Advocate General Ruiz-Jarabo Colomer, 2006 E.C.R. at 3662.

¹⁰⁰ Case C-303/05, *Advocaten voor de Wereld VZW v. Leden van de Ministerraad*, 2007 E.C.R. I-3672, 3696.

¹⁰¹ *Id.* at 3685.

¹⁰² *Id.*

¹⁰³ *Id.*

[EU] Treaty . . . and, more specifically, with the principle of legality in criminal proceedings guaranteed by that provision and with the principle of equality and non-discrimination?¹⁰⁴

Upon examination, the court found no factor capable of affecting the validity of the Framework Decision.¹⁰⁵ Regarding the second question, the court found that the Framework Decision's lack of definition of the 32 offenses, while risking disparate implementation, did not violate the principle of equality and non-discrimination because the Framework Decision was not intended to harmonize the substantive criminal law of the Member States and application of the EAW is not conditional on such harmonization.¹⁰⁶

As the aforementioned cases demonstrate, the EAW's legality has been contested vigorously. Member States' courts have either interpreted their constitutions in ways that facilitate the EAW or have implemented extra protective measures for their citizens. The United Kingdom—which does not have a constitution—found it easier to integrate the EAW into its national law than some other Member States. As a whole, the European Union has enjoyed expedited transfer of persons and increased judicial integration since the implementation of the EAW. However, because the United Kingdom did employ its domestic law to prevent abuse of the EAW, it was left vulnerable to the misuse discussed in Section III.

F. The EAW's Efficiency and Improvements Attributable to the EAW

Proponents of the European Arrest Warrant point to the efficiency of the system; criminal prosecutions are quickly adjudicated due to the diminished controls of the surrender procedure.¹⁰⁷ The 32-offense list exempt from double criminality prohibits political interference in the judicial process; however, Member States do not always abide by this provision.¹⁰⁸ Upon enactment of the EAW, Member States were willing to exercise this new power, as demonstrated by the drastic rise in EAWs issued over the years. From 2004 to 2009, the annual number of issued EAWs rose from 3,353 to 15,826.¹⁰⁹ From 2005 to 2009, between 51% and 62% of requested persons consented to their surrender, on average between 14 and 17 days after issuance.¹¹⁰ For persons who did not consent to their surrender, the average surrender time pursuant to an EAW was 48 days in 2011.¹¹¹ The EAW

¹⁰⁴ Case C-303/05, *Advocaten voor de Wereld VZW v. Leden van de Ministerraad*, 2007 E.C.R. at 3686.

¹⁰⁵ *Id.* at 3698.

¹⁰⁶ *Id.* at 3695.

¹⁰⁷ HENLEY & WILLIAMS, *supra* note 24, at 6.

¹⁰⁸ Mortera-Martinez, *supra* note 26. *See also infra* Section III(c).

¹⁰⁹ Plachta, *supra* note 4, at pt. 3.

¹¹⁰ Report from the Commission to the European Parliament and the Council, at 3, COM (2011) 175 final (Apr. 13, 2011).

¹¹¹ *Id.*

has been lauded for being a more efficient system than extradition, facilitating the free movement of persons within the European Union, and strengthening the fight against international crime.¹¹² The implementation of the Framework Decision is a logical consequence of European integration. In the United Kingdom, however, the unintended consequences of the EAW beg the question of whether efficiency should prevail over justice.

III. PROBLEMS THE EUROPEAN ARREST WARRANT POSES FOR THE UNITED KINGDOM: DISPROPORTIONATE USE, HUMAN RIGHTS VIOLATIONS, AND POLITICAL MOTIVES

A. Polish Prosecutors Misuse EAWs by using them to Bring Frivolous Charges

The European Commission has recognized the problem of a “systematic issuing of EAWs for very minor offenses.”¹¹³ Poland is the primary culprit, with a system of mandatory prosecution that remains similar to its postwar communist system.¹¹⁴ Among Polish prosecutors, rates of successful prosecution are “sacrosanct.”¹¹⁵ In Poland, prosecutors have no discretion to drop charges even if the offense is of a petty character or prosecution would not advance a valid public interest.¹¹⁶ This requirement has led to a substantial number of EAWs issued for frivolous charges, many of which make headlines due to their absurdity.¹¹⁷ Examples of these offenses include “cycling whilst drunk,” “theft of a chicken,” “missing payments on a hire purchase agreement,” and drug possession involving amounts that are not actionable in many other European countries.¹¹⁸ Many Polish prosecutors pursue these charges in order to improve their performance statistics.¹¹⁹

