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28 Traps of Judicial Cooperation in Criminal Matters: The *Tobin* Case

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28.1 Introduction

In 2002 the Hungarian court adopted its judgement regarding the case of the Irish driver, Francis Ciarán Tobin who hit to death two children in Hungary in April 2000. According to the final judgement, the court imposed three years of imprisonment provided that the inmate could not be released earlier than eightteen months and he was also banned from public driving for 3 years. Mr. Tobin left Hungary during the first instance procedure. His criminal offence remained unpunished until 2014 and he was not surrendered from Ireland to Hungary for executing his sentence even though EU law has made surrender in such cases obligatory. Pursuant to the 2002/584/JHA framework decision of the European Union on the European arrest warrant and the surrender procedures between Member States[1] (the 'Framework Decision') surrendering the defendant to the requesting country could be mandatory if the requesting court issued an arrest warrant in order to execute a sentence which is of at least 4 months prison term and if the Framework Decision does not set out grounds for non-execution. In case of Mr. Tobin such non-execution grounds did not exist.

The case confirms my three hypotheses in relation to European criminal law. My first hypothesis is a rather obvious point the case convincingly proves: European criminal justice that used to operate along the lines of intergovernmentalism was inefficient. Historically joint crime prevention and criminal investigation deemed as the counterpoint of free movement of persons.[2] However, a field of law which slowly develops on a case-by-case basis is not suitable for remedying the negative side-effects of an expanded freedom. I believe that only closer cooperation between Member States pursuant the dictates of supranational EU law could ensure effective crime prevention and prosecution in a progressively uniting Europe. Although the Lisbon Treaty scrapped the Union's former pillar system and moved criminal law under the heading of supranationalism, the reminiscent

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1 Council framework decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (2002/584/JHA), Official Journal L 190, 18 July 2000, pp. 1-20.

2 *See*: Section 2 of Art. 3 of the Treaty on the European Union (formerly Art. 2 of EC Treaty).

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of intergovernmentalism is still there, since Union law still allows for a number of exceptions and exemptions in the field. Also voices anxious about national criminal sovereignity and those propagating the reallocation of powers between Member States and the Union to the detriment of the latter in the area of freedom, security and justice become louder and louder. Therefore I consider my seemingly obvious point on blaming European criminal justice to be ineffective or even inoperational if intergovernmentalism was retained, an important one. Lobbying for less Europe in the criminal field will lead to substandard laws representing shallow compromises, inefficient application and lack of enforceability.

My second hypothesis overrides the terrain of criminal law. I predicate that partial communautarisation of criminal law, in addition to fully accepting the priority of EU law will not occur and consequently, Member States will not resign, not even, from a part of their national sovereignty until the human rights paradigm, namely the EU's so-called fundamental rights culture,[3] is not expanded with respect to the field of criminal law including criminal procedural guarantees and minimum harmonisation rules regarding prison conditions.

In this paper I will proceed as follows. In the second chapter the facts of the case will be presented along with procedural history in Hungary, i.e. the first instance decision and the final judgment determining Mr. Tobin's criminal responsibility and imposing sanctions. The third chapter addresses the European arrest warrants issued for the execution of Tobon's prison sentene and the denial of surrender in the first round, which was the result of a faulty implementation of the European arrest warrant on the side of Ireland. This mistake was remedied by the Irish legislative and by reference to the amended law, Hungary issued another arrest warrant. In the fourth chapter the reasons of the Irish court for rejecting surrender again in a second round will be examined in greater detail. The fifth chapter includes a review of the extralegal elements of the case, such as the political controversies between the two states that highly affected the outcome of the actual case. In the sixth chapter the road to the solution of the *Tobin* case will be explained. In the seventh chapter I will provide the theoretical framework explaining how the fear to transfer part of national sovereignity led to the refusal of complying with a European arrest warrant and boycotting the enforcement of a prison sentence. I will also summarise the lessons learned as to the functioning of EU criminal cooperation along intergovernmental lines and formulate some recommendations for the future.

3 Communication from the Commission, Strategy for the effective implementation of the Charter of Fundamental Rights by the European Union, Document COM(2010)0573, final, 19 October 2010.

