1. The charges

Some of the grounds from Paul's defence lawyer relate to the charges that are brought against him. In this regard it is important to distinguish offences listed in the Council Framework Decision 2002/584/JHA (further: Framework Decision) and offences not listed. We would first like to point out that the judicial authority of the issuing Member State has signaled or ticked the box referring to rape in table e in the European Arrest Warrant (further: EAW). This relates to the third offence listed: rape by having sex (vaginal intercourse) with the initially sleeping then half-asleep Caroline without using a condom on the 18th of March.

Charge 3

Rape is a Framework offence, as it is an offence listed in article 2.2 of the Framework Decision. The article provides as follows:

"The following offences, if they are punishable in the issuing Member State by a custodial sentence or detention order for a maximum period of at least three years and as they are defined by the law of the issuing Member State, shall, under the terms of this Framework Decision and without verification of the double criminality of the act, give rise to surrender pursuant to a European Arrest Warrant."

The defence lawyer has argued that the aforementioned offence does not amount to rape in the sense of the Framework Decision on the EAW. Whether or not the EAW contains a listed offence, i.e. under article 2.2, is important, since these offences are so serious that they are not subject to the rule of double criminality.

There is no standard European definition of rape. However rape, as it is a serious offence, has been subject to various considerations of European and International Courts. Several studies have shown that thedefinitions of rape throughout Europe have varied considerably in the past years, reflecting changes in attitudes and policies. A rough distinction can be made between consent-based (common law) and force-based (civil law) definitions. The former focus on the victim's lack of genuine consent as the act in itself is viewed as a deprivation of sexual autonomy. The latter are based essentially on the concept of force/threat of violence (allthough the will of the victim is to some extent taken into account) and consider the act as reflecting unequal relationships of power.

In *M.C. v Bulgaria* (2005) 40 ECHR 20, the European Court of Human Rights (hereafter: the Court) considered a complaint that the law of Bulgaria did not sufficiently protect against

rape, as it was only in those cases where the victim actively resisted, that a prosecution was brought. The Court held that although states have a significant margin of appreciation, a requirement that the victim must physically resist was no longer a requirement in most European countries. After referring to the position in common law states, the Court continued:

> "159. In most European countries influenced by the continental legal tradition the definition of rape contains references to the use of violence or threats of violence by the perpetrator. It is significant, however, that in case law and legal theory, lack of consent, not force is seen as the constituent element of rape.
>
> 161. Regardless of the specific wording chosen by the legislature, in a number of countries the prosecution ofnon consensual sexual acts in all circumstances is sought in practice by means of interpretation of the relevant statutory terms and through a context sensitive assessment of the evidence."

The Court went on to refer to the Recommendation Rec (2005) 5 of the Committee of Ministers of the Council of Europe on the protection of women against violence and the position in international law. It referred to *Prosecutor v Kunarac* (2002) IT 96-23/1, where the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia approved the definition of rape formulated by the Tribunal after a review of international jurisprudence. The definition given was that rape was constituted by intentional penetration without consent with the knowledge that it was without consent. The Court concluded that the trend was towards "regarding lack of consent as the essential element of rape".

The first question that we must answer is whether the executing Member State, under the Framework Decision, can scrutinise whether or not the issuing Member State has correctly ticked the box in article 2. We want to stress that the EAW is based on the principle of mutual recognition and places a high level of trust on the Member States. Article 8 of the Framework Decision obliges the issuing authorities to give a description of the circumstances in which the offence was committed, including time, place and degree of participation in the offence by the requested person. Of course the executing Member State must check the EAW to ensure that it complies with the(se) particular requirements, but besides that the executing Member State should accept, in the case of a Framework offence, the qualification, unless there is an obvious inconsistency.

As we read in considerans 10 of the Framework Decision, the mechanism of the EAW is based on a high level of confidence between Member States. The EAW is the first instrument in the field of criminal law implementing the principle of mutual recognition. Mutual recognition of judicial decisions of other Member States within a common area for justice requires and implies a court to approach EAW on the basis that they must be executed without delay. This is also stipulatedin *Caldarelli v Court of Naples, Italy* [2008] UKHL 51, [2008] 1 WLR 1724, where Lord Bingham stated:

> "(…), but ordinarily statements made by the foreign judge in the European Arrest Warrant, being a judicial decision, will be taken as accurately describing the procedures under the system of law he or she is appointed to administer."