In 2013, the US State Department found that “among [Poland’s] principal human rights problems were an inefficient judicial system and lengthy court procedures, which impeded the delivery of justice.”¹²⁰ The US State Department

¹¹² Ghimis, *supra* note 58.

¹¹³ Sarah Haggemüller, *The Principle of Proportionality and the European Arrest Warrant*, 3 ONATI SOCIO-LEGAL SERIES 95, 99 (2013).

¹¹⁴ Krzysztof Krajewski, *Prosecution and Prosecutors in Poland: In Quest of Independence*, 41 CRIME & JUST. 75, 106 (2012).

¹¹⁵ *Id.* at 108.

¹¹⁶ *Id.* at 107.

¹¹⁷ *Id.* at 108.

¹¹⁸ *Id.*; Thomas Garner, *Proportionality and the European Arrest Warrant*, GHERSON (Jan. 16, 2015), <https://www.gherson.com/blog/proportionality-and-the-european-arrest-warrant>.

¹¹⁹ Krajewski, *supra* note 114, at 108.

¹²⁰ U.S. DEP’T OF STATE BUREAU OF DEMOCRACY, HUMAN RIGHTS AND LABOR, *Poland 2013 Human Rights Report* 1, 1 (2013), <https://www.state.gov/documents/organization/220529.pdf>.

also found that “the [Polish] judicial system was improperly structured and inefficient, with a poor division of labor between different courts.”¹²¹

More than half of EAWs handled by UK courts come from Poland.¹²² Most of the EAWs are issued for Polish nationals.¹²³ A senior district judge in the United Kingdom noted that the EAW “works rather well from [the Polish] point of view” because time spent by foreign suspects on remand in the United Kingdom is deducted from their sentence, therefore saving money for their home country.¹²⁴ The judge explained that “if some of their citizens end up serving their custodial sentence in [UK] facilities, that is not something [Polish authorities] are particularly concerned about.”¹²⁵ Although the Framework Decision mandates that cases are to be completed within 60 days, in contested cases it is not uncommon for a year to pass before resolution.¹²⁶ In 2011, a total of 1,335 individuals were surrendered from the United Kingdom under EAWs, with an estimated 27 million Euros in legal and court costs.¹²⁷

B. The EAW Leaves Requested Persons Vulnerable to Human Rights Violations and Prolonged Detention

Polish authorities overuse pretrial detention and, in many cases, detain the accused for unacceptably long durations.¹²⁸ The European Court of Human Rights found that Polish courts granted about 90 percent of prosecutorial applications for pretrial detention.¹²⁹ Many of these applications are granted by young, inexperienced judges with minimal consideration.¹³⁰ Since courts often consider foreigners to be flight risks, judges refuse bail; pretrial detention—even for minor

¹²¹ *Poland 2013 Human Rights Report* 1, *supra* note 120, at 6.

¹²² Krajewski, *supra* note 114, at 108.

¹²³ Andrew Gilligan, *Britain Left to Count Cost of European Arrest Warrant*, TELEGRAPH (Aug. 28, 2010, 9:32 PM), <http://www.telegraph.co.uk/news/uknews/law-and-order/7969981/Britain-left-to-count-cost-of-European-Arrest-Warrant.html>.

¹²⁴ David Barrett, *Polish Judges ‘back European Arrest Warrant’ as Prisoners Serve Time at British Taxpayers’ Expense*, TELEGRAPH (Oct. 29, 2014, 1:35 PM), <http://www.telegraph.co.uk/news/uknews/crime/11195592/Polish-judges-back-European-Arrest-Warrant-as-prisoners-serve-time-at-British-taxpayers-expense.html>.