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28.2 Facts of the Case and Procedural History

On 9 April 2000, the 36 years old Irish citizen, Francis Ciarán Tobin was driving through a Hungarian village with his company's S40 Volvo with 70-80 km per hour, a significantly faster than the allowed 50 km per hour speed limit. His pregnant wife and family friends were also travelling in the car. At quarter to four following an overtaking manoeuvre in the city of Leányfalu on the way from Visegrád to Szentendre, he hit two children, the four and half years old Márton Zoltai and his one and a half years old sister, Petra, who both died at the scene. The Pest County Chief Prosecutor's Office brought charges against Mr. Tobin for recklessly causing road traffic accident resulting in death.[4] At the time of the offence, Mr. Tobin has been resident in Hungary as senior manager of the Irish Life insurance company. he had initially been required to surrender his passport, it was subsequently returned to enable him to travel to Ireland for the wedding of his wife's sister. It was on 28 August 2000 that Mr. Tobin requested the return of his passport by referring to the important family event. The Irish ambassador, Jim Flavin also supported the return of the passport in his letter written on 18 September, when the diplomat stated: 'I personally know Mr. Tobin for more than one year and I greatly appreciate him.'[5] Upon the initiative of the Pest County Chief Prosecutor' Office, the Buda Surroundings District Court[6] allowed the return of passport to Mr. Tobin and pursuant to the criminal procedural code,[7] the court also ordered the defendant to deposit HUF 500,000 as so-called insurance. The sum of the insurance was deposited and Mr. Tobin authorised his defence attorney to receive official documents on his behalf, then he left Hungary.

In possession of his lawfully returned passport, Mr. Tobin travelled to Ireland with his family and after the wedding he came back to Hungary on 9 October 2000. His defence attorney notified the court on the same day that the defendant was in Hungary again; nevertheless the Hungarian State did not show interest towards Mr. Tobin. He was not required to submit his passport to the Hungarian authorities and no action was taken with respect to ensuring Mr. Tobin's presence during the procedure or providing his return in case of imprisonment. At the end of November 2000, Mr. Tobin's definite term labour contract expired and he travelled back to Ireland with his family. He had valid residence permit until 31 December 2000, therefore after this period he could not stay legally in Hungary, even if he intended to, unless he undertook certain steps in this respect.

4 Pest County Chief Prosecutor's Office, Indictment No. 2644/2000/2, 28 August 2000.

5 Zsófia Gergely, 'Nagykövet kampányolt az ír gázoló hazaengedéséért', www.origo.hu/itthon/20080413-nagykovet-kampanyolt-az-ir-gazolo-hazaengedeseert.html (13 April 2008).

6 As pursuant to the traditions in common law countries we identify the Irish judges by their names, I intend to also identify the Hungarian judges by their names. *Mária Ficzere Bereczné* passed the decision allowing the deposit of insurance.

7 Para. (1) of Art. 393/A of Act I of 1973.

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On 7 May 2002, Mr. Tobin was convicted in absentia to 3 years of imprisonment for recklessly causing a road traffic accident resulting in death[8] by the Buda Surroundings District Court, then in the procedure of second instance the Pest County Court approved the judgement with the condition that the convict could be released on probation after serving at least half of his punishment.[9] The convict did not, however, return to Hungary to serve his sentence.

During the Hungarian procedure two mistakes were committed. The first was allowing Mr. Tobin leave the country upon depositing insurance, and the second was letting him leave for a second time. Using the legal instrument of insurance is disconcerting from several perspectives. First, this legal institution mainly serves ground for the state to deduct the amount of the fine, if the final judgement imposes pecuniary sanction on the defendant.[10] In the *Tobin* case, the imposition of imprisonment was highly predictable as according to paragraph (2) of Article 187 of Act IV of 1978 on the Criminal Code a person who causes road traffic accident which results in death by recklessly breaching the rules of public road transport shall be punished by imprisonment form five to ten years. At the time of allowing the deposit of insurance the charges were already known, which foretold the possibility of imprisonment. Beside envisioning pecuniary fines as sanctions the court therefore should have taken into consideration a scenario where imprisonment is imposed and where the insurance could not fulfil its function. Insurance was not suitable for guaranteeing the convict's return to Hungary because as opposed to the public opinion, insurance is not a security deposit or. The amount of two days emolument[11] would certainly not have retained Mr. Tobin to avoid punishment anyway. Letting Mr. Tobin deposit insurance is also incomprehensible because according to the relevant provision, this legal institution could be applied only if the defendant lives abroad, and however Mr. Tobin was a foreign citizen, he did not live abroad at the material time.[12]

