Reports of Cases

OPINION OF ADVOCATE GENERAL
BOT
delivered on 3 March 2016[1]

Cases C-404/15 and C-659/15 PPU

Pál Aranyosi (C-404/15)
and
Robert Căldăraru (C-659/15 PPU)(Requests for a preliminary ruling

from the Hanseatisches Oberlandesgericht in Bremen (Higher Regional Court, Bremen, Germany))

(Reference for a preliminary ruling — Police and judicial cooperation in criminal matters — Framework Decision 2002/584/JHA — European arrest warrants issued for the purposes of prosecution or the execution of a custodial sentence or detention order — Surrender of persons requested to the issuing judicial authorities — Article 1(3) — Fundamental rights — Detention conditions in the issuing Member State — Risk of inhuman or degrading treatment — Need for a review of proportionality when European arrest warrants are issued)

I – **Introduction**

1. The execution of a European arrest warrant leads to the detention of the requested person. Does the possibility or probability of degrading detention conditions, resulting from a systemic deficiency of the prisons of the issuing Member State, permit the executing judicial authorities to refuse to surrender the person concerned?

2. It is stated in Article 1(3) of Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States,[2] that '[the decision] shall not have the effect of modifying the obligation to respect fundamental rights and fundamental legal principles as enshrined in Article 6 [EU]'.

3. The underlying question is whether the force of the principle of mutual recognition is limited if there is a breakdown in the confidence which the Member States should have in each other, owing to a potential infringement of the fundamental rights which they are presumed to respect.

4. Mutual recognition, of which the European arrest warrant is itself the implementation, is, according to the standard expression, the 'cornerstone'[3] of the area of freedom, security and justice which the European Union has set as its objective, as is recorded in the treaties.

1 — Original language: French.

2 — OJ 2002 L 190, p. 1. Framework Decision as amended by Council Framework Decision 2009/299/JHA of 26 February 2009 (OJ 2009 L 81, p. 24) ('the Framework Decision').

3 — According to the expression used in recital 6 of the Framework Decision.

5. It is therefore necessary for the Court, in this case, to weigh respect for the fundamental rights of the person surrendered against the absolute necessity to achieve that common area by, inter alia, protecting the rights and freedoms of others. The Court will therefore have to ask itself whether the principles which it has identified in other areas of EU law, such as those contained in the judgment in *N. S. and Others*, C-411/10 and C-493/10, EU:C:2011:865, concerning the Common European Asylum System, can be transposed to the specific mechanism of the European arrest warrant at the risk of blocking that mechanism, letting an offence go unpunished and generating extremely serious consequences for the executing judicial authorities.

6. In fact, I believe that the solution is to be found in the very balance of the system established by the European arrest warrant, from which the appropriate conclusions can be drawn. Although the warrant retains the force conferred on it by the principle of mutual recognition, it is in the implicit or express reference made by the Framework Decision to certain basic principles, and in particular to the principle of proportionality, a general principle of Union law, that the solution lies.

7. I shall explain why, where the issuing judicial authorities are faced with generalised prison overcrowding with the consequence that the physical conditions of detention are contrary to fundamental rights, those authorities are required to conduct a review of proportionality in order to adjust the need to issue a European arrest warrant in the light of both the nature of the offence and the specific procedures for enforcement of the penalty.

8. Since the European arrest warrant is an instrument created and regulated by Union law, inter alia as regards the conditions for its issue, judicial authorities wishing to issue such a warrant must make sure not only that it satisfies the conditions as to substance and form in the Framework Decision, but also that it is issued in accordance with the principle of proportionality. That review, in so far as it facilitates control over the conditions and, in particular, the consequences of the surrender of the requested person, is to be understood, more broadly, as forming part of the obligations imposed on the issuing Member State to ensure respect for the fundamental rights of the person requested under a European arrest warrant and, consequently, as security for the confidence which the executing judicial authorities must have, downstream of that review, in the issuing Member State.

9. Finally, I shall state that that review must not elide the responsibilities of the issuing Member State as regards respect for the fundamental rights of individuals held in custody, in accordance not only with Article 6 TEU, but also with the principle of the primacy of Union law and its duty of sincere cooperation, and the action which the Council of the European Union and the European Commission must necessarily undertake in order to increase the effectiveness of the system.

II – **Legal framework**

10. Before analysing the problems raised by the questions referred to the Court, it is necessary, first, to recall the fundamental principles on which my analysis will be based. They are found in the treaties.

A – *The Treaties*

11. As provided in Article 3(2) TEU and Article 67(1) TFEU, the Union's objective is to continue and develop as an area of freedom, security and justice in which the free movement of persons is ensured, in compliance with the fundamental rights of all, by the adoption of appropriate measures with respect to the prevention and combating of crime.

12. To that end, the first subparagraph of Article 6(1) TEU provides that 'the Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union' ('the Charter').

13. It is also apparent from Article 6(3) TEU that 'fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms [, signed in Rome on 4 November 1950, "the ECHR")] and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law'.

14. Under Title V of Part Three of the Treaty on the Functioning of the European Union, entitled 'Area of freedom, security and justice', Article 82 TFEU provides that 'judicial cooperation in criminal matters in the Union shall be based on the principle of mutual recognition'. That principle, as I have said, constitutes the 'cornerstone' of judicial cooperation in criminal matters between the Member States.

B – *The Framework Decision*

15. The European arrest warrant established by the Framework Decision was designed to replace the traditional extradition mechanism, which involves a decision of the executive authority, with an instrument of cooperation between the national judicial authorities based on the principles of mutual recognition of judgments and judicial decisions and mutual confidence between the Member States. [4]

16. The Framework Decision establishes a new simplified and more effective system for the surrender of persons convicted or suspected of having infringed criminal law [5] by strictly limiting the grounds for non-execution and setting time limits for the adoption of decisions relating to the European arrest warrant. [6]

17. By establishing a procedure designed to be more effective and efficient than the previous procedure, the mechanism of the European arrest warrant constitutes, first and foremost, an essential contribution to the prosecution and punishment of criminal conduct within the Union. Inasmuch as it ensures the prosecution, trial and conviction of the perpetrators of a criminal offence committed in one of the Member States, it is today a safeguard which is fundamental to the abolition of the internal borders within the Union and is also designed to increase protection for the victims of criminal offences by ensuring that their perpetrators are tried and convicted for the offences committed and that they are brought before the courts more quickly and effectively.

18. Recitals 10 to 13 of the Framework Decision are worded as follows:

'(10) The mechanism of the European arrest warrant is based on a high level of confidence between Member States. Its implementation may be suspended only in the event of a serious and persistent breach by one of the Member States of the principles set out in Article 6(1) [EU], determined by the Council pursuant to Article 7(1) [EU] with the consequences set out in Article 7(2) thereof. [7]

(11) In relations between Member States, the European arrest warrant should replace all the previous instruments concerning extradition, including the provisions of Title III of the Convention implementing the Schengen Agreement which concern extradition.

(12) This Framework Decision respects fundamental rights and observes the principles recognised by Article 6 [EU] and reflected in the [Charter], in particular Chapter VI thereof. …

4 — First subparagraph of Article 82(1) TFEU and recitals 5, 6, 10 and 11 of the Framework Decision.

5 — Judgments in *Radu*, C-396/11, EU:C:2013:39, paragraph 34, and *Melloni*, C-399/11, EU:C:2013:107, paragraph 37.

6 — Judgment in *F.*, C-168/13 PPU, EU:C:2013:358, paragraphs 57 and 58.

7 — Although recital 10 refers to Article 7(1) EU and Article 7(2) EU, it seems to me that the Union legislature intended to refer to Article 7(2) EU and Article 7(3) EU.

(13) 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.'

19. Article 1 of the Framework Decision, headed 'Definition of the European arrest warrant and obligation to execute it', provides:

'1. The European arrest warrant is a judicial decision issued by a Member State with a view to the arrest and surrender by another Member State of a requested person, for the purposes of conducting a criminal prosecution or executing a custodial sentence or detention order.

2. Member States shall execute any European arrest warrant on the basis of the principle of mutual recognition and in accordance with the provisions of this Framework Decision.