We point out that this approach has to be adopted in general to statements in an EAW made by a judicial authority. This approach is also taken by Dutch and Irish courts. As an example we refer to a decision of the District court of Amsterdam, LJN BO7884. This court concluded:

> "In principle it is up to the issuing judicial authority to judge whether an offence for which surrender is sought does fall under the list and which offence must be ticked. Only in those cases where there is evident inconsistency between the description of offence and the category ticked, should this lead to the conclusion that the issuing judicial authority has not in reasonableness indicated the offence for which the requirement of assessing double criminality does not apply."

In *Palar v Court of First Instance of Brussels* [2005] EWHC 915, the court found that scrutiny into the sufficiency or quality of evidence supporting the request for surrender is not permitted, but that the court has to consider whether the description of the alleged conduct is fair and accurate and capable of constituting the extradition offences set out. The contention advanced by Paul with regard to the third charge fails because a competent national court in Z has already concluded that the charges were all offences under the Criminal Code of Z and all abstractly punishable by imprisonment. The fact that the latter charge of the offences is punishable by up to eight years is sufficient in accordance with article 2.2 of the Framework Decision. The executing Member State Y shall under the terms of the Framework Decision and without verification of the double criminality of the act, give rise to surrender pursuant to the EAW.

In conclusion, we find that the executing authority can only check whether the description broadly matches the box ticked, but cannot scrutinise this in detail. We think, given the aforementioned description of rape, that the description made by the issuing authority broadly matches the offence rape. After all the descriptions mention penetration and lack of consent. A deeper scrutiny of the offence is not possible.

Charge 1 and 2

Thedefence lawyer has argued regarding offence 1 that it does not amount to a criminal offence under the law of Y and Z. Regarding offence 2 he has argued that there is a lack of willingness as Paul did not want to commit the crime.

Charges 1 and 2 are indeed notFramework offences and therefore they require us to assess dual criminality.These offences, unlawful coercion and sexual molestation, are unlawful in both countries Y and Z.It is important that the description of the alleged conduct has to be fair and accurate. This means that a valid EAW contains particulars of the alleged conduct as required by article 2.4 of the Framework Decision:

> "For offences other than those covered by paragraph 2, surrender may be subject to the condition that the acts for which the European Arrest Warrant has been issued constitute an offence under the law of the executing Member State, whatever the constituent elements or however it is described."

Neither the Treaty of the European Union nor the Framework Decision ask for harmonisation of material criminal law before applying an EAW. In the *Advocatenvoor de Wereld* case the Court acknowledges that a vague description of an offence can cause an inaccurate EAW, but the Court has stressed that the Framework Decision does not aim at harmonisation of the material criminal law.

Should you find the description insufficient, article 15 of the Framework Decision provides the possibility for us, the executing judicial authority, to request the issuing Member State for the necessary supplementary information if it finds the information communicated by the issuing Member State to be insufficient to allow it to decide on surrender. According to us this is sufficient for the executing Member State regarding the mutual recognition.

In conclusion we think that it is not necessary to scrutinise the description. Since the offences unlawful coercion and sexual molestation are also unlawful in country Y, the principle of double criminality has been met.

2. The issuing of the European Arrest Warrant

Fleeing and non-cooperation

Pauls'sdefence lawyer has first argued that a defendant's refusal to voluntarily attend a hearing in a foreign country is perfectly legal. In our opinion, whether or not the refusal to voluntarily attend a hearing in a foreign country constitutes the crime of fleeing and non/cooperation should not be a consideration when judging this EAW. The court may have considered that the behaviour of Paul is equivalent to fleeing and non/cooperation, but the EAW is not based on this offense. The EAW is based on the national arrest warrant and as such the offences for which the EAW has been issued are: unlawful coercion, sexual molestation and rape.

In conclusion we believe that the decision whether or not the EAW should be executed should be based on the offences the EAW is issued for. Whether it is a crime that Paul has not attended the hearing is irrelevant.

Proportionality

Paul'sdefence lawyer has argued that proportionality in this case would require that Paul's interrogation should have been carried out through a videolink or by any other legal tool provided by the instruments of mutual legal assistance in criminal matters.