The second major problem with letting Mr. Tobin leave the country without taking steps to ensure his presence in case imprisonment was the sanction was that no bilateral agreement existed between Hungary and Ireland on the basis of which extradition of an own citizen was compulsory. At the time of the accident and sentencing, extradition was regulated by a 1957 convention adopted in the framework of the Council of Europe ratified by Ireland in 1966 and by Hungary in 1993.[13] This convention expressly declares that each

8 Buda Surroundings District Court, Case No. 2.B.1308/2000/20, 7 May 2002. Members of the section: Attiláné Pető, associate judge; Dr. Gyöngyvér Szegedi, Section Head; Józsefné Ur, associate judge.

9 Pest County Court as court of second instance, Case No. 2. Bf. 740/2002/6, 10 October 2002. Section Head: Dr. Gyuláné Sahin-Tóth. Other members of the section: Erzsébet Garzó and Ildikó Lőrinczy.

10 Para. (2) of Art. 393/A of Act I of 1973.

11 http://ciaran-tobin.blogspot.hu/2012/06/humanus-jesz-kifogastalan-nem-annyira.html.

12 Para. 1 of Art. 393/A of Act I of 1973 – 'In case the defendant lives abroad […].'

13 Act of XVIII of 1994 on the announcement of the Euroepan Extradition Convention signed in Paris on 13 December 1957 and its Protocols.

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state, which ratified the convention, has to right to refuse the extradition of its own citizens.[14] The idea of a European arrest warrant which ensures the surrendering of own citizens in respect of EU Member States was not yet come into existence at the time, and Hungary's accession to the EU was also far away at that time.[15] Therefore it seemed very unlikely that Mr. Tobin would ever return.

In May 2004 Hungary acceded to the European Union and could soon make use of an EU instrument on simplified extradition called surrender: the European arrest warrant which provides the possibility to Member States to surrender even its own citizens for the sake of conducting criminal proceedings or in order to impose punishments on convicts.[16] In Hungary the Framework Decision entered into force in 2004[17] and with Hungary's accession to the EU, the possibility was given to request the surrender of Mr. Tobin. Hungary soon used this opportunity to seek the return of Mr Tobin to Hungary.

28.3 Refusing Surrender in the First Round

The issuance of the first arrest warrant is not clarified, as it could be dated somewhere between October 2004 and December 2005.[18] As the EAW was considered not to be sufficiently precise, it was supplemented by two further warrants, generating some discomfitures on the side of the charge, defence and judge as well. The charges in Hungarian are identical in all of the three arrest warrants, namely the causing of criminal accident pursuant to Article 187 of the Criminal Code then in force, but the English translations are different. There are discrepancies in the historical facts in the original Hungarian texts and consequently in the English translations, too. Only the first arrest warrant, on the basis of which Mr. Tobin was arrested, emphasises that the tragedy occurred after an overtaking. The arrest warrants did not include uniformly that according to the final judgement, Mr. Tobin could be released only after serving at least half of his prison sentence.

Mr. Tobin was arrested in Ireland pursuant to the first arrest warrant on 12 January 2006, then, Judge Peart, member of the High Court of Ireland, released the convict subject

14 According to Point A of Section 1 of Art. 6 of the Paris Convention on Extradition, 'a Contracting Party shall have the right to refuse extradition of its nationals.'

15 Mr. Tobin initiated to serve his punishment in the course of January 2014. After deducting costs related to criminal proceedings, HUF 335°296 remained from the deposit which will be reimbursed following the fulfilment of punishment. Zsófia Gergely, 'Mi engedtük el' – amit mindenki rosszul tud az ír gázolóról, 19 February 2014, http://hvg.hu/itthon/20140219_mi_engedtuk_el_amit_rosszul_tud_ir_gazolo.

16 *See* footnote 1.

