

The self-perception of the European Court of Justice and its neglect of the defense perspective in its preliminary rulings on judicial cooperation in criminal matters

A small note on a fundamental misunderstanding

By Prof. Dr. Sabine Swoboda, Bochum

The European Union has developed numerous instruments to promote European integration in all areas of law. Various EU framework decisions and EU directives contribute to building the Area of Freedom, Security and Justice in accordance with Art. 3 (2) and Art. 67 of the Treaty on the Functioning of the European Union (TFEU),¹ among them Council Framework Decision 2002/584/JHA on the European Arrest Warrant and a flood of more recent EU Directives on mutual recognition concerning criminal procedure, e.g. Directive 2014/41/EU on the Investigation Order in Criminal Matters.² Council legislation is however just one pillar of EU integration. Another driving force is the European Court of Justice (ECJ) with a jurisprudence that betrays strong political incentives to use the interpretation of EU law as a technique to expand EU law to the detriment of state interests.³ The ECJ has for instance been known to employ EU competences in one area of the law as a springboard to conquer other areas of law which have not yet been subjected to European integration.⁴ It has furthermore furnished the rules and principles of the common market with a considerable leverage effect in order to allow the principles of the common market and the legal fiction of mutual trust (among the Member States) to seep into every area of the national legal order.⁵ By letting EU competences – originally confined to a very small range of areas – spill over to other areas of the law the ECJ has turned its jurisprudence into a powerful weapon of integration, including integration in the area of mutual recognition in criminal matters.

¹ Consolidated Version of the Treaty on the Functioning of the European Union, OJ EU 2012 No. C 326/01.

² Directive 2014/41/EU of the European Parliament and of the Council of 3.4.2014 regarding the European Investigation Order in criminal matters, OJ EU 2014 No. L 130/1; According to Art. 36 (1) of the Directive it has to be transposed by 22.5.2017.

³ Mayer, in: Grabitz/Hilf/Nettesheim (Hrsg.), Das Recht der Europäischen Union, 2015, Art. 19 AEUV Rn. 42; Schlochauer, in: v. Caemmerer/Schlochauer/Steindorff (Hrsg.), Probleme des Europäischen Rechts, Festschrift für Walter Hallstein zu seinem 65. Geburtstag, 1966, S. 431; Mertens de Wilmars, CDE 1976, 135; for background information see Langbauer, Das Strafrecht der Unionsgerichte, 2015, p. 47 f., 358 f.; Grimm, Verfassungsblog of 22.4.2013, online: <http://www.verfassungsblog.de/was-den-motor-antreibt-der-uegh-als-wegbereiter-der-europaischen-integration/#.VZ4nh1Jqgzc> (9.7.2015).

⁴ For an overview of the history of forcing integration via ECJ jurisprudence even before Art. 67 ff. TFEU came into effect see Langbauer (fn. 3), p. 63 ff.

⁵ The most important leverage effect has been the duty to interpret national law in conformity with EU directives and EU Framework Decisions; Langbauer (fn. 3), p. 59 ff., 79.

This contribution wants to focus on the shadow side of the Court's political engagement. Criminal lawyers are alarmed by how the ECJ turns the legal instruments within the EU Area of Freedom, Security and Justice into yet another mechanism of expediting integration to the detriment of fundamental human rights. The ECJ refuses to consider itself a human rights court.⁶ And in Opinion 2/13 of 18 December 2014⁷ the Court has made it obvious that it is even willing to prevent other (national and international) courts from providing human rights protection in its place.⁸ This position is mistaken and dangerous. A preference of political objectives and an emphasis on EU autonomy⁹ over individual freedoms cannot be the legal foundation on which a European area of freedom, security and justice is built.

I. The perils of a self-image as a “driving force of integration”

In 2009, when the Consolidated Version of the Treaty of the European Union and the Treaty on the Functioning of the European Union came into effect (on 1 December 2009), the ECJ acquired a new role. It acquired the duty to safeguard the fundamental freedoms enshrined in the Charter of Fundamen-

⁶ Statement of the President of the European Court of Justice Vassilios Skouris, quoted after Besselink, Verfassungsblog of 18.8.2014; see also Douglas-Scott, Verfassungsblog of 24.12.2014, online:

<http://www.verfassungsblog.de/opinion-213-eu-accession-ec-hr-christmas-bombshell-european-court-justice/#.VZ4qPIJozc> (9.7.2015);

background explanations by Lenaerts, EuR 2015, 3 (12 ff.); Franzius, ZaöRV 2015, 383 (398).

⁷ Opinion of the Court (Full Court) of 18 December 2014, Opinion pursuant to Art. 218 (11) TFEU, Draft international agreement, Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms, Compatibility of the draft agreement with the EU and FEU Treaties (“Opinion 2/13”).

⁸ Besselink, Verfassungsblog of 18.8.2014; Komárek on the other hand warns to read too much into the ECJ's statement that it is not a “human rights court”; Komárek, Verfassungsblog of 14.3.2015; online:

<http://www.verfassungsblog.de/its-a-stupid-autonomy/#.VZ4rS1Jqgzc> (9.7.2015).

⁹ Dissenting however Halberstam, Verfassungsblog of 12.3.2015, online:

<http://www.verfassungsblog.de/a-constitutional-defense-of-cj-eu-opinion-213-on-eu-accession-to-the-echr-and-the-way-for-ward/#.VZ4ro1Jqgzc> (9.7.2015):

“[...] one of the Court's greatest concerns – mutual trust – goes to the very survival of the Union and demands not an exemption, but full accession.”

tal Rights of the European Union (EU-Charter),¹⁰ and it gained jurisdiction within the area of police and judicial cooperation in criminal matters (Art. 67 ff. TFEU).¹¹ The Court may now occasionally be requested to decide on standards of human rights protection within criminal proceedings in a Member State. That would – at least in the eyes of a criminal lawyer – include that the ECJ adopts the traditional approach of a criminal court to human rights issues. It would require the prioritization of human rights over political objectives as criminal law and criminal procedural law are historically designed as limits to state power. Criminal law in particular is subject to the rule of “*nullum crimen, nulla poena sine lege*” so as to protect individual freedom from political arbitrariness. Criminal procedural law requires the state to abide by specific rules and legal forms when investigating and prosecuting individuals. The traditional approach of a criminal court would be to defend the fundamental freedoms of the accused even in the face of pressing political interests. This duty is fortified by the requirements of the European Convention on Human Rights which demands from criminal courts to put the defence of individual human rights at the forefront of their jurisprudence.¹²

The ECJ however has assumed its new role in the area of judicial cooperation in criminal matters without prioritising a human rights perspective. It still acts in accordance with its traditional self-perception as a driving force of integration; and this requires promoting the judicial fiat of mutual trust among member states even where individual human rights risk to be frustrated by the mechanisms of judicial cooperation.

¹⁰ OJ EU 2012 No. C 326/391; the Charter of Fundamental Rights was already proclaimed in 2000, but acquired legal effectiveness only in 2009 through the Treaty of Lisbon which includes the Charter into the category of EU primary law (Art. 6 [1] [1] Treaty on the European Union – TEU). The Charter therefore takes priority over EU secondary law; *Streinz*, in: *Streinz* (Hrsg.), *AEUV/EUV, Vertrag über die Europäische Union und Vertrag über die Arbeitsweise der Europäischen Union*, 2nd ed. 2012, Art. 6 EUV Rn. 2.

¹¹ *Böse*, in: *Sieber/Satzger/v. Heintschel-Heinegg* (Hrsg.), *Europäisches Strafrecht*, 2nd ed. 2014, § 54 Rn. 1; for those instruments in the area of police and judicial cooperation in criminal matters which had been enacted before the 1.12.2009 on the basis of the old Treaty on the European Union, the judicial supervision of the ECJ did not immediately apply (ex-Art. 29 ff. EU). On 1.12.2014 however the transitional period five years from the day that the Treaty of Lisbon came into effect (see Art. 10(1) and (3) of Protocol no. 36 on transitional provisions to the Treaty of Lisbon) has run out. All instruments adopted under the old and the new treaty framework on police and judicial cooperation in criminal matters are now subject to the supranational judicial review of the ECJ.

¹² *Eschelbach*, in: *Widmaier/Müller/Schlothauer* (Hrsg.), *Münchener Anwaltshandbuch Strafverteidigung*, 2nd ed. 2014, § 31 Rn. 7; *BVerfG NJW* 2004, 3407 (3410) – Case „Görgülü“.

This paper proposes that the ECJ urgently needs to develop a new self-perception. It needs to acknowledge that in requests relating to cooperation in criminal matters the defence of individual rights must be at the forefront of the Court’s jurisprudence; even if faced with the risk to frustrate EU interests in building a unified area of freedom, security and justice.

II. The Area of Freedom, Security and Justice and the instruments of mutual recognition in criminal matter

The lack of interest in individual defence rights has been evident in the ECJ’s jurisprudence even before Opinion 2/13 in which the Court refused EU accession the European Convention of Human Rights.¹³ Opinion 2/13 however deserves specific mentioning because it includes some extremely disturbing passages. They will be analyzed below (in section II. 3.). The complaint is not that the ECJ would be disinterested in human rights. It has – quite on the contrary – always been willing to employ a human rights perspective with a view to enforcing the mechanisms of the common market against protective national interests. But the ECJ is most of all a Court with a political impetus. Its own role perception is strongly linked to its traditional policy to effectively implement the principles of the common market. Where this role perception however comes into conflict with the traditional role model of a (criminal) court, that role model that requires putting individual rights first, the ECJ seems to act under a fundamental misunderstanding: It chooses to advance politics to the detriment of individual rights.