3. This Framework Decision shall not have the effect of modifying the obligation to respect fundamental rights and fundamental legal principles as enshrined in Article 6 [EU].'

20. Articles 3 to 4a of the Framework Decision are devoted to the grounds for mandatory non-execution and the grounds for optional non-execution of the European arrest warrant.

III – **The main proceedings and the questions referred for a preliminary ruling**

21. These references for a preliminary ruling are made in the context of the examination, by the Generalstaatsanwaltschaft Bremen (Public Prosecutor's Office, Bremen), of the permissibility of the surrender of Mr Aranyosi and Mr Căldăraru to the judicial authorities of their Member State of origin. [8]

22. In the case of Mr Aranyosi (C-404/15), the German judicial authorities are seised of a request for the surrender of the person concerned under two European arrest warrants, issued on 4 November and 31 December 2014 respectively, by the Miskolc járásbíróság (District Court, Miskolc, Hungary) for the purpose of conducting a criminal prosecution. Mr Aranyosi is a Hungarian national, currently living in Bremerhaven (Germany) with his mother, and he has a girlfriend and small child.

23. He is accused of having stolen, after breaking into a house in Sajohidveg (Hungary), EUR 2 500 and HUF 100 000 (Hungarian florints) (approximately EUR 313) in cash and various items of value and also of entering a school in Sajohidveg, damaging equipment and stealing technical devices and cash of an estimated total value of HUF 244 000 (approximately EUR 760).

24. In the case of Mr Căldăraru (C-659/15 PPU), the German judicial authorities are, this time, seised of a request for the surrender of the person concerned under a European arrest warrant issued on 29 October 2015 by the Judecatoria Fagaras (District Court, Fagaras, Romania), for the purpose of execution of a custodial sentence of one year and eight months imposed by a final judgment. Mr Căldăraru is a Romanian national.

25. Although there had been imposed on Mr Căldăraru, on 17 December 2013, a suspended prison sentence for the offence of driving without a licence, he reoffended on 5 August 2014 in order to go to his father's home.

8 — Under Article 29(1) of the Law on international mutual assistance in criminal matters (Gesetz über die internationale Rechtshilfe in Strafsachen) of 23 December 1982, as amended by the Law on the European Arrest Warrant (Europäisches Haftbefehlsgesetz) of 20 July 2006 (BGBl. 2006 I, p. 1721, 'IRG'), the Oberlandesgericht (Higher Regional Court, Germany) rules, at the request of the Public Prosecutor's Office, on the permissibility of extradition when the offender has not consented to extradition. The decision is given by an order, in accordance with Article 32 of the IRG.

26. Mr Căldăraru was arrested in Bremen (Germany) on 8 November 2015 and placed in detention pending extradition.

27. At their hearings, Mr Aranyosi and Mr Căldăraru both objected to being surrendered to the issuing judicial authorities, and accordingly declared that they did not consent to the simplified surrender procedure.

28. In each of these two cases, the Public Prosecutor's Office of Bremen asked the issuing judicial authorities to state the name of the establishment in which the persons concerned would be imprisoned in the event of surrender, this being in reference to detention conditions which do not satisfy minimum European standards. Neither of those authorities could commit itself on that point and the Public Prosecutor's Office of Bremen therefore wonders, in the light of Article 1(3) of the Framework Decision and the provisions laid down in Article 73 IRG,[9] whether such surrenders are permissible.

29. These references for a preliminary ruling are therefore set in a very specific context, characterised by the finding made not by the European Council in accordance with the sanction mechanism provided for in Article 7 TEU and expressly referred to in recital 10 of the Framework Decision, but by the European Court of Human Rights.

30. In its judgment in *Iavoc Stanciu* v *Romania*[10] and in its pilot-judgment[11] in *Varga and Others* v *Hungary*,[12] that Court found that there was a general malfunctioning of the Romanian and Hungarian penitentiary systems resulting, inter alia, in generalised prison overcrowding as a consequence of which imprisoned individuals are or risk being exposed to inhuman or degrading treatment during their detention, contrary to Articles 2, 3 and 5 ECHR.

31. Where it is established that, in Romania, 10 detainees may be confined in an area of 9 m^2, and therefore have a living space of less than 2 m^2, and where it is true that the European Court of Human Rights is seised, in that regard, of several hundred individual cases, we cannot but wonder as to the legality of the execution of a European arrest warrant, whether it is issued for the purposes of a prosecution or of execution of a custodial sentence, having regard to the protection of the fundamental rights of the person surrendered.

32. That finding was previously made by the European Court of Human Rights in three pilot-judgements concerning the Italian Republic, the Republic of Bulgaria and Hungary respectively.[13]

33. Nevertheless, its case-law reveals the existence of recurrent problems in the penitentiary systems of the 47 Member States of the Council of Europe, including Member States of the Union.

9 — Paragraph 73 IRG states that, 'Mutual legal assistance and transmission of data, if not requested, are unlawful if they would conflict with basic principles of the German legal system. If a request is made under Parts Eight, Nine and Ten, mutual legal assistance is unlawful if it would infringe the principles laid down in Article 6 [TEU].'

10 — No 35972/05, 24 July 2012. In that judgment, the European Court of Human Rights holds that, in spite of the efforts of the Romanian authorities to improve the situation, there is a structural problem in that area.

11 — The pilot-judgment procedure enables the European Court of Human Rights to find an infringement of the ECHR owing to systematic, recurrent and persistent problems concerning detention conditions which affect or are likely to affect a large number of persons.

12 — Nos 14097/12, 45135/12, 73712/12, 34001/13, 44055/13 and 64586/13. In that judgment, the European Court of Human Rights emphasises the general malfunctioning of the Hungarian penitential system, which has already led to multiple judgments against Hungary under Article 3 ECHR and given rise to the 450 applications currently pending against that State (see, in particular, paragraphs 99 and 100).

13 — See, respectively, ECtHR, *Torregiani and Others v Italy*, Nos 43517/09, 46882/09, 55400/09, 57875/09, 61535/09, 35315/10 and 37818/10, 8 January 2013, *Neshkov and Others v Bulgaria*, Nos 36925/10, 21487/12, 72893/12, 73196/12, 77718/12 and 9717/13, 27 January 2015, and *Varga and Others v Hungary*, cited above.

34. In cases involving the Republic of Lithuania, the Republic of Poland and the Republic of Slovenia,[14] the European Court of Human Rights has held that prison overcrowding had reached such a level that that factor alone was sufficient basis for pleading an infringement of Article 3 ECHR. Moreover, although it has not given rise to delivery of a pilot-judgment, that Court has found that problems stemming from prison overcrowding in Belgium were systemic, going beyond the specific situation of the applicant in the case.[15]

35. In 2011 the European Parliament and the Commission expressed their concern regarding the way in which detention conditions in the Member States may affect mutual confidence and the proper functioning of the instruments of mutual recognition in the area of freedom, security and justice.[16]

36. Five years after that declaration, the Court is now seised of the matter by these requests for a preliminary ruling.

37. Considering it necessary to ask the Court for an interpretation of Article 1(3) of the Framework Decision, the Hanseatisches Oberlandesgericht in Bremen (Higher Regional Court, Bremen) decided to stay the proceedings and refer the following questions for a preliminary ruling:

'1. Is Article 1(3) of the Framework Decision to be interpreted as meaning that surrender for the purposes of criminal prosecution [(Case C-404/15) or surrender for the purposes of the execution of criminal penalties (Case C-659/15 PPU)] is impermissible where there are strong indications that detention conditions in the issuing Member State infringe the fundamental rights of the person concerned and the fundamental legal principles as enshrined in Article 6 TEU or is it to be interpreted as meaning that, in such circumstances, the executing Member State can or must make the decision on the permissibility of surrender conditional upon an assurance that detention conditions are compliant? To that end, can or must the executing Member State lay down specific minimum requirements applicable to the detention conditions in respect of which an assurance is sought?

2. Are Articles 5 and 6(1) of the Framework Decision to be interpreted as meaning that the issuing judicial authority is also entitled to give assurances that detention conditions are compliant, or do assurances in this regard remain subject to the domestic rules of competence in the issuing Member State?'