17 The Framework Decision was transposed in Hungary by Act CXXX of 2003 and in Ireland by Act 45 of 2003.

18 According to the judgement of the Irish high court, 12 October 2004 is indicated on the document, while pursuant to Judge Peart it is likely that it was signed in the course of April 2005. Justice Peart from the High Court received the request to decide on the arrest warrant on 20 December 2005.

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to the payment of € 3,000 criminal bail and € 6,000 security, in addition to the seizure of his passport and fulfilling the obligation to report at the Ashbourne police station three times a week.

The High Court of Ireland refused on 12 January 2007 the request for surrender on the following grounds.[19] According to Section 10 of the Irish act adopted in 2003 to implement the Framework Decision,[20] and amended by Section 71 of the Criminal Justice (Terrorist Offences Act),[21] the convict could be surrendered for the purposes of execution if he or she fled from the issuing state before he or she commenced serving the sentence or before he or she completed serving the punishment. The court found that pursuant to the act implementing the Framework Decision, Mr. Tobin did not flee from Hungary as he left the country following the expiry of his definite term labour contract and in the lawful possession of his passport. The Minister for Justice, Equality and Law Reform submitted an appeal to the Supreme Court. On 3 July 2007 the Supreme Court did not find the appeal grounded and rejected it.[22]

28.4 Refusing Surrender in the Second Round

Following the unsuccessful attempt to extradite Mr. Tobin, the Irish and Hungarian legislators each responded to the discrepancies in their laws: Hungary amended the regulation on security and Ireland modified the act implementing the Framework Decision in order to avoid the refusal of extradition in similar cases arising in the future. The Irish legislator accordingly amended its criminal law with the introduction of Criminal Justice (Miscellaneous Provisions) Act, 2009. Section 6 of the 2009 Act repeals each and every obstacle to the surrender of Francis Ciarán Tobin or any other convict in a similar position. Pursuant to the amendment, which could be inspired by the troubled outcome of the Hungarian incident in the framework of which three arrest warrants were issued with different contents, future arrest warrants do not need to be 'duly' formulated any more. The amendment also removed the conjugative conditions according to which prior to the commencement or the completing the punishment, the convict needs to have 'fled from the issuing state' from the country where the arrest warrant was issued.[23]

19 High Court, *Minister for Justice Equality & Law Reform v. Tobin* [2007] IEHC 15, 12 January 2007.

20 European Arrest Warrant Act 2003.

21 Criminal Justice (Terrorist Offences) Act 2005.

22 Supreme Court of Ireland, *Minister for Justice, Equality & Law Reform v. Tobin* [2008] IESC 3, 3 July 2007. Justice Fennelly provided his reasoning on 25 February 2008. Basically, the judgement did not contain new components in comparison with the judgement at first instance.

23 No. 28 of 2009 Criminal Justice (Miscellaneous Provisions) Act 2009, being effective from 25 August 2009. '6.—Section 10 (as inserted by section 71 of the Criminal Justice (Terrorist Offences) Act 2005) of the Act of 2003 is hereby amended—
(a) by the deletion of the word 'duly',

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In September 2009, Hungary issued another arrest warrant on the basis of which Mr. Tobin was detained on 10 November 2009. The following day he was released in return of criminal bail, passport removal as well as reporting obligation at the police station three times a week. In relation to the issuance of the fourth arrest warrant, we may ask whether arrest warrants could be issued again and again after final refusal of surrender by referring to the change in the regulatory environment. As to their legal nature, I am confident that surrender and extradition could be considered as administrative decisions, or rather the legal instruments have both administrative and criminal law features. Given that these legal instruments do not serve to determine criminal responsibility in any way,[24] the principle of ne bis in idem does not apply, or in other words there is no procedural *res iudicata*. As András Bragyova, judge of the Hungarian Constitutional Court, formulated in his dissenting opinion regarding the constitutional assessment of an international agreement extending the scope of the Framework Decision on the European arrest warrant to Iceland and Norway: 'surrender is not equal to exercising punitive power or qualifying the committed criminal offence, but surrender is rather deemed as a mere administrative procedure which facilitates achieving criminal justice in the state requesting the surrender, and consequently it could be considered as a qualified legal assistance between states, in the framework of which not information is surrended or extradited, but the offender him- or herself is. Surrender involves criminal law issues, nevertheless in the strict sense, surrender is not a criminal law procedure as its subject is not to determine guilt or impose punishment, but it merely aims to settle whether the conditions, including grounds for non-execution of surrender are present.'[25] The European Court of Justice has come to the same conclusion in a case decided in 2008.[26] The Irish court also shared this viewpoint on the