The examples that prove this mistaken approach – mistaken from the viewpoint of a criminal lawyer – have been discussed time and again in legal journals and blogs. They include the cases “*Radu*”, “*Melloni*” and “*Spašić*” – which will be analyzed in an instant – and now “*Opinion 2/13*”. But what is yet unsolved is how to implant the missing perspective of individual human rights in the jurisprudence of the ECJ. Could the Member States force the Court to strengthen its human rights perspective via Council legislation? Would it help if the German Federal Constitutional Court revoked its willingness to cooperate with the ECJ under “*Solange II*”¹⁴, a

¹³ For the background of the Accession Agreement see the “*Fifth Negotiation Meeting between the CDDH Ad Hoc Negotiation Group and the European Commission on the Accession of the European Union to the European Convention on Human Rights*”, Final Report to the CDDH, 3-5 April 2013, Council of Europe, Doc. No. 47+1(2013)008re, 10.6.2013.

¹⁴ *BVerfGE* 73, 339 (387): “As long as the European Communities, in particular European Court case law, generally ensure effective protection of fundamental rights as against the sovereign powers of the Communities which is to be regarded as substantially similar to the protection of fundamental rights required unconditionally by the Constitution, and in so far as they generally safe-guard the essential content of fundamental rights, the Federal Constitutional Court will no longer exercise its jurisdiction to decide on the applicability of secondary Community legislation cited as the

decision that had been endorsed also by the Constitutional Courts of other Member States?¹⁵ Will the European Court of Human Rights start to exert pressure on the ECJ through revocation of the Bosphorus-presumption upheld since 2005 which assumes that the protection of fundamental rights in the EU is equivalent to the protection of fundamental rights under the system of the European Convention of Human Rights?¹⁶ Should the EU introduce not only a European Prosecutor but also a specialized European Court or a European Chamber for Criminal Matters?¹⁷ The perplexity of the current situation might call for more than just one solution.

1. The principle of Mutual Recognition in judicial cooperation in criminal matters

Pursuant to Art. 67 (1) of the Treaty on the Functioning of the European Union the EU the “Union shall constitute an area of freedom, security and justice with respect for fundamental rights and the different legal systems and traditions of the Member States.” Art. 82 (1) of the Treaty adds that “(j)udicial cooperation in criminal matters in the Union shall be based on the principle of mutual recognition of judgments and judicial decisions and shall include the approximation of the laws and regulations of the Member States”.

This paper will not discuss the approximation of national laws as this is only sought for in specific areas of the law concerning “serious crime with a cross-border dimension” (Art. 83 [1] [1] of the Treaty on the Functioning of the EU¹⁸). Instead, this paper will deal with the principle of mutual recognition of judgements and judicial decisions which can apply in any criminal proceedings.

Art. 82 (1) (2) of the Treaty on the Functioning of the EU empowers the European Parliament and the Council to adopt

legal basis for any acts of German courts or authorities within the sovereign juris-diction of the Federal Republic of Germany, and it will no longer review such legislation by the standard of the fundamental rights contained in the Basic Law”.

¹⁵ See for example for the Constitutional Court of the Czech Republic, *Faix*, EuGRZ 2012, 597.

¹⁶ ECHR, Judgement of 30.6.2005 – Application no. 45036/98 (*Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi* [hereafter *Bosphorus Airways*] v. Ireland), para. 152 ff.; ECHR, Admissibility Decision of 20.1.2009 – Application no. 13645/05 (*Coöperatieve Producentenorganisatie van de Nederlandse Kokkelvisserij u. a. v. The Netherlands*).

¹⁷ This is proposed by *Langbauer* (fn. 3), p. 507 f., 609 ff.

¹⁸ Art. 83 (1) (2) of the Treaty on the Functioning of the EU enlists the areas of crime which the EU legislator had in mind. These include: “terrorism, trafficking in human beings and sexual exploitation of women and children, illicit drug trafficking, illicit arms trafficking, money laundering, corruption, counterfeiting of means of payment, computer crime and organized crime.” According to Art. 83 (1) (3) of the Treaty on the Functioning of the EU the enumerative list of areas of crimes may be enlarged by decision of the EU Council if the Council identifies other important “areas of crime that meet the criteria specified in this paragraph.”

any measures to – among others – “lay down rules and procedures for ensuring recognition throughout the Union of all forms of judgments and judicial decisions” or to “facilitate cooperation between judicial or equivalent authorities of the Member States in relation to proceedings in criminal matters and the enforcement of decisions.” Pursuant to Art. 82 (2) of the Treaty on the Functioning of the EU the European Parliament and the Council may by means of EU directive establish minimum rules in specific areas of criminal proceedings where these are necessary “to facilitate mutual recognition of judgments and judicial decisions and police and judicial cooperation in criminal matters having a cross-border dimension”. The last five years have brought about a variety of new instruments on mutual recognition. These include Directive 2014/41/EU regarding the European Investigation Order in Criminal Matters¹⁹, Directive 2014/42/EU on the freezing and confiscation of instrumentalities and proceeds of crime in the European Union²⁰ or Directive 2011/99/EU on the European Protection Order.²¹ Minimum rules on criminal procedure have been introduced for example by Directive 2012/13/EU on the right to information in criminal proceedings²² and by Directive 2013/48/EU on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty.²³

But the most important instrument of mutual recognition has been introduced more than 13 years ago under the previous legislative framework of the EU: The Framework Decision 2002/584/JHA on the European arrest warrant and the surrender procedures between Member States.²⁴ The European Arrest Warrant has proved troublesome to many Member States which have partly tried to limit its scope of applicability to serious crimes and to crimes with no specific link to the territory of the member state.²⁵ The European Arrest Warrant as an instrument of mutual recognition puts the presumption of mutual trust between the member states to the test. Experience with it has so far been mixed. According to empirical data only about one quarter to one third of all EU Arrest

¹⁹ OJ EU 2014 No. L 130/1.

²⁰ OJ EU 2014 No. L 127/39.

²¹ OJ EU 2011 No. L 338/2.

²² OJ EU 2012 No. L 142/1.

²³ OJ EU 2013 No. L 294/1.

²⁴ Framework Decision of 13.6.2002, OJ EU 2002 No. L 190/1.

²⁵ See for example the verdict of the German Federal Constitutional Court: BVerfG, NJW 2005, 2289 (2292 f.); as to that *Bosbach*, NStZ 2006, 104; *Sachs*, JuS 2005, 931 (933); *Knopp*, JR 2005, 448 (450 f.); the verdict’s main intention was to remind the German Parliament of its discretionary powers when transposing the EU Framework Decision into national law, in particular with regard to the grounds for optional non-execution of the European arrest warrant in Art. 4 No. 3 and Nr. 7 (a) of Framework Decision 2002/584/JHA.

Warrants issued in the EU between 2005 and 2013 have resulted in surrender.²⁶ The majority of EU arrest warrants is not executed. This indicates serious flaws in the system of the EU Arrest Warrant. Reports of individual cases suggest an “overuse” of European arrest warrants. Courts issue them regularly but too often for minor offences.²⁷ Courts issue arrest warrants even in cases in which the whereabouts of the accused are in fact unknown. To make up for this lack of knowledge the Courts address several EU arrest warrants to all other Member States just in case that the person might be found somewhere.²⁸ Another problem seems to be that too many European arrest warrants are issued in cases in which the evidence against the person sought is weak. For that person the European Arrest Warrant proceedings resulted in long-term detention in a foreign country in wait for a decision that the criminal proceedings are discontinued due to lack of evidence.²⁹ In several cases courts issued arrest warrants merely to conduct witness interviews with people unwilling to travel to another country. The main problem with the current system of the European arrest warrant is thus obviously one of proportionality. On 27 February 2014 the European Parliament directed several recommendations to the European Commission on how to deal with the issue of proportionality.³⁰ The European Commission however seems reluctant to

tackle the problems. Meanwhile the evident flaws of the European Arrest Warrant system pose the risk of undermining the building of mutual trust between the Member States.

These flaws need to be kept in mind when discussing the ECJ’s refusal to act as a human rights court since this refusal has become manifest in several judgments concerning the European Arrest Warrant. These cases and other examples relate to the Court’s interpretation of the European “ne bis in idem” in Art. 50 of the EU Charter of Fundamental Rights will now be analyzed.

2. The Cases of “Radu”³¹ and “Melloni”³²

The analysis starts with the cases of “Ciprian Vasile Radu” and “Stefano Melloni”. Both cases had the ECJ face the question whether a Member State’s duty to execute a European arrest warrant can find its limits in serious human rights concerns.

a) “Radu”

Ciprian Vasile Radu had been arrested in Romania to be surrendered to Germany on the basis of four European Arrest

²⁶ *European Parliament*, At a glance, Infographic of 23.6.2014, European Arrest Warrant: in the year 2013 10,400 EU arrest warrants had been issued, but only 2,400 EU arrest warrants resulted in surrender; for the years 2005 to 2013 it is reported that 99,841 European Arrest Warrants were issued, but only 26. 210 EU arrest warrants led to the surrender of the person; see:

<http://www.europarl.europa.eu/EPRS/140803REV1-European-Arrest-Warrant-FINAL.pdf> (9.7.2015).