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ Cahal Milmo, *Polish Man Held in Wandsworth Prison for Two Months on European Arrest Warrant Seeking Extradition for Seven-Year-Old Drunk-Cycling Conviction*, INDEPENDENT (Dec. 19, 2012, 6:22 PM), <http://www.independent.co.uk/news/uk/home-news/polish-man-held-in-wandsworth-prison-for-two-months-european-arrest-warrant-seeking-extradition-8426095.html>.

¹²⁸ Krajewski, *supra* note 114, at 105.

¹²⁹ *Id.*

¹³⁰ *Id.*

crimes—can last for years.¹³¹ Also of concern is that some Member States have no maximum duration for legal pretrial detention.¹³²

In one case, a Polish man was detained by UK authorities for months pursuant to a Polish-issued EAW demanding he serve the remainder of a 12-month prison sentence for being drunk on a bike.¹³³ Had he committed this offense in the United Kingdom, he would have been subject to a mere fine.¹³⁴ The issuance of frivolous EAWs can also lead to detention for minor civil offenses, exemplified by a British man who spent weeks in a UK jail pending surrender to Poland, only to resolve the case with the payment of a civil penalty upon his surrender.¹³⁵

Fair Trials International (FTI) reported that the human rights safeguards in the Framework Decision are inadequate and unreflective of European Court of Human Rights rulings.¹³⁶ FTI has noted that some Member States do not consider the human rights implications of extradition before issuing a request.¹³⁷ This is problematic because, in some cases, the requested person has already been subject to an unfair trial or conviction and lacks standing to contest this in the executing state.¹³⁸ FTI proposed an amendment to the Framework Decision that would allow executing states to request further information upon hearing substantive evidence that a requested person's rights would be violated after surrender.¹³⁹

The case of Andrew Symeou illustrates the human rights and due process violations that governments have committed under the guise of valid EAWs. In July 2009, the United Kingdom surrendered Symeou to Greece to face manslaughter charges arising from the 2007 death of another British man.¹⁴⁰ Greek authorities alleged that Symeou punched the victim in the face at a nightclub, knocking him out and causing him to fall off a podium and sustain a fatal brain injury.¹⁴¹ FTI found that the evidence presented against Symeou was based on information Greek police elicited by intimidating and assaulting witnesses—Symeou's friends—who later retracted their statements.¹⁴² The witnesses claim they were forced to sign testimonial documents under intense pressure from police,

¹³¹ Gilligan, *supra* note 123.

¹³² Joanna Dawson, Sally Lipscombe & Samantha Godec, *The European Arrest Warrant*, House of Commons Briefing Paper 1, 14 (2017).

¹³³ Milmo, *supra* note 127.

¹³⁴ *Id.*

¹³⁵ Gilligan, *supra* note 123.

¹³⁶ Fair Trials International, *The European Arrest Warrant seven years on – the case for reform*, at 8, ¶ 25 (2011), https://www.fairtrials.org/documents/FTI_Report_EAW_May_2011.pdf [hereinafter FTI Report].

¹³⁷ *Id.* at 8, ¶ 27.

¹³⁸ *Id.* at 9, ¶ 29.

¹³⁹ *Id.* at 10, ¶ 33.

¹⁴⁰ *Id.* at 9.

¹⁴¹ *Andrew Symeou Cleared Over Death on Zakynthos*, BBC NEWS (June 11, 2011), <http://www.bbc.com/news/uk-england-london-13810608>.

¹⁴² FTI Report, *supra* note 136, at 9.

and did not understand what they were signing.¹⁴³ Regarding his experience, Symeou explained that:

[t]he way they work is not the way we work over here ... you don't beat up two people to sign things they don't understand and then write statements in a language that five other witnesses don't understand, saying what you want and asking them to sign it. That's not an investigation, that's a fabrication.¹⁴⁴

By the time Symeou was acquitted, the damage was done; he had spent eleven months in a cell “so unsanitary that he awoke each morning covered in cockroaches and was frequently bitten by fleas in his bedding.”¹⁴⁵ FTI reported that he was forced to share his cell with five other inmates, some convicted of rape and murder.¹⁴⁶

