

# THEMIS FINAL 2012

## PRACTICAL CASE

*(Inspired on a case drafted by Prof Dr Joachim Vogel, Munich's Ludwig-Maximilians University for the Senator's Training Seminar, held in Edinburgh, Scotland, in June 2012)*

On March 20<sup>th</sup>, 2012, **Caroline**, a citizen of EU Member State Z went to a police station of her country and reported that:

- a) She had met **Paul**, a national of the EU Member State X, living and working in EU Member State Y for more than 12 years, while he was spending his holidays in Member State X.
- b) She had invited **Paul** to her apartment on 13 March 2012; that they kissed and undressed, that **Paul** laid on top of her, held her arms, spread her legs and tried to have unprotected sex (vaginal intercourse) with her; that she resisted and insisted on the use of a condom, to which **Paul** grudgingly agreed;
- c) Subsequently, they had protected sex (vaginal intercourse), but that the condom got torn in the course of events, but **Paul** nevertheless consummated intercourse and ejaculated;
- d) She also invited **Paul** again to her apartment on 17 March 2012; that they repeatedly had sex using condoms during the evening; that in the early morning of 18 March 2012 she awoke and noticed that **Paul** was having sex (vaginal intercourse) with her without using a condom; as she was still half asleep she let it happen; that **Paul** consummated intercourse and ejaculated.

**Caroline's** other concern was that she might have contracted the HIV virus through the unprotected intercourse and that she had in vain asked **Paul** to undergo an AIDS test and inform her of the results.

The competent Public Prosecutor, after some investigations, came to the conclusion that there were reasonable grounds to suspect that **Paul** had committed three criminal offences under the Criminal Code of Z, namely:

- 1- Unlawful coercion by lying on top of C, holding her arms, spreading her legs and trying to have unprotected sex (vaginal intercourse) with her, on the 13<sup>th</sup>;
- 2- Sexual molestation by consummating intercourse and ejaculating although the condom had torn on the same occasion;
- 3- Rape by having sex (vaginal intercourse) with the initially-sleeping and then half-asleep **Caroline** without using a condom on the 18<sup>th</sup>.

Therefore, he notified **Paul** to travel to Z for a formal interrogation, as this act is mandatory under the Criminal Procedure Code of Z in order for formal charges be brought before a criminal court.

**Paul** refused to travel to Z.

In face of this refusal the Prosecutor applied for a national arrest warrant at the competent national court in Z against **Paul**. That court issued this warrant after concluding that **Paul** was strongly suspected of having committed those offences under the Criminal Code of Z, all abstractly punishable by imprisonment (the latter of the offences punishable by up to eight years due to it being considered particularly serious). Furthermore the court considered that his refusal to return to Z was equivalent to fleeing and non-cooperation.

Based on the national arrest warrant, and the grounds supporting it, the public prosecutor in Member State Z issued a European Arrest Warrant (to which he was competent under the internal law) against **Paul**.

Arrested in Member State Y, **Paul** is arguing that the EAW must not be executed.

*As a trainee in a court in Member State Y, your tutor, who happens to be the judge to whom this case was distributed, requests from you a short report about the relevance of some of the arguments Paul's defence lawyer has advanced in order to sustain his point of view that Paul should not be surrendered to Member State Z. These are:*

- 1- In relation to the charges:
  - a) Facts related to charge (1) do not, as a matter of law, amount to a criminal offence, both under the law of Y and the law of Z.
  - b) Facts related to charge (2) do not amount to a criminal offence, on the basis of the lack of willingness indispensable to integrate the criminal offence, both under the law of Y and Z. In fact, C did not allege that **Paul** noticed or was aware of the rupture of the condom.
  - c) Facts related to charge (3) do not amount to "rape" in the sense of the Framework Decision on the European Arrest Warrant.
- 2- In relation to the issuing of the European Arrest Warrant:
  - a) A defendant's refusal to voluntarily attend a hearing in a foreign country is perfectly legal. Moreover, proportionality in this particular case would require that **Paul**'s interrogation should have been carried out through video-link or by any other legal tool provided by the instruments of mutual legal assistance in criminal matters.
  - b) The public prosecutor in Member State Z has not yet taken the decision whether **Paul** should be prosecuted or not (whether criminal charges should be brought before a competent criminal court or not). The EAW FD requires that such a decision had already been taken.
- 3- In relation to the consequences of a potential execution:
  - a) If **Paul** is transferred to Z, he should be so under the condition that he will be returned to Y after the trial. Although it is true that Y grants that privilege only to own nationals, it is discriminatory to exclude other EU nationals living in Y of the same privilege.

## JURY NOTES TO THE TEAMS:

- 1- For the purposes of this exercise please consider that:
  - a) EU COUNTRIES X, Y and Z have implemented the Framework Decision 2002/584/JHA on the European Arrest Warrant in their national legal systems.
  - b) Their implementation laws do not contain any legal statement different from the ones existing in the Framework Decision which may be indispensable to answer the questions asked.
  - c) The integral contents of the Lisbon Treaty are fully applicable in the Member States involved.
  - d) In the European Arrest Warrant issued against **Paul**, the issuing judicial authority signalled the box referring to *rape* in table e).
- 2- If you consider that any other facts beyond the ones indicated in the practical case are **indispensable** to allow you for a good decision of the case, you are allowed to invent them at your own discretion. However, those facts and an explanation of the reasons why you deem them **indispensable** to your draft should be provided in an extra addendum of one page maximum.
- 3- Please address yourselves directly to the questions asked, remembering that your paper must not exceed 10 pages in WORD format, Times New Roman, size 12, line spacing 1.5.; a cover page may be added to the above limit.
- 4- Your paper must be finished and delivered to THEMIS Secretariat by Tuesday, 6pm.