²⁷ Report from the Commission to the European Parliament and the Council on the implementation since 2007 of the Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, 11.4.2011, COM (2011) 175 final, p. 6, 7 f.; that criticism is reiterated by Advocate General Sharpston in: ECJ, Judgment of 29.1.2013 – Case 396/11, Ministerul Public, Parchetul de pe lângă Curtea de Apel Constanța v. Ciprian Vasile Radu, Opinion of Advocate General Sharpston delivered on 18.10.2012, para. 60 f.

²⁸ *Harris*, euronews of 25.4.2015, online:

<http://www.euronews.com/2015/04/27/reform-calls-after-figures-highlight-fundamental-flaws-of-european-arrest/> (9.7.2015).

²⁹ For the case of Andrew Symou see *Harris*, euronews of 25.4.2015.

³⁰ European Parliament resolution of 27 February 2014 with recommendations to the Commission on the review of the European Arrest Warrant (2013/2109[INL]); the recommendations call for legislative proposals by the Commission that include:

a procedure whereby a mutual recognition measure can, if necessary, be validated in the issuing Member State by a judge, court, investigating magistrate or public prosecutor, in

order to overcome the differing interpretations of the term “judicial authority”;

a proportionality check when issuing mutual recognition decisions, based on all the relevant factors and circumstances such as the seriousness of the offence, whether the case is trial-ready, the impact on the rights of the requested person, including the protection of private and family life, the cost implications and the availability of an appropriate less intrusive alternative measure

a standardized consultation procedure whereby the competent authorities in the issuing and executing Member State can exchange information regarding the execution of judicial decisions such as on the assessment of proportionality and specifically in regard to the EAW to ascertain trial-readiness; a mandatory refusal ground where there are substantial grounds to believe that the execution of the measure would be incompatible with the executing Member State’s obligation in accordance with Article 6 of the TEU and the Charter, notably Art. 52 (1) thereof with its reference to the principle of proportionality;

the right to an effective legal remedy in compliance with Art. 47 (1) of the Charter and Art. 13 of the ECHR, such as the right to appeal in the executing Member State against the requested execution of a mutual recognition instrument and the right for the requested person to challenge before a tribunal any failure by the issuing Member State to comply with assurances given to the executing Member State;

a better definition of the crimes where the EAW should apply in order to facilitate the application of the proportionality test.

³¹ ECJ, Judgment of 29.1.2013 – Case C 396/11 (Criminal Proceedings against Ciprian Vasile Radu), OJ EU 2013 No. C 86/07 (“Radu”).

³² ECJ, Judgment of 26.2.2013 – Case C-399/11 (Criminal proceedings against Stefano Melloni), OJ EU 2013 No. C 114/16 (“Melloni”).

Warrants issued by the Public Prosecutor's Offices in Münster, Bielefeld, Coburg and Verden for acts of robbery. Mr. Radu did not consent to his surrender. He claimed that the conditions of surrender under the EU Framework Decision on the European Arrest Warrant were inconsistent with the fundamental rights and guarantees under the Charter of Fundamental Rights. Not only had Germany not fully transposed the Framework Decision into national law,³³ Radu also claimed that any EU Member State executing an EU Arrest Warrant was obliged to ascertain that the issuing Member State did observe the fundamental rights of the accused guaranteed by the EU Charter of Fundamental Rights and Germany, thus Mr. Radu's claim, had disregarded his right to be heard before issuing the EU Arrest Warrant.

The ECJ dismissed Mr. Radu's arguments in their entirety. Art. 47 and 48 of the Charter – which have to be interpreted in accordance with Art. 6 of the European Convention on Human Rights – did not require a suspect to be heard before a European Arrest Warrant is issued. Furthermore, to require a legal hearing by the issuing authority would lead “to the failure of the very system of surrender” as provided by EU Framework Decision on the European Arrest Warrant.³⁴ Concerning Mr. Radu's demand that the authorities of the state executing the European Arrest Warrant are obliged to ascertain that the issuing Member State has observed the fundamental rights of the accused, the ECJ ruled that a Member State may refuse to execute a European Arrest Warrant only in the cases of mandatory or optional non-execution provided for in Art. 3 to 4a of the Framework Decision 2002/584. None of the cases listed in these articles applied to the Arrest Warrant in Mr. Radu's case.

The ECJ's judgement in “Radu” did not strike observers as peculiar. The judicial rights which Mr. Radu claimed to have (e.g. the right to be heard even before an arrest warrant is issued and his expectation that Rumanian authorities must ensure the legality of the action of the German authorities) did not exist, neither on the basis of Art. 6 ECHR (or Art. 47, 48 of the EU Charter respectively)³⁵ nor under the Constitu-

tional Framework of Germany or Romania. It was therefore reasonable that the ECJ dismissed Mr. Radu's claims. Some observers however felt rather uncomfortable with the ECJ's approach to the case. They criticized the ECJ's insistence that the reasons for refusing the execution of an EU Arrest Warrant were exhaustively listed in Art. 3 to 4a of the Framework Decision 2002/584 because this already indicated that the ECJ would not allow Member States to invoke *ordre public* exceptions to their duty to surrender the accused if these were not explicitly reflected in the Framework Decision.³⁶

b) “Melloni”

The ECJ's refusal to accept national *ordre public* exceptions beyond the catalogue of exceptions listed in the EU Framework Decision on the European Arrest Warrant became decisive one month later in the case of Stefano Melloni. This time the ECJ's position triggered substantial criticism throughout Europe.

Stefano Melloni had been convicted and sentenced in absentia by the Tribunal of Ferrara for bankruptcy fraud in 2000. The Judgement in first instance was subsequently confirmed by the Court of Appeal of Bologna and in 2004 by the Italian Supreme Court of Cassation. On 8 June 2004 the Italian Public Prosecutor's Office in the Court of Appeal of Bologna issued a European Arrest Warrant for execution of the sentence imposed by the Tribunal of Ferrara.³⁷ The Spanish police arrested Mr. Melloni on 1 August 2008, but Mr. Melloni opposed his surrender to the Italian authorities, contending that he had revoked the appointment of the two lawyers who had represented him during trial before the final verdict in 2nd instance. After the judgement in first instance he had appointed another lawyer who had not been notified of the subsequent in absentia proceedings before the Court of Appeal of Bologna.³⁸ Stefano Melloni further contended that under Italian law there was no appeal against the sentences

rechtskonvention, Handkommentar, Art. 5 Rn. 65 f.; *Gaede*, NJW 2013, 1279.

³⁶ Advocate General Eleanor Sharpston had in fact offered a quite different approach to the matter that included a strong human rights perspective: see ECJ, Judgment of 29.1.2013 – Case 396/11, *Ministerul Public, Parchetul de pe lângă Curtea de Apel Constanța v. Ciprian Vasile Radu*, Opinion of Advocate General Sharpston delivered on 18.10.2012, para. 69 ff.; approvingly quoted by *Schunke*, EuCLR 5 (2015), 46 (49); *Gaede*, NJW 2013, 1279; in Germany § 73 S. 2 IRG (Law on International Legal Assistance) stipulates that legal assistance or the transfer of personal or other data to a requesting state is unlawful if the state thereby breaches fundamental principles of the European legal order (european *ordre public* exception). The ECJ's ruling in Radu however would prevent the authorities from invoking this *ordre public* exception if the exception is not listed in the EU Framework Decision 2002/584.

³⁷ ECJ, Judgment of 26.2.2013 – Case C-399/11 (“Melloni”), para. 14.

³⁸ ECJ, Judgment of 26.2.2013 – Case C-399/11 (“Melloni”), para. 15 f.

³³ Explanation: On 18 July 2005 the German Federal Constitutional Court had declared the German legislation which transposed the Framework Decision on the EU Arrest Warrant into the “Internationales Rechtshilfegesetz (IRG)” unconstitutional and void for not complying with Art. 16 (2) and Art. 19 (4) of the German Basic Law and the principle of proportionality; BVerfG, NJW 2005, 2989. The EU Arrest Warrant that had been issued in Mr. Radu's Case was based on the “Second Law on the European Arrest Warrant” (2. Europäisches Haftbefehlsgesetz) of 20.7.2006 (BGBl. I 2006, p. 1721) which pays attention to the critical remarks of the Bundesverfassungsgericht.

³⁴ ECJ, Judgment of 29.1.2013 – Case C 396/11 (Radu), para. 39 f.

³⁵ The rights of the arrested person are explained in Art. 5 (2)-(5) ECHR; these include a right to be heard by a judge, but only after the arrest has taken place; *Meyer-Ladewig*, in: *Meyer-Ladewig* (Hrsg.), EMRK, Europäische Menschen-

imposed in absentia. The Spanish authorities should therefore make the execution of the European Arrest Warrant conditional upon a guarantee of appeal against his judgement by Italian authorities.³⁹ These requests were at first refused by a Spanish Court which ordered Mr. Melloni's surrender to Italy, but Mr. Melloni filed a "recurso de amparo", an appeal to the Spanish Constitutional Court based on Art. 24 (2) of the Spanish Constitution which provides the right of access to a judge and the right to a fair trial. The Constitutional Court decided to hear the complaint but was unresolved on whether it was allowed to apply its own constitutional level of protection of a fair trial to the case. It therefore requested a preliminary ruling from the European Court of Justice in accordance with Art. 267 TFEU for the interpretation of Art. 4a (1) of Council Framework Decision 2002/584/JHA of 13 June 2002 on the European Arrest Warrant and the Surrender Procedures between Member States. It in particular requested "whether a Member State may refuse to execute a European arrest warrant on the basis of Article 53 of the Charter of Fundamental Rights of the European Union ('the Charter') on grounds of infringement of the fundamental rights of the person concerned guaranteed by the national constitution."⁴⁰

Art. 53 of the Charter of Fundamental Rights would in fact allow for a higher level of protection of fundamental rights in the Member States.