38. Although the questions raised in connection with Case C-404/15 concern the execution of a European arrest warrant issued for the purposes of criminal prosecution and those raised in connection with Case C-659/15 PPU concern, in contrast, the execution of a European arrest warrant issued for the purposes of execution of a custodial sentence, these questions lend themselves to joint examination because the issues are identical. Furthermore, I shall examine together the two questions raised since they are complementary and consequently related.

14 — See, respectively, ECtHR, *Karalevičius v Lithuania*, No 53254/99, 7 April 2005; *Norbert Sikorski* v *Poland*, No 17599/05, 22 October 2009, and *Mandic and Jovic v Slovenia*, Nos 5774/10 and 5985/10, 20 October 2011.

15 — See ECtHR, *Vasilescu* v *Belgium*, No 64682/12, 25 November 2014.

16 — See the Resolution of the European Parliament of 15 December 2011 on detention conditions in the Union (OJ 2013 C 168 E, p. 82) and paragraph 4 of the 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 [COM(2011) 175 final].

IV – **Preliminary observations relating to the difficulties raised by a transposition of the principles identified in the judgment in *N. S. and Others***

39. Several Member States propose transposing the principle identified by the Court in its judgment in *N. S. and Others*, C-411/10 and C-493/10, EU:C:2011:865.[17] It is true that the idea comes quite spontaneously to mind owing to a factual comparability which, as in the context of the saying that you cannot see the wood for the trees, focuses attention and reasoning.

40. That comparability relates to the fact that, in the case giving rise to that judgment, as in the main proceedings, there was a systemic deficiency in the Member State in which the asylum seeker was to be detained in the event of his removal, a deficiency identified by the European Court of Human Rights following individual cases which had been brought before it.

41. In the judgment in *N.S. and Others*, C-411/10 and C-493/10, EU:C:2011:865, the Court held that the Member States, including the national courts, may not transfer an asylum seeker to the 'Member State responsible' within the meaning of Regulation No 343/2003 where they cannot be unaware, owing to the instruments available to them, that systemic deficiencies in the asylum procedure and in the reception conditions of asylum seekers in that Member State are likely to expose the asylum seeker to inhuman or degrading treatment within the meaning of Article 4 of the Charter.[18]

42. The reasoning followed in that judgment amounts to requiring the Member State in whose territory the asylum seeker is to be present to examine itself the asylum claim, if the Member State 'responsible' within the meaning of Regulation No 343/2003 does not provide adequate assurances regarding detention conditions.

43. However tempting it may be, particularly owing to its simplicity, that case-law does not seem to me to be applicable by analogy to the interpretation of the provisions of the Framework Decision.

44. Several reasons preclude it.

45. In the first place, the principle which the Court identified in its judgment in *N. S. and Others.*, C-411/10 and C-493/10, EU:C:2011:865, is a transposition, at Union level, of the fundamental principle governing the rules for removal and expulsion in connection with the right to asylum. That principle, according to which no one may 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, is enshrined in Article 19(2) of the Charter and in Article 3 ECHR.

46. However, it must be stated that, in connection with the mechanism of the European arrest warrant, transposition of that principle is carefully precluded by the Union legislature, owing to the wording used in recital 13 of the Framework Decision.

47. That recital states 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'.

17 — In the case which gave rise to that judgment, asylum seekers from Afghanistan, Iran and Algeria objected to being transferred from the United Kingdom and Ireland to Greece, the Member State competent to hear their application under Council Regulation (EC) No 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national (OJ 2003 L 50, p. 1), since they risked being subjected, in Greece, to inhuman and degrading treatment within the meaning of Article 4 of the Charter owing to the conditions of their detention.

18 — See, inter alia, paragraphs 86, 94 and 106 of that judgment.

48. No mention is made of the 'surrendered' person. However, since that term designates the fundamental mechanism newly created by the European arrest warrant, it is unlikely that the Union legislature would have omitted to include it if it had intended to submit the procedure for surrendering a person to whom a European arrest warrant applies to the principles stated in that recital. In so acting, the Union legislature clearly distinguished the rules governing the European arrest warrant from those regulating the Common European Asylum System. It also clearly announced its intention to break with the traditional rules governing extradition, which is perfectly justified where the intention is to replace it with judicial cooperation based on mutual recognition and mutual confidence. [19]

49. In the second place, the Common European Asylum System and the European arrest warrant mechanism, although they both form part of the creation of the area of freedom, security and justice, fulfil different objectives and have particular characteristics, structured around specific rules and principles.

50. First, the Common European Asylum System is based on a comprehensive body of rules harmonised at Union level. Criminal law, substantive and procedural, has not been harmonised throughout the Union and remains, in spite of everything, governed by the territoriality of the criminal law.

51. Second, the Common European Asylum System is intended to provide an area of protection and solidarity for individuals who are fleeing from persecution or serious physical injury and seek international protection. The European arrest warrant is intended, for its part, to ensure the prosecution and punishment of criminal conduct in the Union by enabling the prosecution, trial and conviction of the perpetrators of criminal offences.

52. Third, the Common European Asylum System is based on a purely administrative examination procedure, where the issue is to ascertain whether or not the person concerned is entitled to refugee status and, if not, to remove him from the territory of the Union. The European arrest warrant is part of a purely internal Union mechanism and is based, furthermore, on an exclusively judicial procedure. It is not a Member State, but rather a national court which seeks an individual's imprisonment and the Framework Decision requires, under certain conditions, that is to say with certain reservations, the other Member States to accede to that request.

53. Fourth, in the Common European Asylum System, the detention order constitutes, for the Member State responsible, the measure of last resort, wholly in the alternative, linked to the need to ensure enforced removal. The detention which the European arrest warrant involves is the rule and is the result of a court decision convicting the perpetrator of a criminal offence or requiring him, by means of enforcement, to appear before a court to be tried.

54. Last, we must take into consideration what is at issue in, and the very specific consequences of, applying the case-law in *N. S. and Others*, C-411/10 and C-493/10, EU:C:2011:865) to the European arrest warrant mechanism and the limits of that application in view of the role and competencies of the Member State in the execution of a European arrest warrant.

55. In the case which gave rise to the judgment in *N. S. and Others*, C-411/10 and C-493/10, EU:C:2011:865, what was at issue was to ascertain which of the Member States was responsible for examining an asylum claim within the meaning of Regulation No 343/2003. Very specifically, the solution adopted by the Court had no consequences other than to require the competent United Kingdom and Irish authorities to either identify, in accordance with the criteria laid down by that

19 — Recital 13 of the Framework Decision must be read in the light of the provisions laid down in Article 28 thereof, since the principle which it establishes applies where, once the European arrest warrant has been executed, the question of removal, expulsion or extradition is raised in the issuing Member State.

regulation, another 'Member State responsible' or to handle the asylum application themselves, if appropriate, by requiring the persons concerned to be removed from their territory. It was therefore a question of making an exception to a rule of territorial jurisdiction, laid down in order to spread the burden of administrative procedures subject to substantive criteria common to all the Member States.

56. In the main proceedings, the issue is entirely different because it is a question of ensuring public order and public security by enabling a criminal prosecution to be brought against Mr Aranyosi and ensuring the execution of a custodial sentence against Mr Căldăraru.

57. The practical consequences are also of a very different scale since, on the basis of the principles affirmed by the Court in its judgment in *N. S. and Others*, C-411/10 and C-493/10, EU:C:2011:865, the executing judicial authorities are obliged to refuse to surrender the requested person.

58. Contrary to the Common European Asylum System, which is, as I have said, broadly harmonised, criminal law, substantive and procedural, has not been harmonised throughout the Union and remains, in spite of everything, governed by the territoriality of the criminal law.