We would like to refer to the report of the Commission to the European Parliament and the Council, dated April 11, 2011, in which the issue of proportionality is discussed. The Commission has pointed out that the application of the EAW has been undermined by the systematic issue of EAWs for the surrender of persons sought in respect of often very minor offences. The Commission also highlights that there is a general agreement among Member States that a proportionality check of the seriousness of the offence is necessary.

When looking at the case of Paul, we find that the offence of fleeing and non-cooperation in itself may not be serious enough to pass a proportionality test. However, the EAW in question is not based on this offence, but on several other crimes, including rape which, in the requesting state, is punishable by imprisonment of up to eight years. Therefore we conclude that the combined offences on which the EAW is based, would pass a proportionality test when looking solely at the seriousness of the crime.

However, the Commission also points out a number of circumstances taken into account within a proportionality check, besides the seriousness of the crime. One of the factors to be

taken into account is the existence of an alternative approach that would be less onerous for both the person sought and the executing authority and a cost/benefit analysis of the execution of the EAW. Considering this, we believe that the check of proportionality should be regarded broader than just the seriousness of the offence the person is sought for. In this case, as the defence lawyer argued, it would have been a possible alternative to hear Paul using a videolink. This would have been less onerous for both Paul, and country Y, as the executing state.

As we will explain further under our next point, we think that the EAW is not issued solely to hear Paul, but also with a view to his prosecution. Videolink therefore is obviously not a possible alternative for this prosecution. However, given the fact that it is not certain yet whether or not the hearing will be followed by an actual prosecution, it could also be argued that the EAW for Paul is not (yet) proportionate.

Should the EAW be considered disproportionate, must the EAW be refused? Whether or not the EAW is proportionate is not one of the grounds for refusal within the Framework Decision. Even though currently, given the experience with the EAW, there seems to be a general consensus that there should be a proportionality test, we do not think this test should be performed by the executing Member State. After all, the system of the EAW is founded on a high level of trust between the Member States. The executing Member State should therefore trust that the EAW is not disproportionate. It is therefore upon the issuing Member State and not the executing Member State to check whether or not the EAW is proportional.

This viewpoint is in accordance with the Handbook on how to issue a EAW 8216/1/08 REV 2 COPEN 70 EJN 26 EUROJUST 31:

> "(3. criteria to apply when issuing an EAW – principle of proportionality) Considering the severe consequences of the execution of an EAW as regards restrictions on physical freedom and the free movement of the requested person, the competent authorities should, before deciding to issue a warrant, bear in mind, where possible, considerations of proportionality by weighing the usefulness of the EAW in the specific case against the measure to be applied and its consequences.(-)

The Commission also shares this point of view as can be deducted from their statement that an overload of disproportionate requests can lead to a situation in which the executing judicial authorities, as opposed to the issuing authorities, feel inclined to apply a proportionality test, even though this is not in line with the framework agreement. The Commission appears to not

look favorable upon such a development. Of course, since country Y has just implemented the Framework Decision without further additions, we do not have sucha ground for refusal.

In conclusion, although it could be argued that the EAW is not proportional, this does not lead to the refusal of the request to surrender Paul.

The requirement of a decision to prosecute

Furthermore the defence has argued that the Framework Decision requires that the prosecutor of the issuing Member State has decided that Paul should be prosecuted *before* the EAW is issued. To weigh this argument, it is necessary to have a look at the requirements set out in the Framework Decision. Article 1 of the Framework Decision refers to the definition of the EAW and the obligation to execute it. The first paragraph states that:

> "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 criminal prosecution or executing a custodial sentence or detention order."

Article 8 of the Framework Decision requires that the EAW contains:

> "evidence of an enforceable judgment, an arrest warrant or any other enforceable judicial decision having the same effect, coming within the scope of articles 1 and 2."

In country Z a national arrest warrant was issued by the court against Paul. This court issued that warrant after considering that Paul was strongly suspected of having committed the three aforementioned offenses. Country Z has included evidence of the national arrest warrant in the EAW. The first part of the requirement set out in article 8 is therefore fulfilled. The next question is whether this is enough.