Art. 53 reads:

"Nothing in this Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognized, in their respective fields of application, by Union law and international law and by international agreements to which the Union, the Community or all the Member States are party, including the European Convention for the Protection of Human Rights and Fundamental Freedoms, and by the Member States' constitutions."

The ECJ however upheld its ruling in "Radu" which says that the reasons for refusing the execution of an EU Arrest Warrant are exhaustively listed in Art. 3 to 4a of the Framework Decision 2002/584. And it proceeded to subject the interpretation of Art. 53 of the Charter of Fundamental Rights to the principle of primacy, unity and effectiveness of EU law.⁴¹

³⁹ ECJ, Judgment of 26.2.2013 – Case C-399/11 ("Melloni"), para. 16.

⁴⁰ ECJ, Judgment of 26.2.2013 – Case C-399/11 ("Melloni"), guiding principles and para. 26, 55; that question reiterates a question in *N.S. v. Secretary of State for the Home Department* in which the ECJ in fact did find that even a piece of legislation of exclusive harmonization is subject to unwritten human rights exceptions, ECJ, Judgment of 21.12.2011 – Case C-411/10, C-493/10 (*N.S. v. Secretary of State for the Home Department* and *M.E. v. Refugee Applications Commissioner Ministry for Justice Equality and Law Reform*), para. 86, 94 ("N.S. and M.E.").

⁴¹ ECJ, Judgment of 26.2.2013 – Case C-399/11 (*Melloni*), para. 57 ff.

The Court explained that EU Framework Decision 2002/584 sought to establish a new simplified and more effective system for the surrender of persons convicted or suspected of a crime with a view to "contributing to the objective set for the EU to become an area of freedom, security and justice by basing itself on the high degree of confidence which should exist between the Member States (Radu, paragraph 34)".⁴² If Art. 53 of the EU Charter of Fundamental Rights was interpreted as proposed by the Spanish Constitutional Court so as to allow the Member States to apply higher standards of protection of fundamental rights as guaranteed in the Member State's Constitution, the Member States would be enabled to ignore EU legal rules even though these rules are in full compliance with the EU Charter.⁴³ Since the EU Framework Decision on the European Arrest Warrant reflected the consensus of the Member States on the scope of procedural rights that a person convicted in absentia should enjoy in the area of freedom, security and justice, no Member State should try to unilaterally raise that level of protection as this meant to cast doubt on the uniformity of the standard of protection under the Framework Decision. The State would thus undermine the principles of mutual trust and recognition in the EU area of freedom, security and justice and thus compromise the efficacy of the framework decision.⁴⁴

The ECJ's firm conviction that where the effectiveness of EU law and EU integration policies is at stake, fundamental rights and freedoms must only be granted within the limits of the minimum standards defined by the European Convention on Human Rights and the EU Charter on Fundamental Rights has provoked strong criticism.⁴⁵ For once, the ECJ's interpretation of Art. 53 of the Charter of Fundamental Rights is in effect a way to "side-step" the guarantees offered under Art. 53. The text of Art. 53 unequivocally says that a state may afford a higher level of protection. But by subjecting the promise of a higher level of protection under a Member State's national constitutional law to the principle of primacy, unity and effectiveness of EU law, the Court has de facto almost abolished the possibility of higher levels of protection under Art. 53 of the Charter.⁴⁶ The ECJ in *Melloni* also ignored para. 12 of the Preamble of EU Framework Decision 2002/584 which says that the Framework Decision on the European Arrest Warrant "respects fundamental rights and observes the principles recognized by Article 6 of the Treaty on European Union and reflected in the Charter of Fundamental Rights of the European Union" and that "[T]his

⁴² ECJ, Judgment of 26.2.2013 – Case C-399/11 ("Melloni"), para. 36.

⁴³ ECJ, Judgment of 26.2.2013 – Case C-399/11 ("Melloni"), para. 58.

⁴⁴ ECJ, Judgment of 26.2.2013 – Case C-399/11 ("Melloni"), para. 63.

⁴⁵ *Franzius*, EuGRZ 2015, 139 (142 f.); *Franzius*, ZaöRV 2015, 383 (397 ff.); *Besselink*, European Law Review 39 (2014), 531 (533 f.); *Hwang*, EuR 2014, 400 (413 f.); *Gaede*, NJW 2013, 1279 (1281 f.); *Lenaerts*, EuR 2015, 3 (23 ff.).

⁴⁶ *Besselink*, Verfassungsblog of 18.8.2014, and *Besselink*, European Law Review 39 (2014), 531 (533).

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.”⁴⁷ That means that not only Art. 53 of the EU Charter of Fundamental Rights but also the EU Framework Decision itself provides for a “principle of advantage” (Günstigkeitsprinzip) to the accused, meaning that the highest available human rights standards should apply. The ECJ simply ignored that.

Given the wide applicability of the EU Charter of Fundamental Rights after the ECJ’s decision on the scope of Art. 51 of the Charter in Åkerberg Fransson⁴⁸ and the ECJ’s monopoly on the interpretation of human rights standards that goes with the applicability of the Charter⁴⁹, the ECJ’s rulings might have turned Art. 53 into a Trojan Horse which does not in fact provide the accused with the most effective procedural safeguards but on the contrary takes away from him all safeguards that surpass the EU-minimum level of rights and freedoms. This position however is inconsistent with Art. 4(2) of the Treaty on European Union which provides that the EU shall respect the national identities of the Member States,

⁴⁷ I want to thank *Lukasz Stepkowski* from the University of Wrocław for pointing both aspects out to me.

⁴⁸ ECJ, Judgment of 26.2.2013 – Case C-617/10 (Criminal proceedings against Hans Åkerberg Fransson), OJ EU 2013 No. C 617/10, para. 27, 30 (“Åkerberg Fransson”); the German Federal Constitutional Court reacted critically to the ECJ judgement in Åkerberg Fransson; see BVerfGE 133, 277 (316), and *Masing*, JZ 2015, 477 (481 f., 483).

⁴⁹ ECJ, Judgment of 26.2.2013 – Case C-617/10 (Åkerberg Fransson), para. 30 f.; in parts confirmed in ECJ, Judgment of 30.4.2014 – Case C-390/12 (Preliminary Ruling in the Proceedings brought by Robert Pflieger et al.), para. 33 ff.; more restrictive however ECJ, Judgment of 6.3.2014 – Case C-206/13 (Preliminary Ruling in the Proceedings Proceedings of Cruciano Siragusa v. Regione Sicilia), para. 25 f.; ECJ, Judgment of 10.7.2014 – Case C-198/13 (Preliminary Ruling in the Proceedings brought by Victor Hernández et al.), para. 34 ff., stating that “the mere fact that a national measure comes within an area in which the European Union has powers cannot bring it within the scope of EU law, and, therefore, cannot render the Charter applicable” and that in order to determine whether a national measure involves the implementation of EU law for the purposes of Art. 51 (1) of the Charter, it is necessary to determine, inter alia, whether that national legislation is intended to implement a provision of EU law; the nature of the legislation at issue and whether it pursues objectives other than those covered by EU law, even if it is capable of indirectly affecting EU law; and also whether there are specific rules of EU law on the matter or rules which are capable of affecting it.” For the dispute on how to “organize” the relationship between the spheres of national constitutions and Charter rights in accordance with Art. 51 EU Charter see *Franzius*, ZaöRV 2015, 383 (385 ff.); also *Cremer*, NVwZ 2003, 1452.

inherent in their fundamental structures, political and constitutional”.⁵⁰

There is however one ray of hope: In *Melloni* and in Åkerberg Fransson the Court also said that “in a situation where action of the Member States is not entirely determined by European Union law” a national court may in interpreting a national provision which implements EU law apply “national standards of protection of fundamental rights, provided that the level of protection provided for by the Charter, as interpreted by the Court, and the primacy, unity and effectiveness of European Union law are not thereby compromised”.⁵¹ This means that where a Member State has discretion on how to implement EU directives it may at least apply its own higher constitutional standards to its discretionary acts.⁵² But can that be all that is left of the principle of ad-

⁵⁰ *Franzius*, EuGRZ 2015, 139 (142); for an opposing opinion see *Lenaerts*, EuR 2015, 3 (10 ff., 27).

⁵¹ ECJ, Judgment of 26.2.2013 – Case C-617/10 (Åkerberg Fransson), para. 29; ECJ, Judgment of 26.2.2013 – Case C-399/11 (*Melloni*), para. 60.