59. This means that, in the context of the execution of a European arrest warrant issued for the purpose of conducting a criminal prosecution, the transposition of the principle identified by the Court in its judgment in *N. S. and Others*, C-411/10 and C-493/10, EU:C:2011:865, leads to the situation in which the executing judicial authorities can no longer surrender the requested person for the purposes of prosecution and also no longer has, as a general rule, jurisdiction to prosecute him in place of the issuing judicial authorities. As is apparent from the order for reference in Case C-404/15 and particularly from the comments made by the District Prosecutor's Office of Miskolc, establishing the offence and choosing the penalties to be applied fall within the exclusive jurisdiction of the Hungarian judicial authorities.

60. There is therefore a clear and obvious risk that the offence would remain unpunished and that its perpetrator would reoffend, thus infringing the rights and freedoms of the other citizens of the Union.

61. In connection with the execution of a European arrest warrant issued for purposes of the execution of a custodial sentence, the problem may appear less sensitive in so far as, if the requested individual resides on the territory of the executing Member State, the judicial authorities of that State might possibly undertake to execute that sentence, on the basis of the provisions of Article 4(6) of the Framework Decision. The issuing judicial authorities might also, for their part, invoke the provisions of Council Framework Decision 2008/909/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union,[20] in order that that individual may serve his sentence on the territory of the executing Member State.

62. While such a solution is conceivable, the fact remains that, by applying the principle identified by the Court in its judgment in *N. S. and Others*, C-411/10 and C-493/10, EU:C:2011:865 to the European arrest warrant mechanism, we end up with a difference in treatment and, therefore, a breach of the principle of equal treatment, depending on whether the requested person is accused of an offence or has already been convicted.

63. Moreover, we cannot preclude the possibility that such a solution may eventually encourage persons requested for the purposes of criminal prosecution or the execution of a custodial sentence to go to other Member States in order to escape those prosecutions or to be able to serve their sentence there. Those States would therefore become States of refuge, as, indeed, the Public Prosecutor's Office

20 — OJ 2008 L 327, p. 27.

of Bremen expressly stated during the hearing held before the Court. How can it be ensured that those latter States will not in their turn experience problems and become deficient? They will doubtless avoid this by not executing sentences in respect of which they have refused to execute the European arrest warrant. Such consequences must be seriously considered.

64. Further, judging by the number of Member States which, according to the findings of the European Court of Human Rights or the Commission, are to be considered as deficient with regard to detention conditions, those seem to be suitable places of refuge. Already overburdened, there is little likelihood that they will further increase the occupation rate of their prisons by accommodating individuals convicted by the judicial authorities of other Member States.

65. In the light of all these considerations, it must be stated that a transposition of the principle identified by the Court in its judgment in *N. S. and Others*, C-411/10 and C-493/10, EU:C:2011:865, would meet major obstacles relating to the nature and objectives of the European arrest warrant and would involve, furthermore, not only a paralysis of the mechanism introduced by the Framework Decision, but also extremely onerous and harmful consequences for the executing judicial authorities, points to which I shall return.

V – **My analysis**

66. By its questions, the referring court asks the Court whether, in the light of the provisions of Article 1(3) of the Framework Decision, the judicial authority executing a European arrest warrant is required to surrender the person requested for the purposes of criminal prosecution or the execution of a custodial sentence where that person is likely to be detained, in the issuing Member State, in physical conditions which infringe his fundamental rights and, if so, on what terms and in accordance with what procedural requirements.

67. The problem raised by the national court does not concern an irregularity affecting the intrinsic validity of the European arrest warrant or an irregularity in the investigation procedure, the trial or legal remedies applicable in the issuing Member State. The irregularity concerns the detention conditions in that State, that is to say a stage subsequent to the execution of the European arrest warrant. That irregularity involves a risk, that of submitting the requested person to physical detention conditions which are contrary to the safeguards provided for in Article 4 of the Charter.

68. The problem raised by the referring court therefore concerns the classic difficulty of weighing different fundamental objectives, whether it is necessary to attain those objectives, and whether it is possible to do so without nullifying or even merely weakening the safeguards which make the Union an area of justice and freedom.

69. First of all, I shall carry out a traditional analysis of the wording in which Article 1(3) of the Framework Decision is couched, of the structure of that decision and of the guiding principles on which it is based. At the end of that examination, I shall conclude that Article 1(3) of the Framework Decision cannot be interpreted as constituting a ground for non-execution of the European arrest warrant.

70. However, I shall not argue for an absolute obligation to surrender where execution of the European arrest warrant risks having results such as those described by the referring court.

71. Secondly, I shall explain the reasons why a review of proportionality is required when a judicial authority decides, in spite of the lack of space in the State's prisons and the numerous times that State has been censured owing to physical detention conditions which infringe the fundamental rights, to issue a European arrest warrant for minor offences.

A – *The wording of Article (3) of the Framework Decision*

72. Article 1 of the Framework Decision is headed 'Definition of the European arrest warrant and obligation to execute it.'

73. The Union legislature therefore defines, in Article 1(1), the subject matter of the European arrest warrant and states, in Article 1(2), the principle that the Member States must execute it in accordance with the principle of mutual recognition.

74. When it states, in Article 1(3), that the 'Framework Decision shall not have the effect of modifying the obligation to respect fundamental rights and fundamental legal principles as enshrined in Article 6 [EU]', the Union legislature is merely reminding each of the Member States that they are required, under the latter provision, to respect fundamental rights.

75. That obligation constitutes, as we shall see, an expression of the principal of mutual confidence between the Member States as reiterated by the Court in its Opinion 2/13 (EU:C:2014:2454).

76. The Union legislature therefore states, in Article 1(2) and (3) of the Framework Decision, the principles on which the execution of the European arrest warrant is based, namely, the principle of mutual recognition of judicial decisions and the principle of mutual confidence between the Member States, respectively.

77. Those paragraphs 2 and 3 complement each other, since the two principles which they lay down are inseparably linked in so far as the principle of mutual recognition is based on the confidence held by the Member States that each of them respects Union law, and in particular fundamental rights.

78. In the light of these considerations, Article 1(3) of the Framework Decision can therefore not be interpreted as aiming to introduce an exception to the general rule of execution of the European arrest warrant.

B – *The structure of the system*

79. If Article 1(3) of the Framework Decision were to be interpreted as a provision allowing the executing judicial authority to refuse to execute the European arrest warrant on the ground that the requested person is likely to be exposed to physical detention conditions which infringe his fundamental rights, such an interpretation would, furthermore, be clearly contrary to the structure of the system.

80. It would have the effect of introducing a ground for non-execution which was clearly not provided for by the Union legislature.

81. It would therefore go against not only the Union legislature's clearly stated intention of stipulating exhaustively, for reasons of legal certainty, the cases in which the European arrest warrant may not be executed, but also against the case-law of the Court which applies a very strict interpretation of the Framework Decision, and particularly of the grounds for non-execution provided for in Article 3 to Article 4a thereof.

82. That interpretation would also have the effect of introducing a ground for the systematic non-execution of the European arrest warrants issued by Member States beset by major problems in the functioning of their prisons, other than the ground expressly mentioned in recital 10 of the Framework Decision.

83. In that recital, the Union legislature expressly provides for the possibility of suspending the European arrest warrant mechanism in respect of a Member State in the event that that Member State commits a serious and persistent breach of the principles set out in Article 6(1) EU.

84. 'Persistent' breach is defined by the Commission as referring to the 'systematic repetition of individual breaches',[21] the Commission taking care to observe that the fact that 'a Member State has repeatedly been condemned for the same type of breach over a period of time by an international court such as the European Court of Human Rights …, and has not demonstrated any intention of taking practical remedial action'[22] is a factor that could be taken into account.

85. There is no doubt, in my view, that this is the situation here.

86. In recital 10 of the Framework Decision, the Union legislature advocates the ultimate intervention of political leaders to suspend the European arrest warrant mechanism, since only the European Council, in accordance with the procedure referred to in Article 7(2) EU, may initiate the procedure to suspend the rights of the Member State in question. However, the procedure is onerous and complex, since the European Council acts by unanimity on a proposal by one third of the Member States or by the Commission and after obtaining the consent of the European Parliament, and clearly needs strong political will.

87. By allowing only the European Council to suspend the mechanism of the European arrest warrant by means of the sanction mechanism provided for in Article 7(2) EU, the Union legislature wished to regulate that situation very strictly and clearly did not intend to allow the executing judicial authorities to refuse to execute a European arrest warrant in such circumstances.