(b) in paragraph (c) by the insertion after 'offence' of 'in that state',
(c) in paragraph (d)—
(i) by the insertion after 'imposed' of 'in that state',
and
(ii) by the deletion of the following words:
'and who fled from the issuing state before he or she—
(i) commenced serving that sentence, or
(ii) completed serving that sentence'.
Amendments to section 10 of Act of 2003.'

24 Péter M. Nyitrai, *Nemzetközi bűnügyi jogsegély Európában*, Budapest, KJK-Kerszöv, 2002, p. 23.

25 Concurring opinion of Constitutional Judge András Bragyova with respect to Constitutional Court Decision No. 32/2008 of 12 March 2008 on the constitutional assessment of Arts. 3 and 4 of the act adopted by the Hungarian Parliament on 11 June 2007 in relation to the promulgation of the agreement between the European Union and the Republic of Iceland and the Kingdom of Norway on the surrender procedure between the Member States of the European Union and Iceland and Norway, in addition to Paras. 2 and 3 of Art. 3 of the same agreement. *See also* Krisztina Karsai and Katalin Ligeti, 'Magyar alkotmányosság a bűnügyi jogsegélyjog útvesztőiben', 6 *Magyar Jog* (2008), pp. 399-408.

26 C-296/08 PPU case, *Criminal law proceedings against Ignacio Pedro Santesteban Goicoechea*, Opinion of Advocate-General Juliane Kokott, 6 August 2008, Paras. 55-56.

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nature of arrest warrants and agreed to decide in the merits whether to approve the fourth Hungarian request for surrender.

Following several hearing postponements, on 11 February 2011 Judge Peart, contemplating with the Irish amendment in due course, approved the surrender request repeated in the fourth European arrest warrant.[27]

Mr. Tobin submitted an appeal against allowing the surrender, then 9 months after the judgement of first instance had been rendered, but prior to the adoption of the judgement of second instance, on 9 November 11 he voluntarily went to surrender custody. Mr. Tobin most likely was aware of the fact when he arrived to this decision that in case if he still needed to return to Hungary pursuant to the judgement of second instance, the months served in Ireland would have been deducted from the entire punishment. However, the Irish Supreme Court rejected Hungary's request for surrender.

On 19 July 2012 the Supreme Court of Ireland adopted its 3:2 judgement and reversed the judgement of first instance resulting in a decision where the surrender of Mr. Tobin to Hungary was refused.[28] There was not any definite consensus between the judges and each of them in favour of the decision composed a separate concurring opinion, while the other judges being in minority provided their dissents. Taking into consideration the first and second instance judgements, we may conclude that altogether three judges (Justices Fennelly, O'Donnell and Hardiman) agreed on the surrender, while three other judges (Judge Peart at the first instance, Chief Justice Denham and Justice Murray at second instance) came to an understanding to refuse it. In the following I will explore the second instance decision in the second round in greater detail.

28.5 Legal Issues

Chief Justice Denham exhaustively dealt with all the possible points arising in the matter, in order to decide whether Mr. Tobin's second-instance extradition procedure and, if so required, his actual surrender could in any way be in violation of the Irish Constitution – especially regarding the principles of the separation of powers according to Chapter 6 and of the independence of the judiciary according to Chapters 34 and 37. In the interest of resolving the issue, the prosecution and the defense agreed on addressing eight questions, some of which had several sub-questions. In my opinion, only the first major question had relevance to the matter, as there had already been decisions on all the other points at the first instance rulings, and the facts, the evidence and the relevant legal articles have not

27 High Court, *MJELR v. Tobin* [2011] IEHC 72, 11 February 2011 (Judge Peart does not number the paragraphs, thus I cannot provide more precise citations).