⁵² *Besselink*, Verfassungsblog of 18.8.2014; *Franzius*, EuGRZ 2015, 139 (142); *Franzius*, ZaöRV 2015, 383 (399); *Masing*, JZ 2015, 477 (486); this principle has already been applied in ECJ, Judgment of 30.5.2013 – Case C-168/13 (*Jeremy F. v. Premier Ministre*). The accused Jeremy Forrest consented to his surrender from France to the United Kingdom but did not renounce the specialty rule, under which a person who has been subject of an arrest warrant may not be prosecuted for an offence committed prior to his surrender other than that for which he or she was surrendered. The judicial authorities however subsequently asked the competent investigation chamber of the Cour d’appel de Bordeaux to consent to the prosecution of another offence committed in the U.K. prior to the accused’s surrender. The investigative chamber decided to grant its consent and the accused brought an appeal before la Cour de Cassation. The French Code of Criminal Procedure however did not provide for any appeal against the decision of the investigative chamber, a fact that in the eyes of the Court of Cassation was inconsistent with the guarantees of the French Constitution. The Court therefore referred a priority question of constitutionality to the Conseil Constitutionnel. The Conseil Constitutionnel on its part then wanted to know from the European Court of Justice whether the European law required the possibility of such an appeal or whether it prohibited such an appeal. The ECJ ruled that the Framework Decision 2002/584 did not provide for rules on this matter. That meant that Member States could provide regulations for such an appeal (subject to the condition that the requested surrender must be put into effect within a reasonable time – notwithstanding the possibility to appeal), but that the Framework Decision at the same time did not require them to introduce such an appeal. Le Conseil Constitutionnel subsequently ruled that the French law must provide for an appeal against the decision to consent to foreign prosecution for an offence for which the accused had originally not been surrendered; *Franzius*, EuGRZ 2015, 139 (142 [fn. 38]).

vantage under Art. 53 of the Charter after Melloni and Åkerberg Fransson? Was it really the intention of the drafters of the EU Charter to allow for higher levels of protection under national constitutional law only where a Member State still has room for autonomous action?⁵³ If this is the case then there is also another consequence to consider: Since it is the European Court of Justice that defines the scope for autonomous action that is left to the Member States, it is also be the ECJ who becomes the final arbiter of the scope of applicability of the national constitutions.⁵⁴ Not only do the higher national levels of protection have to give way to mere EU minimum standards of fundamental rights if the European Court of Justice decides that a higher level of protection jeopardizes the objectives of EU law, it is also up to the European Court of Justice to determine in which cases the national human rights standards have to be examined for a potential collision with the primacy of EU law.

3. “*Ne bis in idem*” pursuant to Art. 50 of the EU Charter of Fundamental Rights in the Case of “*Spašić*”

The conflict between primacy of EU law and the principle of advantage (*Günstigkeitsprinzip/le principe de faveur*) as foreseen in Art. 53 of the Charter of Fundamental Rights is not the only aspect that troubles criminal lawyers. The risk that national constitutional guarantees have to give way to common EU minimum standards of fundamental rights might be manageable if the Member States pay attention to this risk while negotiating EU acts within the area of freedom, security and justice. They might decide to bypass that risk by leaving room for state discretion in implementing EU law. The wider the scope of state discretion the better the chances that a higher national level of human rights protection can apply under Art. 53 EU Charter of Fundamental Rights.⁵⁵

Still criminal lawyers are alarmed to see that the principle of primacy of EU law, that has once been known to improve the legal protection of citizens,⁵⁶ now also works into the opposite direction. It takes away national constitutional rights and lowers the level of protection against infringements of rights of an accused by a Member States.⁵⁷

To make matters worse, the European Court of Justice seems inclined to promote the idea of “security” or “law enforcement” in the area of freedom, security and justice to

the disadvantage of the dimension of individual freedoms and judicial rights.⁵⁸ This preference for interests of law enforcement became evident in the case of “*Zoran Spašić*”.⁵⁹ Zoran Spašić was a Serbian national who had been convicted by an Italian court in absentia for fraudulent offences committed on 20 March 2009 in Milano to the detriment of a German national. The Italian court imposed a prison sentence and a fine of 800,- €. The verdict became final on 7 July 2012. In the meantime, the accused had absconded to Austria and Italy had failed to submit a request for his surrender. Meanwhile the Public Prosecutor’s Office in Regensburg had issued a European Arrest Warrant requesting the surrender of Zoran Spašić from Austria to Germany for criminal proceedings for the same fraudulent offences of 20 March 2009 which had been the subject matter of the Italian verdict. When the Italian verdict became final in July 2012, the public prosecutor at the Tribunale ordinario di Milano revoked the previously granted suspension of the sentence and ordered imprisonment and the payment of the fine of 800,- €. Meanwhile the Austrian authorities proceeded to surrender Mr. Spašić to Germany on 6 December 2013. There Mr. Spašić challenged the decision ordering his continued detention, claiming that he had already been finally convicted and sentenced by the Tribunale ordinario di Milano and that he enjoyed protection under the European principle of *ne bis in idem*. On 24 January 2014, he also paid the fine of 800,- € in order to demonstrate that parts of his punishment under the Italian verdict were served.

Art. 50 of the Charter of Fundamental Rights stipulates that:

“No one shall be liable to be tried or punished again in criminal proceedings for an offence for which he or she has already been finally acquitted or convicted within the Union in accordance with the law.”

Art. 54 of the Convention Implementing the Schengen Agreement,⁶⁰ the much older rule on the principle of *ne bis in idem* in Europe, is slightly more restrictive. It says:

“A person whose trial has been finally disposed of in one Contracting Party may not be prosecuted in another Contracting Party for the same acts provided that, if a penalty has been imposed, it has been enforced, is actually in the process of being enforced or can no longer be enforced under the laws of the sentencing Contracting Party.”

⁵³ The answer to that is most probably: no! The Spanish Constitutional Court in Melloni therefore reacted to the ECJ’s decision by reminding the ECJ that according to Art. 4 (2) TEU EU law and its interpretation by the ECJ must respect the national identity of the Member States’ legal orders. For Spain the idea of a national legal identity also includes the principle of supremacy of the Spanish Constitution; *Franzius*, *ZaöRV* 2015, 383 (400 f.).

⁵⁴ *Besselink*, *Verfassungsblog* of 18.8.2014.

⁵⁵ *Franzius*, *EuGRZ* 2015, 139 (142); *Thym*, *JZ* 2015, 53 (55).

⁵⁶ Starting with ECJ, Judgment of 14.7.1967 – Case C 6/64 (*Costa v. ENEL*).

⁵⁷ *Gaede*, *NJW* 2013, 1279 (1281); *Besselink*, *Verfassungsblog* of 18.8.2014.

⁵⁸ *Meyer*, *HRRS* 2014, 270 (272 ff.); *Gaede*, *NJW* 2014, 2990.

⁵⁹ ECJ, Judgment of 27.5.2014 – Case C-129/14 PPU (*Criminal Proceedings against Zoran Spašić*), *OJ EU* 2014 No. C 129/14 (“*Spašić*”).

⁶⁰ The Schengen acquis, Convention implementing the Schengen Agreement of 14.6.1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders, as referred to in Art. 1 (2) of Council Decision 1999/435/EC of 20 May 1999; *OJ EU* 2000 No. L 239, p. 0019 ff.

Zoran Spašić claimed that he had been finally sentenced within a Member State and that his continued detention therefore violated his right to protection under Art. 50 of the Charter. The German authorities however replied that the enforcement condition of the older *ne bis in idem* protection under Art. 54 of the Convention Implementing the Schengen Agreement also applies to the protection under Art. 50 of the Charter.⁶¹ This means that the protection of *ne bis in idem* under Art. 50 of the EU Charter is confined to cases in which the foreign penalty has already been enforced, is in the process of being enforced or can no longer be enforced. Since Zoran Spašić had never served his prison sentence in Italy he did not merit protection under Art. 50 of the Charter. With regard to this, the accused responded that, although he had never served the prison sentence, his penalty had already partly been enforced since he had already paid the Italian fine of 800,- €.

The question which the Higher Regional Court Nuremberg (OLG Nürnberg) now forwarded to the ECJ concerned the relation between Art. 50 of the Charter and the older rule in Art. 54 of the Convention Implementing the Schengen Agreement (“CISA”). The German court wanted to know in particular whether Art. 54 CISA is compatible with Art. 50 of the Charter in so far as it restricts the application of the *ne bis in idem* principle to the condition that, if a penalty has been imposed, the penalty has been enforced, is in the process of

being enforced or can no longer be enforced under the laws of the sentencing State.⁶²

The argument for restricting Art. 50 of the Charter of Fundamental Rights by an enforcement condition emphasizes the potential for abuse of the *ne bis in idem* protection by fugitives who, after having been convicted in one Member State from which they subsequently fled, might go unpunished if no other State is entitled to hold them to account. The enforcement condition under Art. 54 CISA is seen as a necessary and proportionate precaution that ensures that the European area of freedom, security and justice does not become a “safe haven” for persons fleeing their sentence. The enforcement condition – thus the argument goes – should therefore also be applied to Art. 50 of the Charter, notwithstanding the fact that the drafters of the Charter had deliberately decided to forego an enforcement condition⁶³ in the belief that in the near future a multitude of European instruments of mutual judicial assistance in criminal matters – instruments like the European arrest warrant – would ensure that forum-fleeing was no longer a useful option to an accused.

The German jurisprudence has even offered a theoretical concept of how to construct Art. 54 of the Convention Implementing the Schengen Agreement as a “legal limitation” to the *ne bis in idem* clause under Art. 50 of the Charter. That concept is based on an extensive reading of Art. 52 (1) of the Charter. Art. 52 (1) deals with the possibility to restrict the fundamental guarantees of the Charter by law. The article provides that “[a]ny limitation on the exercise of the rights and freedoms recognized by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognized by the Union or the need to protect the rights and freedoms of others.” The German Federal High Court believes that the protection of *ne bis in idem* under Art. 50 of the Charter may be restricted by EU secondary legislation and deems it appropriate to construe Art. 54 CISA or – more exactly – the enforcement condition of *ne bis in idem* under Art. 54 CISA as such a limitation to the guarantee of *ne bis in idem* under Art. 50 of the Charter.⁶⁴ The prohibition of double jeopardy under Art. 50 of the Charter is thus only granted within the limits and under the conditions laid down in Art. 54 CISA.