88. Furthermore, if it had wished to afford that possibility, there were many opportunities for doing so.

89. First of all, the Union legislature could have stated it in recital 10 of the Framework Decision.

90. It could then have applied by analogy the fundamental principle which governs the rules for removal, expulsion and extradition, set out in recital 13 of the Framework Decision and according to which, I reiterate, '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'.

91. The wording of that recital was carefully chosen because no reference is made to the person 'surrendered' under a European arrest warrant. I believe that there was a clear intention to distinguish the rules governing the European arrest warrant from those regulating the Common European Asylum System and also an intention to break away from the traditional rules governing extradition, which is perfectly justified when the intention was to replace it with judicial cooperation based on mutual recognition and mutual confidence.

92. Finally, the Union legislature could have expressly included that ground in the grounds for non-execution, mandatory or optional, provided for in Article 3 to Article 4a of the Framework Decision, but it did not do so.

93. In the light of these considerations, I can only say that, by laying down the principle stated in Article 1(3) of the Framework Decision, the Union legislature did not intend to allow the executing judicial authorities to refuse to surrender the requested person in circumstances such as those at issue in the present cases.

21 — See paragraph 1.4.4 of the Communication from the Commission to the Council and the European Parliament on Article 7 of the Treaty on European Union — Respect for and promotion of the values on which the Union is based [COM(2003) 606 final].

22 — Idem.

C – *The guiding principles of the Framework Decision*

94. The Framework Decision is based, as we know, on the principles of mutual recognition and mutual confidence, which require the executing judicial authorities to consider that, in the implementation of the European arrest warrant, the issuing judicial authorities will ensure respect for the fundamental rights of the surrendered person.

1. The principle of mutual recognition of judicial decisions

95. The use of the mutual recognition principle became necessary in order to achieve the area of freedom, security and justice, the aim which the Union set itself under Article 3(2) TEU and Article 82 TFEU.

96. By laying down that principle as the 'cornerstone' of that area, it is clear that the Member States wished to achieve it without necessarily having first harmonised national criminal law. Past experience had adequately shown that that step, although logically required, was ultimately the surest means of reaching an impasse. The Member States therefore wished to break through that impasse, while retaining the idea that harmonisation may still be necessary, but will henceforth have an ancillary role.

97. That assertion, far from being an opinion of academic lawyers, can be clearly inferred from the wording of Article 82(1) and (2) TFEU.

98. That reasoning was fully integrated by the Court, even before the drafting of the Treaty of Lisbon, when it defined the principle of mutual recognition, in connection with an application of the *ne bis in idem* rule, in its judgment in *Gözütok and Brügge*.[23] The latter principle can apply in a cross-border context only if the judicial decisions of the various Member States are not disregarded as a matter of principle and are recognised in the circumstances and with the effects laid down by the Court. Accordingly, mutual recognition necessarily implies, regardless of the way in which a penalty is imposed, that the Member States have mutual trust in their criminal justice systems and that each of them recognises the criminal law in force in the other Member States, even when the outcome would be different if its own national law were applied.[24]

99. As a result, in the 'mutual recognition/mutual confidence' relationship, the former imposes the latter on the Member States. From the moment the principle of mutual recognition applies and constitutes the 'essential rule' on which judicial cooperation is based,[25] the Member States must have mutual confidence in each other.

100. There is no doubt, in my view, that the terms of Article 82 TFEU constitute an implicit confirmation of the case-law of the Court, which it would have been so easy to reverse when the Treaty of Lisbon was drafted. We should note that Article 82(2) presents a legal basis for harmonisation of national legislation in order to facilitate mutual recognition.

101. Questions referred for a preliminary ruling in connection with the implementation of the European arrest warrant allowed the Court to establish the rules leading to the creation and maintenance of the European criminal judicial area and to give full force and meaning to the principle of mutual recognition.

23 — C-187/01 and C-385/01, EU:C:2003:87.

24 — Paragraph 33 of that judgment.

25 — Judgment in *West*, C-192/12 PPU, EU:C:2012:404, paragraph 62 and the case-law cited.

102. Since its judgment in *Gözütok and Brügge*,[26] the Court has always applied a very strict interpretation of that principle, particularly with regard to the automatic nature of the surrender of the requested person where no objection to that surrender can be pleaded, on the basis of an extremely rigorous application of the principles of mutual recognition and mutual confidence and of the promotion of the efficient and expeditious functioning of the surrender procedure laid down by the Framework Decision.

103. It follows that, where the judicial authority of a Member State requests the surrender of a person either by reason of a final conviction or because that person is the subject of a criminal prosecution, its decision must be automatically recognised by the executing Member State, which is obliged, under Article 1(2) of the Framework Decision, to implement that warrant without any possible ground for non-execution other than those listed exhaustively in Article 3 to Article 4a of the decision.[27] Furthermore, the executing judicial authority may make the execution of that warrant subject only to the conditions set out in Article 5 of the Framework Decision.

104. Therefore, according to standard wording, it is to '[facilitate] the surrender of requested persons, in accordance with the principle of mutual recognition'[28] and to '[reinforce] the system of surrender established by the Framework Decision for the good of the area of freedom, security and justice',[29] that the Court, in its judgment in *Wolzenburg*, C-123/08, EU:C:2009:616, encouraged the Member States to limit, as far as possible, the situations in which they may refuse to execute a European arrest warrant, inviting them not necessarily to take advantage of the opportunities granted to them by Article 4 of the Framework Decision relating to the grounds for optional non-execution, however important the objectives referred to in that article are.[30] The Court has thus acknowledged that, in spite of the importance of the objective of reintegrating the requested person into society,[31] referred to in Article 4(6) of the Framework Decision,[32] the Member States must be able to limit, in accordance with the principle of mutual recognition, the situations in which it ought to be possible to refuse to surrender that person.

105. In its judgment in *West*, C-192/12 PPU, EU:C:2012:404, once again, it is to facilitate surrender and to reinforce the European arrest warrant system that the Court, in the context of successive surrenders of the same person, limited the concept of 'executing Member State' to the Member State which carried out the last surrender so as to limit the situations in which the national judicial authorities may refuse to consent to the execution of a European arrest warrant.[33]

2. The principle of mutual confidence between the Member States

106. The principle of mutual confidence between the Member States is today among the fundamental principles of Union law, of comparable status to the principles of primacy and direct effect.

26 — C-187/01 and C-385/01, EU:C:2003:87.

27 — See the judgments in *Leymann and Pustovarov*, C-388/08 PPU, EU:C:2008:669, paragraph 51; *Wolzenburg*, C-123/08, EU:C:2009:616, paragraph 57; *Radu*, C-396/11, EU:C:2013:39, paragraphs 35 and 36; and *Melloni*, C-399/11, EU:C:2013:107, paragraph 38.

28 — Judgments in *Wolzenburg*, C-123/08, EU:C:2009:616, paragraph 59, and *West*, C-192/12 PPU, EU:C:2012:404, paragraph 62.

29 — Judgment in *Wolzenburg*, C-123/08, EU:C:2009:616, paragraph 58.

30 — Judgment in *Wolzenburg*, C-123/08, EU:C:2009:616, paragraph 62 and the case-law cited.

31 — See the judgment in *Kozłowski*, C-66/08, EU:C:2008:437, paragraph 45.

32 — Under that provision, the executing Member State may refuse to execute a European arrest warrant issued for the purposes of execution of a custodial sentence where the requested person 'is staying in, or is a national or a resident of the executing Member State' and that State 'undertakes to execute the sentence'.

33 — Paragraph 62 of that judgment.