28 Supreme Court of Ireland, *Minister for Justice Equality and Law Reform v. Tobin*, [2012] IESC 37, 19 June 2012.

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changed, and even the composition of the panel of judges was hardly altered. Neither were the judges – even including the ones who concurred in the majority view – swayed by these excuses, with the sole exception of Justice Hardiman, who only stated that, even in the event that he hadn't refused the request for surrender on the basis of the first point, he would have continued to study the other points listed, and could not exclude the possibility that he would have ended up refusing the surrender on these other bases.

The legal issues to be decided on are the following (paragraph 16):[29]

- Does the procedure in the second round constitute an abuse of process, violate separation of powers, violate Section 27 of the Interpretaton Act 2005?
- How to interpret the requirement of the Transfer of Execution of Sentences Act 2005 according to which a prison sentence can only be executed if the convict 'fled' from the issuing state?
- Does lack of reciprocity, i.e. the fact that Hungary would not surrender a Hungarian citizen to Ireland in a reverse scenario have any significance?
- Does the offence identified in the European arrest warrant issued by Hungary correspond to an offence under Irish law?
- Taking the differences in the various European arrest warrants issued by Hungary into consideration, are they sufficiently precise so as to serve as the basis of surrender?
- Can a person be surrendered to a Member State in respect of a conviction imposed by the courts of that country prior to its EU accession?
- Does it influence the validity of the warrant that at the time of issuing it, the amendment to the law possibly enabling Mr. Tobin's surrender, i.e. the provisions of the Criminal Justice (Miscellaneous Provisions) Act 2009 were not yet published and disseminated?
- Can surrender be denied on other grounds, such as the period of ten years that has elapsed since the crime, the exclusion of relevant pieces of possibly exonerating evidence at the trial, the alleged threat to the life and bodily integrity of Mr. Tobin if he was returned to serve his prison sentence in Hungary?

Legal issues under Points C, D, F and H.b are irrelevant with regard to the principle of mutual recognition, and this has already been declared by the courts in the first round proceedings. Still, it I worth looking into two issues in greater detail. In relation to Point F Mr. Tobin's representatives argued that surrender of persons 'in respect of convictions obtained under Stalinist or Nazi legal regimes' would also be allowed if there was no temporal limit whatsoever on convictions that could be enforced under the Framework Decision on the European arrest warrant.[30] One could, of course, easily repudiate this argument by

29 Some judges number the paragraphs, others don't. Accordingly I will only indicate paragraph numbers in relation to the former judges' separate opinions.

30 Supreme Court of Ireland, *Minister for Justice Equality and Law Reform v. Tobin* [2012] IESC 37, 19 June 2012, concurring opinion of Justice O'Donnell, Para. 23.

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saying that the Court issuing the arrest warrant was operating in a country that had already undergone a democratic transition and this was the guarantee for the rule of the law.[31] To put it differently: in 2004 Hungary would obviously not have requested the surrender of a person charged with an act that had constituted a crime under the previous regime, if that was irreconcilable with the rule of the law. As far as Point H.b is concerned, in other words, the inadmissibility of certain evidence, it is worth noting Justice O'Donnell's parallel opinion: 'While it has been determined that Mr. Tobin did not flee from Hungary it is equally the case that he did not voluntarily return.' Therefore, the circumstance that he failed to address the concerns related to the admissibility of the evidence was Mr. Tobin's choice and responsibility.[32]

While Point E is relevant, the issues raised in it have been considered on merits in the first round, by the courts of both the first and the second instance, not to mention the fact that the legislature has, in the meantime, already abolished the requirement that the arrest warrant should be issued 'duly', presumably partly in consideration of the concerns in the *Tobin* case.

In connection with Point G, in an act of rising to the soaring heights of legal philosophy, Mr. Tobin's representative argued – based on concepts developed by Lon Fuller in his work The Morality of Law[33] – that a law cannot properly be regarded as part of the legal system until it is officially published, implying that if for nothing else, Mr. Tobin's surrender had been unlawful for that reason. But according to the Court, this was not a convincing argument for various reasons. First, at the time of issuing the fourth arrest warrant the law in question had already been published electronically.[34] The paper-based announcement of legal norms had relevance only prior to the transition to the digital age, and was mostly known as one of the tools in the fight against totalitarian regimes. Second, according to the Strasbourg case-law, this legal principle only had relevance in the limitation of rights, while by the time of arresting Mr. Tobin, the modification had already been published in a paper-based version.[35] Thirdly, and this I add myself, the modification was not the kind of substantive law instrument, to which Mr. Tobin could have adjusted his conduct, even if we were to accept the unrealistic scenario suggested by the defence that Mr. Tobin and his representatives only followed the paper-based official journal, but not the electronic publication of the legal acts.