When Symeou litigated his surrender in UK court, he argued that surrender would subject him to mistreatment in violation of the European Convention on Human Rights.¹⁴⁷ His challenge failed even though his underlying argument was supported by numerous human rights organizations and court rulings.¹⁴⁸

The United Kingdom should not expose requested persons to human rights violations and inhumane prison conditions without independently assessing the merits on a case-by-case basis. Post-Brexit extradition agreements with Member States such as Greece and Poland should include a provision allowing UK authorities to inquire into the conditions a requested person will face upon surrender if the requested person presents evidence of imminent human rights violations. Such inquiries should allow UK courts to balance prison conditions, the strength of

¹⁴³ Leah Hyslop, *Andrew Symeou Criticises Extradition Laws*, TELEGRAPH, (Nov. 2, 2011, 3:59 PM), <http://www.telegraph.co.uk/expat/expatnews/8864518/Andrew-Symeou-criticises-extradition-laws.html>.

¹⁴⁴ *Id.*

¹⁴⁵ FTI Report, *supra* note 136, at 9.

¹⁴⁶ *Id.* at 18.

¹⁴⁷ *Id.* at 18–19.

¹⁴⁸ *Symeou v. Public Prosecutor's Office at Court of Appeals*, Patras, Greece [2009] EWHC 897 at ¶ 65 (“[T]here is no sound evidence that the Appellant is at a real risk of being subjected to treatment which would breach article 3 ECHR, even if there is evidence that some police do sometimes inflict such treatment on those in 19.”); FTI Report, *supra* note 136, at 18 (“[Symeou’s recount of prison conditions] conforms with information contained in the numerous expert reports placed before the court in Andrew’s Article 3 challenge to extradition. The Committee for the Prevention of Torture (CPT) had reported the previous year that ‘persons deprived of their liberty in Greece run a real risk of being ill-treated.’”); Elena Becatoros, *Europe’s Leading Human Rights Body Has Slammed Conditions in Greek Prisons and Criticized the Handling of Police Brutality Allegations, Saying Not Enough Improvements Have Been Made Despite Repeated Recommendations*, U.S. NEWS (Feb. 26, 2016, 6:09 PM), <https://www.usnews.com/news/world/articles/2016-02-29/council-of-europe-slams-greek-prison-conditions>. See also Amnesty International, *Greece Must Urgently Remedy Deplorable Detention Conditions*, <http://www.amnesty.eu/en/news/press-releases/council-of-europe/0488-0488/#.WLEkThLyunc>.

the prosecution's evidence, and other human rights concerns with the severity of the alleged crime. While it would be untenable to categorically refuse surrender to certain Member States due to inhumane prison conditions, UK courts should nevertheless provide a means for requested persons to challenge the propriety of their surrender based on human rights and evidentiary concerns.

C. The European Arrest Warrant Facilitates non-UK Government Prosecutions of Political Dissidents

An active case illustrates how corrupt foreign officials can use an EAW to prosecute a political dissident. In June 2016, Alexander Adamescu was arrested and sent to a UK prison for two nights before being released on bail.¹⁴⁹ Romanian authorities are seeking Adamescu's return in order to investigate bribery corruption charges against his father, who is a proprietor of a prominent opposition newspaper called Romania Libera.¹⁵⁰ After the fall of communism, Romania Libera advocated for democratic values and the transition of Romania into a market economy.¹⁵¹ Romania issued the EAW just days after he filed a request to arbitrate claims that Romanian government officials targeted and undermined his father's business dealings.¹⁵² A report from a high level figure in UK intelligence says that Adamescu's surrender is part of an attempt to thwart his family's efforts to arbitrate claims against government officials.¹⁵³ Despite warranted suspicions of political motivation, UK judges must treat the EAW with a "wholly unmerited level of reciprocity."¹⁵⁴

The Adamescu case illustrates a major flaw in the EAW system that the United Kingdom now has the discretion to remedy. While the Framework Decision allows refusal of an EAW for political offenses, it does not allow refusal of an EAW for non-political charges that the issuing authority brings for political reasons. The United Kingdom's post-Brexit extradition policy should allow its political, judicial, and law enforcement authorities to investigate political motivations behind extradition requests and refuse extradition if political motivations are found to exist.