Doubts remain whether this interpretation truly replicates the intent of the drafters of the Charter of Fundamental Rights. If the drafters of the Charter had wanted to maintain an enforcement condition, why did they not mention it in

⁶¹ The notion that Art. 54 CISA and its restrictive conditions for *ne bis in idem* also apply to the much broader text of Art. 50 of the Charter of Fundamental Rights, although the Charter does not explicitly require that the penalty has been enforced to grant the protection *ne bis in idem*, is firmly established in the jurisprudence of the German Federal High Court (“BGH”). The BGH however came to this conclusion without referring an interpretation request to the ECJ. Its ruling is quite controversial and it remained controversial in Germany even after the ECJ’s ruling in “Spašić”; for the German jurisprudence see BGHSt 56, 11; BVerfG NJW 2012, 1202 (1204); LG Aachen StV 2010, 237; OLG Hamburg BeckRS 2014, 22309 (para. 13); consenting Hecker, JuS 2012, 261; *id.*, *Europäisches Strafrecht*, 4th ed. 2012, § 13 Rn. 38 f.; Satzger, *Internationales und Europäisches Strafrecht*, 6th ed. 2013, § 10 Rn. 70; Eckstein, ZStW 124 (2012), 490 (514 ff.); Hackner, NStZ 2011, 425 (429); Ambos, *Internationales Strafrecht*, 4th ed. 2014, § 10 Rn. 132; Safferling, *Internationales Strafrecht*, 2011, § 12 Rn. 84 f.; for the discussion prior to the judgment see Burchard/Brodowski, *StraFo* 2010, 179 (184 ff.); dissenting Böse, GA 2011, 504 (505 ff.); Merkel/Scheinfeld, ZIS 2012, 206 (208 ff.); Walther, ZJS 2013, 16 (19 f.); Schomburg/Suominen-Picht, NJW 2012, 1190 (1191), see also Anagnostopoulos, in: Neumann/Herzog (Hrsg.), *Festschrift für Winfried Hassemer*, 2010, p. 1121 (1137); Nestler, HRRS 2013, 337; Eser, in: Meyer (Hrsg.), *Charta der Grundrechte der Europäischen Union*, 4th ed. 2014, Art. 50 Rn. 14.

⁶² ECJ, Judgment of 27.5.2014 – Case C-129/14 PPU (Spašić), para. 41.

⁶³ Schomburg/Suominen-Picht, NJW 2012, 1190 (1191); Böse, GA 2011, 504 (505 f.); Eser (fn. 61), Art. 50 Rn. 14.

⁶⁴ BGHSt. 56, 11 (14 ff.); the German Federal Constitutional Court supported that interpretation as “reasonable”; BVerfG NJW 2012, 1202 (1204); consenting Burchard/Brodowski, *StraFo* 2010, 179 (184 ff.); Satzger (fn. 61), § 10 Rn. 70; for a critical review of that argument see Meyer, HRRS 2014, 270 (272 [fn. 20]).

Art. 50 of the Charter?⁶⁵ It is more reasonable to believe that Art. 50 of the Charter of Fundamental Rights replicates the broad *ne bis in idem* protection under Art. 14(7) of the International Covenant on Civil and Political Rights which does not require any enforcement of the first conviction.⁶⁶ Furthermore, Art. 54 CISA and Art. 50 of the Charter have different scopes of application. According to Art. 51 of the Charter of Fundamental Rights, the Charter applies whenever a Member State implements Union law. This may include criminal proceedings without any identifiable cross-border element as for example in Åkerberg Fransson⁶⁷. The Convention Implementing the Schengen Agreement, on the other hand, only applies to criminal proceedings with a transborder element. The accused must have been convicted and sentenced in another Member State.⁶⁸ Another surprise is that the enforcement condition of Art. 54 CISA is understood as a “limitation” to the *ne bis in idem* protection under Art. 54 CISA. A thorough analysis of Art. 54 CISA shows that the enforcement condition is not a restrictive element but a precondition for the *ne bis in idem* protection.⁶⁹ May a precondition be turned into a “limitation” merely by reinterpretation of the law?⁷⁰ And finally, why should a right which is such an important constituent of the European area of freedom, security and justice and essential for the freedom of movement between Member States (Art. 21 TFEU) suffer limitations merely because it is – like any other procedural right of the accused – susceptible of misuse?⁷⁰ Even if suspects should make use of the *ne bis in idem* protection under Art. 50 to go “forum shopping” in the Member States why should that be a problem? The phenomenon of “forum shopping” by states and suspects is a direct and anticipated consequence of the common area of freedom, security and justice. It would be paradox to argue that the precise objective of a common area of freedom, security and justice once achieved turns into a security threat.⁷¹

Many expected that the ECJ would use the case of “Zoran Spašić” to reject the arguments of the German Federal High Court and rule that not even the risk of forum fleeing made it necessary to subject the *ne bis in idem* protection under Art. 50 of the Charter to an enforcement condition; all the more

since Zoran Spašić had in fact not fled from Italy but had already been held in custody in Austria when the Italian judgement became final.⁷² Spašić had not gone forum shopping. Besides, the German request for the surrender of Zoran Spašić from Austria proved that the EU arrest warrant system worked considerably well.⁷³ Italy might just have asked for extradition or entreat Austria or Germany to take over the enforcement of the prison sentence. If all these alternatives are available, why should an accused have to bear the risk that the Member State of first conviction neglects to enforce its sentence? Why should the individual bear the risk of double jeopardy within the area of freedom, security and justice only because some states might be negligent in combating crime?⁷⁴

But the ECJ paid no attention to the aspect of individual rights. It only focused on the security aspect thereby turning the area of freedom, justice and security in fact into a European area of collective combat against impunity.⁷⁵ The original idea to enable the free movement of European citizens throughout a common area of freedom and justice is dutifully mentioned in the judgement,⁷⁶ but it is not given any weight in the Court’s reasoning. The Court in fact downplays the aspect of individual rights and freedoms in order to ignore them. When the Court subsequently assesses the necessity and appropriateness of an enforcement condition for “*ne bis in idem*” under Art. 50 of the Charter, there is just one objective mentioned to guide the assessment of proportionality: the objective of ensuring impunity within an area of “security”.⁷⁷ Or, to highlight the methodology of the court with more precision, the Court solves the innate conflict between individual rights and state security interests within the area of freedom, security and justice by ignoring the perspective that includes individual rights and freedoms. The Court thus succeeds to manipulate the subsequent assessment of necessity in such a way that the test leaves no other choice but to apply the enforcement condition of Art. 54 CISA to Art. 50 of the Charter of Fundamental Rights.⁷⁸ – For if there is only one objective left to pursue, i.e. the objective to avoid impunity at all costs, then the test of necessity will indeed favour those measures which appear most effective in preventing forum shopping and other risks of impunity. And the most effective prevention is to deny protection under the *ne bis in idem* clause to those who have been finally sentenced in one Member State but did not yet have to suffer the sentence yet. Other

⁶⁵ *Eser* (fn. 61), Art. 50 Rn. 14.

⁶⁶ *Eser* (fn. 61), Art. 50 Rn. 14; Art. 50 of the Charter must therefore primarily be understood in its protective function for the individual who is at risk of double jeopardy; *Gaede*, NJW 2014, 2990.

⁶⁷ ECJ, Judgment of 26.2.2013 — Case C-617/10 (Åkerberg Fransson), para. 27, 30; the German Federal Constitutional Court criticized the Judgment right away; see BVerfGE 133, 277 (316), and *Masing*, JZ 2015, 477 (481 f., 483).

⁶⁸ *Merkel/Scheinfeld*, ZIS 2012, 206 (209), noting that it is unreasonable to limit the *ne bis in idem* protection within the framework of one national legal order by an enforcement condition; likewise *Nestler*, HRRS 2013, 337 (339).

⁶⁹ *Merkel/Scheinfeld*, ZIS 2012, 206 (209); *Nestler*, HRRS 2013, 337 (339); *Meyer*, HRRS 2014, 270 (272).

⁷⁰ *Merkel/Scheinfeld*, ZIS 2012, 206 (210).

⁷¹ *Merkel/Scheinfeld*, ZIS 2012, 206 (210 f.).

⁷² *Weißer*, ZJS 2014, 589 (593); *Meyer*, HRRS 2014, 270 (278).

⁷³ *Meyer*, HRRS 2014, 270 (276); *Gaede*, NJW 2014, 2990 f.

⁷⁴ *Weißer*, ZJS 2014, 589 (593); *Meyer*, HRRS 2014, 270 (277 f.).

⁷⁵ ECJ, Judgment of 27.5.2014 – Case C-129/14 PPU (Spašić), para. 62 ff.; for criticism see *Meyer*, HRRS 2014, 270 (273); *Gaede*, Journal? Year?, Starting Page?, (2991).

⁷⁶ ECJ, Judgment of 27.5.2014 – Case C-129/14 PPU (Spašić), para. 61

⁷⁷ ECJ, Judgment of 27.5.2014 – Case C-129/14 PPU (Spašić), para. 65.