Considering article 1, the purpose of the EAW must be to conduct criminal prosecution or executing a custodial sentence. In this case there is no custodial sentence, and so far, criminal prosecution has not commenced. It is possible to defend the statement of the defence, especially from a practical viewpoint. At times the EAW is used, for example by Belgium, to have people surrendered for interrogation purposes only. This practice is onerous for an executive Member State and for the person sought. Our opinion is however that the solution for this problem lies in the aforementioned proportionality check by the issuing Member State

and by using possible alternatives, such as using videolink to interrogate a suspect. We do not find that article 1 should be interpreted restrictively.

Article 1states that the EAW must be issued for the purpose of prosecution. In our opinion, this does not entail an obligation that this prosecution must have already started. The Dutch version of the Framework Decision appears even less strict than the English version stating: "(…) met het oog op de aanhouding en de overlevering door een andere lidstaat van een persoon die gezocht wordt met het oog op strafvervolging (…)".

This text uses the phrase (similar to) "with a view to" twice. Not only with a view to the arrest, but also with a view to prosecution. This definitely does not seem to hold the obligation that that prosecution must already have commenced.The issuing authorities' decision speaks of a strong suspicion. This seems to give some inclination that the purpose of the EAW is to prosecute, even though the prosecution has not started yet. Especially given the fact that in country Z a formal interrogation is required before formal charges can be brought to a criminal court.Prior to the interrogation of Paul the prosecution cannot commence, however this does not mean that the EAW does not have the purpose of prosecution.

If a restrictive interpretation would be used, it would force countries such as Z, to change their laws in order to be able to make use of the EAW. This is especially unfavorable since the requirement in the law of country Z protects the suspect, who cannot be prosecuted before he is formally interrogated.
Our conclusion is that the fact that prosecution has not commenced yet should not lead to refusal of the EAW, since the EAW does have the purpose of prosecution.

3. The consequences of a potential execution

The third point raised by Paul's defence lawyer regards the fact that Y requires the issuing authorities to enable fellow countrymen to return to Y after trial, using the optional ground for non-execution of the EAW as set out in article 5 paragraph 3 of the Framework Decision:

> "The execution of the European arrest warrant by the executing judicial authority may, by the law of the executing Member State, be subject to the following conditions: where a person who is the subject of a European arrest warrant for the purposes of prosecution is a national or resident of the executing Member State, surrender may be subject to the condition that the person, after being heard, is returned to the executing

Member State in order to serve there the custodial sentence or detention order passed against him in the issuing Member State."

Paul's defence lawyer seeks to get this guarantee, so Paul can serve possible jail-time after trial in Y. In short Paul seeks the same treatment as Y's nationals, although he does not have the nationality of Y.

A similar case was before the Court of Justice of the European Communities by the Netherlands (C-123/08 *Dominic Wolzenburg*). The court ruled that Dutch legislation may provide for different treatment of Netherlands nationals and nationals of other Member States with regards to the execution of an EAW. However according toDirective 2004/38/EC on residence of citizens of the Union, such citizens who have resided legally for a continuous period of five years in the host Member State are to have the right of permanent residence there. Directive 2004/38/EC, while allowing citizens of the Union to apply for a document attesting to their permanent residence in the host Member State, does not require such a formality. Consequently, the Court ruled that the Netherlands could not, in addition to a condition as to the duration of residence in that State, make application of the ground for non-execution of an EAW subject to supplementary administrative requirements, such as possession of a residence permit of indefinite duration.

Our conclusion is that, as Paul lived in country Y for more than 12 years, it would indeed be discriminatory not to require the requesting authorities to enable Paul to return to Y after the trial.

We hope we answered the questions set out by Paul's defence lawyer sufficiently. Should you like to discuss the case with us, we are available tomorrow, 31 October 2012, at the Grand Amphitheatre between 10.15 and 11.45 AM.

Bibliography:

Fichera, M., The implementation of the European Arrest Warrant in the European Union: law, policy and practice, PhD thesis University of Edinburgh, 2009.

Mackarel, M., The European Arrest Warrant – the Early Years: Implementing and Using the Warrant, in: European Journal of Crime, Criminal Law and Criminal Justice (2007) 37-65.

Assange case [2011] EWHC 2849