¹⁴⁹ Patrick Sawyer, *European Arrest Warrant 'Targeting Innocent British Resident'*, TELEGRAPH (Dec. 13, 2016, 9:19AM), <http://www.telegraph.co.uk/news/2016/12/13/european-arrest-warrant-targeting-innocent-british-resident/>.

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ Sawyer, *supra* note 149.

**IV. THE UNITED KINGDOM, AS THE EXECUTING AUTHORITY,
SHOULD EMPLOY A PROPORTIONALITY TEST BEFORE AGREEING
TO EXTRADITE A SUSPECT**

Romania's use of the EAW to prosecute political adversaries demonstrates another problem mutual recognition poses for the United Kingdom. A stringent political offense exception, however, is not sufficient to curtail abuse of the surrender system. The problem stems from mutual recognition—the underlying principle of the EAW. Mutual recognition assumes, unequivocally, that the legal systems of the United Kingdom, Romania, and Poland are equally fair and impartial, and that judicial or prosecutorial decisions from all three countries deserve equal deference. This assumption is wrong. The World Justice Project, as part of its annual Rule of Law Index, quantitatively assesses and ranks the fairness of every country's criminal justice system.¹⁵⁵ Member States' rankings on this scale range from Denmark, which ranks first in the world, to Greece, which ranks forty-first.¹⁵⁶ If the presumption is that an EAW from each Member State is equally valid, the executing state should be able to take action when the circumstances of the extradition request suggest that this presumption is rebuttable. The executing state should be allowed to consider the fairness of the criminal justice system that the requested person will enter as a factor bearing on the decision to extradite.

If the United Kingdom chooses to continue giving equal deference to unequal legal systems, it should employ a judicial mechanism to scrutinize and, when necessary, deny requests that may be frivolous or unfounded. The Framework Decision does not include a proportionality test, meaning that the issuing judicial authority is not required to balance the seriousness of the offense against the consequences for the arrested person of the execution of the warrant.¹⁵⁷ A Member State may issue an EAW for any act punishable by the law of the issuing Member State by a custodial sentence for a maximum period of at least twelve months or, if a sentence has already been passed, for a sentence of at least four months.¹⁵⁸ Theft, for instance, is punishable by a maximum sentence of more than twelve months in every Member State.¹⁵⁹ This is what makes the issuance of an EAW for petty theft permissible. Under the EAW scheme, the execution of such a warrant is never subject to a proportionality test.

Since 2005, European institutions have regularly discussed how to deal with disproportionate use of the EAW—that is, use of an EAW in situations where the human and financial costs of surrender outweigh the gravity of the offense.¹⁶⁰ In 2010, the European Council inserted a chapter on proportionality into its

¹⁵⁵ See World Justice Project, *Rule of Law Index 2016*, <http://data.worldjusticeproject.org/>.

¹⁵⁶ *Id.*

¹⁵⁷ Baker et. al., *supra* note 11, at 119–20.

¹⁵⁸ Haggemüller, *supra* note 113, at 101.

¹⁵⁹ *Id.*

¹⁶⁰ *Id.* at 100, 102 (“Sometimes the notion of disproportionate use of EAW concerns cases in which an extradition would be legitimate in itself, however it is deemed too severe for the case at hand and not appropriate in relation to the situation of the defendant.”).

‘Handbook on how to issue a European Arrest Warrant’ (Handbook).¹⁶¹ The Handbook encourages issuing authorities to consider alternatives to an EAW, including “using less coercive instruments of mutual legal assistance where possible, using videoconferencing for suspects by means of summons” and “use of the Framework Decision on the mutual recognition of financial penalties.”¹⁶² The Handbook notes that “this interpretation is consistent with the provision of the Framework Decision on the EAW and with the general philosophy behind its implementation, with a view to making the EAW an effective tool for combatting serious and organised crime in particular.”¹⁶³ Later, the European Commission recommended a higher degree in uniformity that Member States could achieve by following the Handbook.¹⁶⁴