31 *Ibid.*, Para. 24.

32 *Ibid.*, Para. 26.

33 Lon L. Fuller, *The Morality of Law*, New Haven, Yale University Press, 1969.

34 The President signed the law on 21 July 2009, and the act of signing was reported in the official gazette on 24 July, with the modification regarding the surrender taking effect on 25 August. The Hungarian authorities issued the arrest warrant on 17 September. The full text of the modified act was published in the official gazette on 3 November, while the accused was taken into custody after that date, on 10 November. *See* the dissenting opinion of Chief Justice Denham, Paras. 128-133.

35 Concurring opinion of Justice O'Donnell, Paras. 19-22.

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The Court's response to the question raised under Point H.c was that Mr. Tobin and his legal representatives had shown no evidence to confirm the allegation that the Hungarian state and its representatives – who have been under a positive obligation to guarantee the protection of Mr. Tobin's life and limb in the penitentiary institution – may have had a grudge against the Irish convict.

Finally, the issue raised in Point H.a can only be discussed in conjunction with Point A. Although the question about the execution of the legal sentence in Point B only has an indirect relevance from the viewpoint of the surrender, I shall also discuss it in conjunction with Point A.

In a somewhat unorthodox manner, I shall present the dissents first, as these back up the results of their authors' analyses with substantially simpler arguments, before moving on to summing up and evaluating the considerably more complex concurring opinions, which contain the system of arguments produced in support of the denial of Mr. Tobin's surrender.

28.6 Dissenting Opinion of Chief Justice Denham

According to Chief Justice Denham the question presented under Point A.a can only be answered in the negative: the second round surrender proceeding does not constitute abuse of rights. In order to underpin his statement the Chief Justice invokes Irish[36] and Luxembourg[37] case-law (paragraphs 29-54). In Chief Justice Denham's view back in the first proceedings before the High Court and those in 2012 were fundamentally different. In the first case the Court was required to determine whether Mr. Tobin 'fled' Hungary, whereas this question did not arise in the second round proceedings as a results of the amendment of the law (paragraph 51). The Chief Justice believes that the question in Point A.c also needs to be answered negatively: Section 27 of the Interpretation Act is not violated, since the legislature did not overwrite the final decision in the first round, according to which Mr. Tobin as a convict did not flee from Hungary. The legislature merely brought Irish law in conformity with EU rules (paragraphs 59-70). This is Ireland's obligation flowing from EU membership and not least from the *Pupino* judgment[38] (paragraph 71). Concerns raised under Point A.b in relation to separation of powers were not shared by the Chief Justice either, since the intention of the legislature was to harmonise Irish and EU laws and not to overrule a judicial decision[39] (paragraphs 55-58). Chief Justice Denham

36 Supreme Court of Ireland, *Bolger v. O'Toole & Ors, Ex tempore*, 2 December 2002, *Attorney General v. Gibson, Ex tempore*, 10 June 2004.

37 *See supra* note 28.

38 European Court of Justice, Case C-105/03, *Criminal proceedings against Maria Pupino*, 16 June 2005.

39 *See* the cases quoted by the defence: *Buckley v. Attorney General* [1950] I.R. 67, *Costello v. Director of Public Prosecutions* [1984] I.R. 436.

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does not find it problematic that the Transfer of Execution of Sentences Act 2005 only allows for the Irish Minister to consent to the execution of a prison sentence in Ireland if the person fled the issuing state before he or she commenced serving that sentence, or completed serving that sentence[40] (paragraph 84). The Framework Decision on the European arrest warrant in its Article 4 paragraph (6) only formulates denial of surrender as a possibility, not as an obligation, among the facultative grounds for refusal, in case if '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 or detention order in accordance with its domestic law.' Hungary decided to make use of this possibility, and therefore in a reverse situation a Hungarian convict residing in Hungary would not be transferred to Ireland. This fact however is irrelevant, since the European arrest warrant does not operate on a reciprocal basis. According to Chief Justice Denham there is no constitutional provision, nor is there an article enshrined in the European Convention on Human Rights which would create a right to have prison sentences served in one's home country (paragraph 87).