⁷⁸ *Meyer*, HRRS 2014, 270 (272 f.).

measures, in particular measures that use EU instruments of mutual legal assistance like the European Arrest Warrant, are not as efficient for the objective of avoiding impunity.⁷⁹

The Court underscores this lack of efficiency with the argument that the Member State which has originally imposed the penalty does not have any obligation to make use of the instruments of mutual assistance.⁸⁰ But how can such an argument of distrust play a role in the area of freedom, justice and security under Art. 67 TFEU which indeed implores Member States to trust each other and to cooperate? It is probable that the decision of the European Court of Justice in *Spašić* was driven by fears that if the Court enforces the *ne bis in idem* protection, although the convicting state's negligence in enforcing the sentence was obvious, it would encounter strong state resistance and endanger future state compliance with the EU legislation in the area of freedom security of justice. But if so, then this fear-driven reasoning has led to a paradoxical argument: The European Court of Justice in *Spašić* consolidates the achievements of the area of freedom, security and justice by denying the very idea on which this area is built. Member States are called upon to trust each other. But in *Spašić* the individual has to suffer restrictions of fundamental rights because the ECJ finds it more appropriate to allow Member States to distrust each other and to doubt each other's willingness to enforce charges and sentences for a crime.⁸¹

4. Opinion 2/13⁸² and the ECJ's emphasis on the specific character of EU law in the Area of Freedom, Security and Justice

This paradoxical reasoning which most probably derives from fears that the Member States might start to object to the achievements in the common area of freedom, security and justice if the ECJ enforces the regulations on individual freedoms too strongly against state interests, has now found another expression in the Opinion 2/13 of 18 December 2014. In this opinion the ECJ seeks to entrench or cement existing structures and "achievements" in the area of freedom, security and justice and to shield these structures from potential human rights enquiries by the European Court of Human Rights. The dominant refrain of the Court's Opinion is the need to safeguard the autonomy of the EU legal order with its specific characteristics and its *sui generis* nature.⁸³ The European Court of Justice requests privileges within the system of the European Convention of Human Rights. It in particular

requires the European Court of Human Rights to step back or act restrained when adjudging matters which might affect European integration.⁸⁴ In its effort to ensure that accession to the European Human Rights System does not call into question the structures of European integration or even challenge the ECJ's monopoly on interpreting and guiding the course of European integration, the ECJ however forgets to address the most important aspect: the idea of strengthening the protection of human rights within the European Union by accession to the system of the European Convention of Human Rights.⁸⁵ The need to effectively guarantee human rights is mentioned not even once; neither is the idea that the human rights content of the European Convention of Human Rights and the EU Charter of Fundamental Rights are in principle anyhow the same.⁸⁶ The ECJ is too preoccupied to establish that the European Convention on Human Rights must – where it comes into contact with the EU legal order – be accepted as an integral part of that legal order, that it does not come into the Court's mind to include a human rights perspective.

To "cement" existing structures of the area of freedom, security and justice, the ECJ starts with putting specific emphasis on the Court's monopoly on interpreting EU law. The Court reminds the Member State that in "*Melloni*" it has stipulated a specific framework for the application of diverse Human Rights Standards within the area of freedom, security and justice. Although Art. 53 of the Charter of Fundamental Rights principally allows that the Member States retain higher standards of protection of fundamental rights than those guaranteed by the Charter, the Court has made it clear that the level of protection must not undermine the primacy, unity and effectiveness of EU law.⁸⁷ In Opinion 2/13 the Court now specifies that these limits on the proliferation of European human rights standards must also apply when the EU accedes to the European Convention of Human Rights.⁸⁸ The Court in particular refuses to accept human rights standards that exceed the guarantees approved in the various European instruments of mutual recognition. The ECJ also explains that it cannot accept an accession agreement which does not solve the "conflict" between Art. 53 of the European Convention of Human Rights and Art. 53 of the EU Charter of Fundamental Rights. Art. 53 of the ECHR, so the argument goes, stipulates that the Contracting Parties to the European Convention of Human Rights may lay down higher human rights standards than those guaranteed by the Convention. This permission, however, may come into conflict with the Court's interpreta-

⁷⁹ ECJ, Judgment of 27.5.2014 – Case C-129/14 PPU (*Spašić*), para. 68 ff.

⁸⁰ ECJ, Judgment of 27.5.2014 – Case C-129/14 PPU (*Spašić*), para. 69.

⁸¹ *Meyer*, HRRS 2014, 270 (276); *Gaede*, NJW 2014, 2990 (2992).

⁸² Opinion 2/13 (fn. 7).

⁸³ *Douglas-Scott*, Verfassungsblog of 24.12.2014; *Douglas-Scott*, Verfassungsblog of 13.3.2015; online:

<http://www.verfassungsblog.de/opinion-213-and-the-elephant-in-the-room-a-response-to-daniel-halberstam/#.VZ5D51Jozqc> (9.7.2015).

⁸⁴ For a profound criticism of this position see *Tomuschat*, EuGRZ 2015, 133 (134, 136).

⁸⁵ *Tomuschat*, EuGRZ 2015, 133 (135).

⁸⁶ *Tomuschat*, EuGRZ 2015, 133 (135); Art. 52 (3) of the EU Charter provides that "[i]n so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention."

⁸⁷ Opinion 2/13 (fn. 7), para. 188.

⁸⁸ Opinion 2/13 (fn. 7), para. 189.

tion of Art. 53 of the EU Charter of Fundamental Rights which establishes that higher human rights standards may only be applied subject to the condition that this does not violate the primacy, unity and effectiveness of EU law.⁸⁹

Critical reviews of Opinion 2/13 argue that there is no conflict between Art. 53 of the European Convention on Human Rights and Art. 53 of the Charter. The only conflict imaginable is the conflict between the law as stated in these Articles, which both allow for a level of protection in national laws, and the ECJ's refusal to implement this law within the framework of the EU Charter of Fundamental Rights.⁹⁰

On the principle of "mutual trust" between Member States the ECJ repeats that it is of "fundamental importance in EU law" because it lies at the heart of the creation of an area without internal borders.⁹¹ Critics however point out that the principle of mutual trust is still mainly based on fiction or a "judicial fiat", not on social reality.⁹² They also note that it would have been more in line with the drafters' intent for Art. 6(2) of the EU-Treaties to ensure that even in matters involving a fiction of mutual trust human rights aspects prevail.⁹³ That would include a safeguard that any application of EU mechanisms based on a fiction of mutual trust can be subjected to an external human rights control.⁹⁴

But it seems inconceivable for the ECJ to weaken the fiction of mutual trust through human rights arguments. The Court emphasizes that where EU Member States, under EU law, are required to presume that fundamental rights have been observed by the other Member States, no State may "check whether that other Member State has actually [...] observed the fundamental rights guaranteed by the EU."⁹⁵ And as no Member State may challenge the principle of mutual trust from a human rights perspective, the European Court of Human Rights should likewise not be allowed to force EU Member States to question human rights standards in another Member State. Such an obligation would "upset the underlying balance of the EU and undermine the autonomy of EU law."⁹⁶

That EU law is of a very specific nature and delicate balance is true, but it is disconcerting to see that political arguments – i.e. the argument that EU legal autonomy must be

maintained is in essence a political aim – oust human rights principles. The ECJ promotes EU supremacy irrespective of human rights concerns. It thereby ignores Art. 2 of the Treaty on European Union which states that "[t]he Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights" and Art. 67 (1) of the Treaty on the Functioning of the European Union which accepts that the area of freedom, security and justice can only be created "with respect for fundamental rights and the different legal systems and traditions of the Member States."⁹⁷ Individual human rights have no place in the Court's reasoning unless they accidentally coincide with the Court's political objectives; and – what is even more damaging – individuals may not even request an inquiry into human rights violations, although the Court itself has admitted in "Spašić" that the assumption of equal criminal justice standards throughout the European Union does not match social reality.⁹⁸ What the ECJ's Opinion 2/13 in fact does is to deny individuals legal protection by exactly that Court which in Europe has been entrusted to define and enforce minimum standards of human rights: The ECJ is willing to inhibit legal protection by the European Court of Human Rights wherever European political interests come into conflict with individual human rights.⁹⁹

It is yet unclear how the European Court of Human Rights will respond to the ECJ's implicit confession in Opinion 2/13 that the EU system of mutual recognition and its fictitious basis – the assumption of mutual trust founded on similar human rights standards – are not yet fit to be presented to the inquisitive eye of the European Court of Human Rights.¹⁰⁰ The European Court of Human Rights currently upholds a presumption that the protection of fundamental human rights in the EU can be considered as equivalent to the protection under the system of the European Convention of Human Rights.¹⁰¹ This presumption, which privileges the EU

⁸⁹ Opinion 2/13 (fn. 7), para. 189 f.

⁹⁰ *Michl*, *Verfassungsblog* of 23.12.2014, online: <http://www.verfassungsblog.de/thou-shalt-no-courts/#.VZ5EiVJJoqzc> (9.7.2015);

Douglas-Scott, *Verfassungsblog* of 13.3.2015; also *Halberstam*, *Verfassungsblog* of 12.3.2015.

⁹¹ Opinion 2/13 (fn. 7), para. 191.