107. In its Opinion 2/13 (EU:C:2014:2454), the Court (Full Court) reaffirmed 'the fundamental importance' of that principle 'which Union law imposes … between [the] Member States' in that it 'allows an area without internal borders to be created and maintained' and observance of which is essential to the 'underlying balance of the EU'. [34]

108. As regards the area of freedom, security and justice, the Court defined that principle as requiring each of the Member States to consider, save in exceptional circumstances, that all the other States are complying with Union law, and particularly with the fundamental rights recognised by that law. [35]

109. According to the Court, the principle of mutual confidence therefore precludes a Member State checking whether another Member State has actually complied, in a specific case, with the fundamental rights safeguarded by the Union, because that '[would upset] the underlying balance of the EU'. [36]

110. Mutual confidence between the Member States is based on several factors.

111. First, the confidence that each Member State must have in the respective criminal justice systems of the other Member States appears to be the logical and absolutely inevitable result of the disappearance of internal borders and the creation of a single area of freedom, security and justice.

112. Secondly, as the Court points out in its Opinion 2/13, EU:C:2014:2454, that confidence is based on the fundamental premise that each Member State shares with all the other Member States, and recognises that they share with it, a set of common values on which the Union is founded, such as respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, as stated in Article 2 TEU. [37] Accordingly, all the Member States showed, when they created the European Communities or acceded to them, that they were States governed by the rule of law which respected fundamental rights.

113. Thirdly, that confidence is based on the fact that each of the Member States is obliged to respect the fundamental rights as enshrined in the ECHR or in the Charter or laid down by their national law, even in connection with criminal law, substantive or procedural, which does not fall within the scope of the Framework Decision and Union law. [38]

114. In spite of the absence, to date, of extensive harmonisation of substantive and procedural criminal law within the Union, the Member States have therefore been able to be convinced that the conditions in which requested persons are prosecuted, tried and, depending on the circumstances, detained in the other Member States respect the rights of those persons and will allow them properly to defend themselves.

115. It is that obligation imposed on each of the Member States to respect fundamental rights that, according to the Court, must enable the Member States to have confidence 'that their national legal systems are capable of providing equivalent and effective protection of the fundamental rights recognised at EU level, particularly in the Charter'. [39]

34 — Paragraphs 191 and 194 of that opinion.

35 — Paragraph 191 of the opinion.

36 — Opinion 2/13, EU:C:2014:2454, paragraph 194.

37 — Paragraph 168.

38 — Judgment in *F.*, C-168/13 PPU, EU:C:2013:358, paragraph 48.

39 — Judgment in *F.*, C-168/13 PPU, EU:C:2013:358, paragraph 50.

116. Thus, in accordance with those principles, the Court held, in its judgment in *F.*, C-168/13 PPU, EU:C:2013:358,[40] that 'it is therefore within the legal system of the issuing Member State that persons who are the subject of a European arrest warrant can avail themselves of any remedies which allow the lawfulness of the criminal proceedings or the enforcement of the custodial sentence or detention order, or indeed the substantive criminal proceedings which led to that sentence or order, to be contested'.[41]

117. Again, in accordance with those principles the Court held, in its judgment in *Melloni*, C-399/11, EU:C:2013:107,[42] that surrender must be automatic even if the executing Member State develops as part of its constitution a more demanding concept of the right to a fair trial.

118. Therefore, from the moment the executing judicial authority is unable to rely on one of the grounds for non-execution exhaustively listed in Article 3 to Article 4a of the Framework Decision, it is obliged to surrender the requested person to the issuing judicial authorities even if the provisions of its national law, including constitutional provisions, would provide a higher level of protection of fundamental rights than that deriving from the provisions of the Framework Decision.

119. In the case which gave rise to that judgment, the Court therefore held that allowing a Member State to avail itself of a higher standard of protection for fundamental rights in its constitution to make the surrender of a person convicted *in absentia* subject to conditions would therefore undermine the principles of mutual recognition and confidence on which the Framework Decision is based and, accordingly, compromise the effectiveness of that decision.

120. It is that obligation relating to respect for fundamental rights which, in the end, according to the Court, explains the wording of recital 10 of the Framework Decision, according to which the implementation of the European arrest warrant may be suspended only in the event of a serious and persistent breach by one of the Member States of the principles set out in Article 6(1) EU, determined by the Council pursuant to Article 7(2) EU with the consequences set out in Article 7(3) EU.[43]

121. It is therefore that obligation which, again according to the Court, strengthens the principle of mutual recognition, which is the basis for the European arrest warrant mechanism in accordance with Article 1(2) of the Framework Decision.

122. It is clear, at the end of this analysis, that a ground for non-execution based on the risk of infringement, in the issuing Member State, of the fundamental rights of the surrendered person would substantially undermine the relationship of trust which is deemed to form the basis of the cooperation of one court with another which the Framework Decision requires, therefore nullifying the principle of mutual recognition of judicial decisions.

123. In view of the number of Member States faced with a malfunctioning prison system, and in particular a problem of generalised prison overcrowding, that interpretation would have the effect, as we have seen, of introducing a systematic exception to the execution of European arrest warrants issued by those States, which would lead to the paralysis of the European arrest warrant mechanism.

124. It is a fact, furthermore, that the executing judicial authorities would no longer be able to surrender the person requested for the purposes of criminal prosecution or the execution of a custodial sentence.

40 — That judgment concerns the possibility of bringing an appeal suspending execution of the decision of the executing judicial authority.

41 — Paragraph 50.

42 — In that judgment, Court ruled on the scope of Article 4a(1) of the Framework Decision which provides grounds for the optional non-execution of a European arrest warrant issued for the purposes of executing a custodial sentence or detention order, if the person concerned has not appeared in person in the proceedings leading to his conviction.

43 — Judgment in *F.*, C-168/13 PPU, EU:C:2013:358, paragraph 49.

125. If the Framework Decision mechanism were paralysed, it would in fact be one of the aims of the area of freedom, security and justice which would be undermined, namely the aim of ensuring the prosecution and punishment of criminal conduct not only in the common interest of all the Member States but also in the interest of victims because, if the European arrest warrant were issued for the purposes of criminal prosecution, the executing judicial authorities would not have, in principle, any jurisdiction to try the party concerned in place of the issuing judicial authorities, having regard to the principle of territoriality of criminal law. If, on the other hand, they did have jurisdiction, as seems to be the situation in the present case, the Public Prosecutor's Office of Bremen has pointed out the difficulties and disproportionate resources which that would involve.

126. It is not the responsibility of the executing Member State, even under its duty of solidarity as stated in Article 4(3) TEU, to execute, owing to the malfunctioning of the prison system of the issuing Member State, the sentence of the requested person with the cost which that involves, unless, of course, it is required to assume that responsibility for the purpose of reintegrating that person into society, a possibility offered by the provisions of the Framework Decision. Other than in those cases, to reduce prison overcrowding in one Member State only to increase it in another is not a solution.

127. We must also not forget that the issue here is to prevent a risk, not to find and penalise an infringement. Although the existence of a systemic deficiency constitutes legitimate grounds for questioning the detention conditions of surrendered persons, that finding made at one given moment does permit *a priori* suspicion of infringement of the fundamental rights of surrendered persons and the blocking of mutual recognition by the introduction of a 'systematic' ground for non-execution.

128. Finally, as one last point, if the Court were to consider that the existence of a systemic deficiency of detention conditions constitutes a ground for non-execution of the European arrest warrant, that would also constitute grounds for non-transfer under Framework Decision 2008/909.

129. Having regard to the issues involved in and deriving from the principle of mutual recognition, the executing judicial authorities can therefore rely only on the grounds for mandatory or optional non-execution set out in Article 3 to Article 4a of the Framework Decision and, if none of those grounds can be relied upon, they must surrender the requested persons in accordance with the mutual confidence which they must have in the issuing judicial authorities.

130. From this perspective, the logic of the system therefore means that the answer to the referring court is that it is, as a general rule, obliged to execute the European arrest warrants which it is responsible for examining.

131. Is it, however, possible to conclude, without more, that there is an obligation to execute European arrest warrants the execution of which would lead to disproportionate results such as those described in the orders for reference?

132. I would say that there is not.

133. In exceptional circumstances,[44] such as those at issue in the main proceedings, characterised by a systemic deficiency in the detention conditions in the issuing Member State, established by the European Court of Human Rights, it is legitimate for the executing judicial authority to ask itself whether the surrendered person actually 'risks' being detained in the conditions indicated by that Court.