In 2015, the UK government amended the Extradition Act 2003 and set forth two decisions that judges must make before executing EAWs.¹⁶⁵ The first inquiry is “whether the extradition would be compatible with the Convention rights within the Human Rights Act 1998.”¹⁶⁶ The second inquiry is “whether the extradition would be disproportionate.”¹⁶⁷ In deciding whether the extradition would be disproportionate, the judge must take into account three specified matters: (1) “the seriousness of the conduct alleged to constitute the extradition offence;” (2) “the likely penalty that would be imposed if D was found guilty of the extradition offence;” and (3) “the possibility of the relevant authorities taking measures that would be less coercive than the extradition of D.”¹⁶⁸ The judge is required to order the defendant’s discharge if he decides that the extradition would be disproportionate.¹⁶⁹ While delay is not a codified factor in the proportionality decision, a court held that it is relevant to the extent that it informs the three factors in the amended Act.¹⁷⁰

The recent amendment to the Extradition Act 2003 is a step in the right direction for the United Kingdom because it allots greater decision-making authority to UK judges. As demonstrated by the rigidity of the Polish prosecution and the political influence on Romanian authorities, European legal systems are not sufficiently equal to justify mutual recognition in its purest sense. While it is important to respect the rule of law and give credence to extradition requests, a

¹⁶¹ Hagenmüller, *supra* note 113, at 102.

¹⁶² European Handbook on How to Issue a European Arrest Warrant, COPEN, 14-15 (2010), <http://register.consilium.europa.eu/doc/srv?l=en&f=ST%2017195%202010%20REV%201>.

¹⁶³ *Id.* at 15.

¹⁶⁴ Dawson, *supra* note 132, at 12.

¹⁶⁵ *Id.* at 19–20.

¹⁶⁶ *Id.* at 19.

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

¹⁶⁹ Dawson, *supra* note 132, at 20.

¹⁷⁰ Anand Doobay, *European Arrest Warrants: Amendments to the Extradition Act 2003 by the Anti-Social Behaviour Crime and Policing Act 2014*, European Criminal Law Association 1, 8 (2006), <http://static1.1.sqspcdn.com/static/f/650429/27064939/1465387408160/Extradition+Handout+6-6-16.pdf?token=UL1OG3drphYb94ICTb2QlwyZSFk%3D>.

balance must be struck between the costs to the defendant and the executing state and the benefits of prosecution for the issuing state.

The proportionality test is a practical method for preventing extradition abuse because it will not impede prosecution of serious offenses such as a murder, drug trafficking, and terrorism. When foreign prosecutors allege serious offenses, prudent judges will find that surrender of the suspect is necessary notwithstanding the implementation of a proportionality test. Further, the European Union enacted the Framework Decision in response to the rise of international terrorist groups. Regional integration remains necessary to combat these groups and ensure the timely prosecution of serious offenders. The enactment of an EAW-style surrender procedure with a mandatory proportionality inquiry would insulate petty offenses as the target of heightened scrutiny and retain the streamlined procedure that hastens the prosecution of serious criminals.

V. CONCLUSION

The EAW has served its purpose by integrating the Member States' criminal justice systems, making extradition a judicial procedure rather than a political one, and expediting the transfer of suspects. Despite these benefits, abuse of the system has harmed the United Kingdom.

The Brexit referendum puts the United Kingdom in a position to alter its extradition policy in ways it was previously incapable of doing. UK lawmakers and politicians should not forget the inefficient and protracted system that the EAW replaced. The country's ability to combat serious international crimes and terrorism should remain the utmost concern as it finds a way to replace the EAW. Nevertheless, the United Kingdom should institute protective measures to prevent further abuse of extradition by foreign authorities. A proportionality test for executing extradition requests would serve this purpose.

The United Kingdom's post-Brexit extradition agreements with Member States should not wholly repudiate mutual recognition. They should, however, allocate to UK courts the discretion to determine whether an extradition request (1) serves non-political purposes; (2) is issued based on legitimately obtained evidence; (3) will not endanger the suspect's human rights if executed; and (4) alleges an offense serious enough to justify the human and financial costs of detaining and transporting the suspect. UK Courts should consider these four factors before extraditing a suspect. This does not require a return to the inefficient European Convention on Extradition. It requires a more nuanced application of the principle of mutual recognition—one that reflects the significant differences among European criminal justice systems.