⁹² *Douglas-Scott*, *Verfassungsblog* of 13.3.2015; *Duff*, *Verfassungsblog* of 13.3.2015, online:

<http://www.verfassungsblog.de/eu-accession-to-the-echr-what-to-do-next/#.VZ5E8lJJoqzc> (9.7.2015).

⁹³ *Duff*, *Verfassungsblog* of 13.3.2015.

⁹⁴ *Streinz*, *Verfassungsblog* of 15.3.2015, to be found under: <http://www.verfassungsblog.de/the-autonomy-paradox/#.VZ5FUVJJoqzc> (9.7.2015).

⁹⁵ Opinion 2/13 (fn. 7), para. 192.

⁹⁶ Opinion 2/13 (fn. 7), para. 194.

⁹⁷ *Douglas-Scott*, *Verfassungsblog* of 13.3.2015. The ECJ also disregards that the aim of an area of freedom, security and justice is not only security but has multiple facets; *Meyer*, *HRRS* 2014, 270 (273).

⁹⁸ Apart from *Spašić* there are also ECHR-judgments that show that the fiction of mutual trust does not reflect reality; see for example ECHR, Judgment of 21.1.2011 – App. No. 30696/09 (M.S.S./Belgium and Greece), para. 345 ff.

⁹⁹ *Tomuschat*, *EuGRZ* 2015, 133 (136 ff.).

¹⁰⁰ For a first reaction by the President of the ECHR see *Spielmann*, in: ECHR (ed.), *Annual Report 2014*, p. 6: "More than ever, therefore, the onus will be on the Strasbourg Court to do what it can in cases before it to protect citizens from the negative effects of this situation."

¹⁰¹ ECHR, Judgment of 30.6.2005 – App. No. 45036/98 (*Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi* [hereafter *Bosphorus Airways*] v. Ireland), para. 152 ff.; ECHR, Admissibility Decision of 20.1.2009 – App. No. 13645/05 (*Coöperatieve Producentenorganisatie van de Nederlandse Kokkelvisserij u. a. v. The Netherlands*); discussed by *Baumann*, *EuGRZ* 2011, 1; *Schorkopf*, *German Law Journal* 06 (2005), 1255; *Lavranos*, *EuR* 2007, 78.

and its Member States when implementing their legal obligations under EU law, may however be rebutted.¹⁰² Considering the ECJ's confession about the human rights shortcomings in the field of mutual recognition the European Court of Human Rights might have good reason to either recant that presumption or to apply it with much more constraint.¹⁰³

III. The missing perspective of individual defence rights as a poor omen for the future of the Area of Freedom, Security and Justice

The case review has established that the ECJ, although entrusted with the protection of the rights and guarantees under the European Charter of Fundamental Rights in December 2009, has not managed to perform the necessary transition from a Court with a mainly political incentive to a Court which puts human rights perspectives first. The ECJ does not attach due value to a human rights perspective. It persists to advance European integration policy even *contra legem*, in particular in contradiction to Art. 53 of the EU Charter of Fundamental Rights. According to Art. 6 (1) of the Treaty of the European Union, Art. 53 of the Charter carries the force of EU primary legislation and should therefore have enough weight to withstand an interpretation that grants individual human rights only within the conditions and limits of the residual European law. Or to put it another way, Art. 53 of the Charter should carry enough weight to at least make the ECJ reconsider its concept of absolute supremacy of common market and security interests. The Court should furthermore reconsider its decision in *Spašić* to reduce the multi-layered objectives of the area of freedom, security and justice to a mere common goal of fighting impunity.

The fundamental misunderstanding to which the capital headline refers then is nothing other than ECJ misunderstanding the role that it has to play within an area of freedom, security and justice and as guardian of the Charter of Fundamental Rights. The idea of the Charter and of acceding to the European Convention on Human Rights was to give the ECJ a legal foundation that would enable it to develop a human rights jurisprudence for Europe. The Court was entrusted with developing a quasi-constitutional frame for the European legal order.¹⁰⁴ But the ECJ refuses to play this role. It

¹⁰² ECHR, Judgement of 30.6.2005 – App. No. 45036/98 (*Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi* [hereafter *Bosphorus Airways*] v. Ireland), para. 156.

¹⁰³ *Spielman* (fn. 100), p. 6; *Lock*, Verfassungsblog of 30.1.2015; online:

<http://www.verfassungsblog.de/will-empire-strike-back-strasbourgs-reaction-cjeus-accession-opinion/#.VZ5YF1Jqz> (9.7.2015).

¹⁰⁴ Opinion of Advocate General Juliane Kokott delivered on 13.6.2014, Opinion Procedure 2/13, initiated following a request made by the European Commission, para. 164: "Recognition by the EU of the jurisdiction of the ECtHR should not be seen as mere submission, [...] but as an opportunity to reinforce the ongoing dialogue between the Court of Justice and the ECtHR, as two genuinely European jurisdictions, regarding issues of fundamental rights (see, to that

holds on to its traditional political self-conception as a court with a political incentive, as a driving force of European integration.

The difficulty now is to persuade the Court to perform the transition into a Human Rights Court or to at least add human rights positions to the objectives that guide the test of necessity and proportionality of measures within the area of freedom, security and justice. Schemes on how a human rights perspective may be integrated into the mechanisms of mutual recognition already exist. These schemes have for example been offered by the Working Group on a Manifesto on European Procedure Law¹⁰⁵ or by Advocate General Eleanor Sharpston in her opinion on "Radu".¹⁰⁶ All schemes have common denominators. They in particular emphasise that the principle of mutual recognition, although a cornerstone of the area of freedom, justice and security, must not be absolute.¹⁰⁷ Mutual recognition has to be limited. Limits may be drawn by general rules and principles of European Union law, but also by aspects of *ordre public*, state sovereignty, national identity or legal coherence.¹⁰⁸ The Manifesto on European

effect, also the second sentence of Declaration No 2). Ideally this cooperation will lead to a strengthening of fundamental rights protection in Europe and will thus also help to give effect to the fundamental values on which the EU is founded (Art. 2 TEU)." See also *Douglas-Scott*, Verfassungsblog of 24.12.2014.

¹⁰⁵ *European Criminal Policy Initiative*, ZIS 2013, 430 ("Manifesto").

¹⁰⁶ ECJ, Judgment of 29.1.2013 – Case 396/11, *Ministerul Public, Parchetul de pe lângă Curtea de Apel Constanța v. Ciprian Vasile Radu*, Opinion of Advocate General Sharpston delivered on 18.10.2012, para. 63 ff., in particular para. 97 reads: "[...] the answer to Question 4 should be that the competent judicial authority of the State executing a European arrest warrant can refuse the request for surrender without being in breach of the obligations authorized by the founding Treaties and the other provisions of Community law, where it is shown that the human rights of the person whose surrender is requested have been infringed, or will be infringed, as part of or following the surrender process. However, such a refusal will be competent only in exceptional circumstances. In cases involving Articles 5 and 6 of the Convention and/or Articles 6, 47 and 48 of the Charter, the infringement in question must be such as fundamentally to destroy the fairness of the process. The person alleging infringement must persuade the decision-maker that his objections are substantially well founded. Past infringements that are capable of remedy will not found such an objection." As to the position of the ECJ that the list of circumstances in which a State may refuse to execute an arrest warrant, are exhaustive, Sharpston said in para. 69: "[...] I do not believe that a narrow approach – which would exclude human rights considerations altogether – is supported either by the wording of the Framework Decision or by the [ECJ] case law."

¹⁰⁷ *European Criminal Policy Initiative*, ZIS 2013, 430.

¹⁰⁸ For a comprehensive analysis of the limits to mutual recognition see *Suominen*, *EuCLR* 4 (2014), 210.

Criminal Procedure Law in particular demands limits defined by the rights of the individual, be it either a suspect, a victim or a third persons affected by the proceedings. In addition, mutual recognition should be limited through the principle of proportionality.¹⁰⁹ Other schemes propose to install some kind of “Solange-Test” within European law, as used for example by the ECJ in *N.S. v. Secretary of State for the Home Department* and *M.E. v. Refugee Applications Commissioner Ministry for Justice Equality and Law Reform* in which the Court prohibited the transfer of asylum seekers back to the state of first entrance into the EU for human rights reasons as long as it is known that there are systemic flaws in the asylum procedure and reception conditions for asylum applicants in the receiver state.¹¹⁰

At any rate, the ECJ must be encouraged to reconsider its role as a driving force of European integration, notwithstanding the fact that Opinion 2/13 gives enough reason to fear that the ECJ is determined not to shift position. But if it does not change course, there might not be many more instruments of mutual recognition to come – or the instruments of mutual recognition to come will recognize inflated lists of exceptions to mutual recognition.¹¹¹ Either way, European integration in the area of freedom, security and justice will not profit from the Court’s denial to enforce individual human rights on a flexible basis, not least because a Europe obsessed with security interests and dominated by pressure to cooperate even in the face of massive human rights concerns is not what the Member States of the EU bargained for.

¹⁰⁹ *European Criminal Policy Initiative*, ZIS 2013, 430 (430 ff., 433 ff.).

¹¹⁰ *Franzius*, ZaöRV 2015, 383 (408 f.).

¹¹¹ Such general exceptions in reference to Art. 6 ECHR and the Charter can e.g. be found in Preamble No. 19 and Art. 11 (1) (f) of the Directive 2014/41/EU on the European Investigation Order of 3.4.2014, OJ EU 2014 No. L 130/1. But even in that Directive there is no general ordre public exception referring to national constitutional rights and principles.