44 — I am referring here to the exceptional circumstances referred to by the Court in paragraph 191 of its Opinion 2/13, EU:C:2014:2454.

134. It is therefore through an exchange of information based on the cooperation of one court with another that the executing judicial authority must assess whether, in the light of the information provided by the issuing judicial authority, the surrendered person will actually be detained in conditions which are not disproportionate.

D – *Application of the principle of proportionality to the issue of European arrest warrants*

135. It is clear that, in circumstances such as those at issue in the main proceedings, it is necessary to weigh up the rights of the surrendered person against the requirements of the protection of the rights and freedoms of others. As the Court pointed out in its judgment in *N.*, C-601/15 PPU, EU:C:2016:84, Article 6 of the Charter states that everyone has the right not only to liberty but also to security of person.[45] That right, as the right guaranteed in Article 4 of the Charter is an absolute and non-derogable right. Where the person with respect to whom the European arrest warrant is issued is sought for acts of terrorism or rape of a child, it is clear that non-execution of that warrant raises the question of the need to safeguard national security and public order.

136. That weighing is therefore essential and falls fully within the role of the judge of a court of law, the guardian of individual freedoms, who in this situation is genuinely constrained to choose, and it is, in my view, through the application of the principle of proportionality that this weighing may be effected.

1. Scope of the principal of proportionality

137. The principle of proportionality has a particularly significant application in the judicial sphere as the 'individualisation' of the penalty.

138. The individualisation of the penalty has two dimensions: at the stage of the imposition of the penalty and the stage of its execution.

139. At the stage of the imposition of the penalty, the principle of the individualisation of the penalty precludes the rule of an automatic and entirely fixed penalty. The court will decide on the penalty according to the specific characteristics of the offender, as they emerge from inter alia the nature of the offence committed, the circumstances of its commission, the social enquiry report, victim and witness statements, psychological and psychiatric reports and the possibilities of reintegration offered by the specific characteristics of that individual.

140. Where the court imposes a custodial sentence, it must take into account, for the purpose of fixing its length, the conditions of the execution of that sentence, and in particular their possible harshness. The aim is to ensure that the detention of the surrendered person does not have consequences for him that are disproportionate.

141. In that connection, it is clearly necessary to take into account the capacity of the prisons and the possible inability of the system to ensure proper detention conditions owing to a problem of prison overcrowding.

142. That principle of individualisation also applies, and with the same force, to the stage of execution of the penalty. One speaks of enforcement of sentences. Consideration of the physical detention conditions is relevant here, for two main reasons, irrespective of the aspects relating to human dignity.

45 — Paragraph 53 and the case-law cited.

143. First of all, modern criminology is unanimous in drawing attention to the unwanted effects of excessive overcrowding, because such a factor is morally debilitating. The sense of injustice which is the result of suffering degrading treatment only reinforces the detainee's detachment from society and therefore only increases exponentially the risk of reoffending. The aim of the penalty, which is to ensure, ultimately, the rehabilitation and reintegration of the convicted person into society is therefore clearly compromised.

144. Secondly, the penalty cannot become a humiliation. Excessively harsh detention conditions lend to the penalty an extra degree of severity which is not intended by the court and which reinforces the sense of injustice described above.

145. The same proportionality must be observed when issuing a European arrest warrant for the purposes of criminal prosecution.

146. In that situation, the presumption of innocence enjoyed by the prosecuted person is already sufficient ground, in itself, to encourage moderation. Moreover, detention which is the result of execution of the European arrest warrant is, in fact, similar to provisional pre-trial detention, since the duration of that detention will be deducted from the sentence to be imposed at the end of the proceedings. It is therefore reasonable to issue the European arrest warrant only in cases in which it is likely that a sentence will be imposed, owing to the objective nature of the acts committed.

147. It is true that no provision in the Framework Decision expressly requires a review of proportionality to be carried out. However, since the principle of proportionality is a general principle of Union law, it can, as such, be relied on to oppose an action of the Member States where they are implementing Union law, which includes the Framework Decision.

148. Moreover, the discretion allowed to the executing judicial authorities by Articles 4 and 5 of the Framework Decision is nothing other than an application of the principle of proportionality. The aim of that discretion conferred on the court called upon to execute the European arrest warrant is, in fact, to enable enforcement measures to be adjusted, whether criminal prosecution or the execution of a custodial sentence is concerned, in order to avoid a situation where an automatic and indiscriminate execution results in the detachment from society of the person concerned.

149. In the light of these considerations, a review of proportionality must, in my view, be carried out.

150. Others appear to share this opinion, even if they base it on grounds which are different, such as those relating, inter alia, to freedom of movement, but which are, in fact, complementary.

151. The European handbook on how to issue a European arrest warrant[46] thus quite clearly invites the issuing judicial authorities to carry out that review. Taking account of the serious consequences of the execution of such a warrant as regards the restrictions placed on the freedom of movement of the requested person, that manual emphasises that the European arrest warrant must be used, 'in an efficient, effective and proportionate manner' to further the prosecution of 'more serious or more damaging' offences.

46 — Document 17195/1/10 REV 1 — COPEN 275 EJN 72 Eurojust 139.

152. In its Resolution of 27 February 2014 with recommendations to the Commission on the review of the European Arrest Warrant,[47] the Parliament also recommended that, when issuing such a warrant, the judicial authority should 'carefully assess the need for the requested measure based on all the relevant factors and circumstances, taking into account the rights of the suspected or accused person and the availability of an appropriate less intrusive alternative measure to achieve the intended objectives'.[48]

153. In a significant number of Member States, the issuing judicial authorities have already integrated that review prior to the issue of a European arrest warrant,[49] either in the measure transposing the Framework Decision[50] or in their own practice.[51]

154. I share the view of the Parliament, the Council and the Commission in so far as they state that it is when the European arrest warrant is issued that the review of proportionality must be carried out.

155. The very spirit of the system requires that it is the issuing judicial authority that should carry out that review, since the European arrest warrant must satisfy that condition even before it leaves the borders of the national territory.

156. However, that is not always so, for various reasons.

157. Some national legislation prohibits, in particular, such a review under the principle of mandatory prosecution. That is the case in Hungary and Romania[52] which were required to apply that principle strictly when they acceded to the Union.

158. That principle prohibits any assessment of proportionality at the stage of the decision to prosecute or of the execution of a judicial decision in order to ensure the full independence of the judicial authority. Its aim, which is very laudable, and which is also imposed on judicial authorities which are not courts of law, is to ensure by the automatic nature of the procedure that no outside influence, particularly political influence, interferes with the course of justice.

159. The result is an automatic response which may lead to genuine lack of humanity in the implementation of decisions, to the extent that mechanisms such as that of the European arrest warrant are discredited. It culminates in a systematic and sometimes unjustified issue of the European arrest warrant for the surrender of persons requested for offences which are often minor,[53] such as the theft of 2 m^2 of tiling or of a bicycle wheel, a practice which the Commission itself criticised in its report mentioned in footnote 16 of this opinion.

160. For these reasons, I think it is legitimate that the question of the proportionality of the European arrest warrant may be raised before the executing judicial authority.

47 — Document T7-0174/2014.

48 — See the annex to that resolution. It is interesting to note that the requirement of proportionality is already enshrined within the framework of the establishment, operation and use of the second generation Schengen Information System (SIS II) established by Council Decision 2007/533/JHA of 12 June 2007 (OJ L 205, p. 63). Article 21 of that decision provides that, before issuing an alert, the issuing Member State shall determine whether the case is 'adequate, relevant and important enough to warrant entry of the alert in SIS'.

49 — See, inter alia, the final report on the fourth round of mutual evaluations, entitled 'The practical application of the European Arrest Warrant and corresponding surrender procedures between Member States', adopted by the Council on 4 and 5 June 2009 (document 8302/4/09 REV 4 — Crimorg 55 COPEN 68 EJN 24 Eurojust 20), which assesses the implementation of the European arrest warrant in each Member State.

50 — Inter alia in the Czech Republic, Latvia, Lithuania and Slovakia.

51 — Inter alia in Belgium, Denmark, Germany, Estonia, Ireland (by the police forces and the Public Prosecutor), Spain, France, Cyprus, Luxembourg, the Netherlands, Portugal, Slovenia, Finland, Sweden (by the Public Prosecutor) and also the United Kingdom.

52 — That is expressly stated in the replies given by those Member States in connection with the Commission's report referred to in footnote 16 of this opinion.

53 — This has been extensively noted by the latest institutional documents relating to the application of the Framework Decision. See, inter alia, paragraph 4 of the Commission's report mentioned in footnote 16 of this opinion.

161. Admittedly, there is no question of my challenging the principle of procedural autonomy.

162. However, when the decision of the issuing judicial authority leaves the national territory where it alone is enforceable to be applied in the area of freedom, security and justice, it must comply with the general rules and principles which govern that single judicial area and enable the uniform application of the principle of mutual recognition.

163. The obligation of the executing Member State to give the 'foreign' decision the same force as if it were its own decision, even if its national law would have led to a different solution, cannot require it to execute a European arrest warrant which does not satisfy the conditions required expressly and implicitly by the Framework Decision which governs a particular aspect of mutual recognition.

164. In my view, that situation must be distinguished from that in which the executing judicial authority tries to assess the legality of the European arrest warrant in the light of its own standard of protection of fundamental rights, a situation regulated inter alia by the judgment in *Melloni*, C-399/11, EU:C:2013:107. It is a question of determining whether, in the specific sphere of the criminal law and within the framework of the 'horizontal' dialogue between the sovereign courts of law, it is necessary to raise the question of proportionality.

165. Let me say, first of all, that, to my mind, since the principle of proportionality is a general principle of Union law, it is for the Court and for the Court alone to define its scope and parameters if necessary. It will therefore be for the executing judicial authority, where appropriate, to refer the matter to the Court by means of a reference for a preliminary ruling.

166. The specific procedures for assessing that principle remain to be determined.

2. The specific procedures for applying the principle of proportionality to the issue of the European arrest warrant

167. Where, on the basis of reliable factual information, the executing judicial authority establishes the existence of a systemic deficiency in detention conditions in the issuing Member State, it must be able to assess, in the light of the specific circumstances of each case, whether surrender of the requested person is likely to expose him to detention conditions that are disproportionate.

168. To that end, the executing judicial authority must be able to ask the issuing judicial authority for any information it considers necessary. Owing to the principle of separation of powers, the executing judicial authority ought, in my view, to approach its competent national authority in order that it may make direct contact with the competent national authority in the issuing Member State and the replies should be communicated to it through the same channels.

169. As regards a European arrest warrant issued for the purposes of the execution of a custodial sentence, this must, in my view, be considered proportionate where the conditions of execution do not lead to adverse consequences out of all proportion to those which would result from the sentence imposed if it were executed under normal circumstances.

170. As regards a European arrest warrant issued for the purposes of criminal prosecution, it is proportionate if its conditions of execution are compatible with the sole necessity of ensuring that the requested person does not evade the course of justice. In its judgment in *Ladent v. Poland*,[54] the European Court of Human Rights held, furthermore, that the issue of a European arrest warrant for the commission of an offence for which provisional detention is normally considered inappropriate may have disproportionate consequences for the freedom of the requested person which may be addressed from the perspective of the guarantees referred to in Article 5 ECHR.[55]

171. Finally, it is clear that the possibilities offered by Articles 4 and 5 of the Framework Decision must be examined systematically.

172. If, in connection with a review of proportionality, the executing judicial authority were to be faced with a specific problem of assessment, it would then be required to refer the matter to the Court, which alone has jurisdiction to settle that matter of EU law.

173. In any event, we must not lose sight of the fact that it is for the issuing judicial authority to carry out a review of proportionality in the first place. Since this is a matter of implementation of Union law, it is its responsibility to do so, even if, in order to do so, it must disapply its national legislation imposing the principle of mandatory prosecution, because it is necessary here to give a ruling in accordance with EU law, the primacy of which also applies in respect of the provisions of the Framework Decision.

174. Indeed, if that review were carried out, questions such as those raised in the present references would undoubtedly be a rare occurrence.

175. I am aware that the position which I suggest the Court should adopt amounts, in part, to asking it to behave as a human rights court would behave. In the sphere of criminal law, I think that that approach will need to be addressed at some point.

176. However, I cannot ignore the fact that the current situation is also the consequence of a damaging failure to act, on the part both of the Member States and of the Union institutions.

177. It should be unnecessary to point out that each of the Member States is required to ensure respect for fundamental rights under Article 6 TEU. That obligation is imposed, as we have seen, by virtue not only of mutual confidence but also of the principle of sincere cooperation.[56] The two go together. Let us remember, moreover, that in its judgment in *Pupino*, C-105/03, EU:C:2005:386, the Court expressly stated that 'it would be difficult for the Union to carry out its task effectively if the principle of [sincere] cooperation, requiring in particular that Member States take all appropriate measures, whether general or particular, to ensure fulfilment of their obligations under … Union law, were not also binding in the area of police and judicial cooperation in criminal matters, which is moreover entirely based on cooperation between the Member States and the institutions'.[57]

54 — No 11036/03, 18 March 2008.

55 — Paragraphs 55 and 56.

56 — That duty of sincere cooperation derives from Article 4(3) TEU, it being understood that, under that provision, the obligation is equally applicable to relations between Member States and the Union (see Opinion 2/13, EU:C:2014:2454, paragraph 202).

57 — Paragraph 42.

178. If we insist that the executing judicial authorities must surrender the requested person, in circumstances such as those at issue in the main proceedings, the principle of mutual confidence means, in turn, that the issuing judicial authorities in which that confidence is placed, and in particular the Member State to which the requested person will be surrendered, should take all necessary measures, including necessary reforms of criminal policy, to ensure that that person serves his sentence in conditions which respect his fundamental rights and is able to avail himself of all legal remedies available to defend his individual freedoms.

179. In that regard, I can only welcome the commitments made in that respect by Hungary and Romania.

180. I also note, in view of the very large number of individual applications brought before the European Court of Human Rights, that the legal remedies provided for in Hungary and Romania enable individuals exposed to physical conditions of detention which are contrary to the safeguards laid down in Article 3 ECHR to obtain the protection of their fundamental rights.

181. Finally, I see no solution other than to reinforce the mechanism of the European arrest warrant through the action of the Union institutions. Although the Commission, in 2011, painted a disheartening picture of the detention conditions in certain Member States and the consequences for the implementation of the Framework Decision, I note that neither the Council nor the Commission has undertaken action to ensure that the Member States meet all their obligations or, at least, take the necessary measures.

182. However, Article 82 TFEU provides them with a legal basis for doing so.

VI – **Conclusion**

183. In the light of the foregoing, I propose that the Court reply to the questions raised by the Hanseatisches Oberlandesgericht in Bremen (Higher Regional Court, Bremen) as follows:

Article 1(3) of Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, as amended by Council Framework Decision 2009/299/JHA of 26 February 2009, is to be interpreted as meaning that it does not constitute a ground for non-execution of the European arrest warrant issued for the purposes of criminal prosecution or the execution of a custodial sentence, based on the risk of an infringement, in the issuing Member State, of the fundamental rights of the surrendered person.

It is for the issuing judicial authorities to carry out a review of proportionality in order to adjust the need to issue a European arrest warrant in the light of the nature of the offence and the specific procedures for executing the sentence.

In circumstances such as those at issue in the main proceedings, characterised by a systemic deficiency of detention conditions in the issuing Member State, the executing judicial authority may legitimately ask the issuing judicial authority, through the competent national authorities where appropriate, for any information necessary to enable it to assess, in the light of the specific circumstances of each case, whether surrender of the requested person is likely to expose him to detention conditions that are disproportionate.

It is also for the issuing Member State, in accordance with the obligations deriving from Article 6 TEU and its duties in respect of the principles of mutual confidence and sincere cooperation, to take all necessary measures, including necessary reforms of criminal policy, to ensure that that person serves his sentence in conditions which respect his fundamental rights and is able to avail himself of all legal remedies available to defend his individual freedoms.