28.7 Dissenting Opinion of Justice Murray

In his dissenting judgment Justice Murray basically agreed with Chief Justice Denham's arguments. But he thought it necessary to add that despite the five separate opinions by five separate judges several issues have not been debated. The fact that Mr. Tobin had committed the crime was not questioned; neither was the criminal responsibility of the convict as established by Hungarian courts; the judges also agreed that the opinions had no bearing on the validity of the arrest warrant issued in Hungary, on the basis of which any country other than Ireland could surrender Mr. Tobin; furthermore, it was generally agreed that the second-round procedure could not in any way be regarded as *res iudicata* (paragraphs 7-8).

Justice Murray also invoked the *Pupino* decision's much quoted statement according to which the principle of loyal co-operation is also binding in the area of judicial co-operation in criminal matters[41] (paragraph 51).[42] The ruling in the *Pupino* case became such a

40 Transfer of Execution of Sentences Act 2005, Section 7 Para. (1):
'[…] the Minister may, upon receipt of a request in writing from a sentencing country to consent to the execution in the State of a sentence imposed in the sentencing country, or part of a sentence so imposed, on a person who fled to the State before he or she—
(a) commenced serving that sentence, or
(b) completed serving that sentence,
give such consent.'

41 *See* footnote 38, Para. 42.

42 'It would be difficult for the Union to carry out its task effectively if the principle of loyal co-operation, requiring in particular that Member States take all appropriate measures, whether general or particular, to

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breakthrough precisely because by transplanting a first-pillar principle to the third pillar – we might add: contrary to the intentions of the legislature – it eventually made EU criminal laws enforceable. It is this very same case discussing the principle of interpretation in conformity with EU law. Framework decisions cannot serve as the basis for an interpretation of national law contra legem, nevertheless there is a duty on the courts to avoid, as far as possible, interpretations of domestic law that was contrary to the Framework Decision (paragraph 63). Justice Murray implied that the concurring justices violated this principle.

28.8 Concurring Opinion of Justice O'Donnell

'I thought it was all over after the Supreme Court' – quotes Justice O'Donnell Mr. Tobin at the time when he was arrested. Justice O'Donnell believes that his duty was to determine whether the reaction of the defendant in the course of his arrest at second instance was lawful or not. Justice O'Donnell also shares the opinion that no procedural *res iudicata* exists in the case,[43] however he found important to clarify whether Mr. Tobin has the right to finality of the first instance judgement,[44] in particular considering the principle of fair procedure (paragraphs 38-48).[45] Pursuant to Justice O'Donnell, the surrender could be refused by referring to Section 27(1)(C) of the Interpretation Act according to which, the amendment to a law does not affect any right, benefit, entitlement obligation or responsibility arising in accordance with a previous provision of law. Nevertheless, Section 4 of the Interpretation Act needs to be mentioned because it refines that Section 27 is a pure presumption, which could be rebutted if on the basis of the amendment one can conclude the contrary intention of the legislator (paragraph 62). The question for Justice O'Donnell is whether the Oireachtas, the Irish Parliament intended to overwrite the judgment adopted at first instance. When answering the question, he assessed the text of the amending act, and came to the conclusion that the respective Irish law serves compliance purposes with the Framework Decision and it did not aim at the alteration of the Tobin decision passed in 2007 (paragraph 64). Justice O'Donnell underlined repeatedly that his judgement does not have precedential value: due to the special circumstances of the case it is so narrow that it would not be applicable to anyone else. Besides Mr. Tobin, most probably no other person would be involved in a similar situation. In each future case, surrender will be preceded in accordance with the amended act (paragraph 78).

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ensure fulfilment of their obligations under European Law, were not also binding in the area of police and judicial co-operation in criminal matters, which is moreover entirely based on co-operation between Member States and the institutions, […].' *See* the *Pupino* judgment cited in footnote 38, Para. 42.

43 Supreme Court, *Bolger v. O'Toole*, 2 December 2002; *MJELR v. O'Fallúin*, 19 May 2010.

44 *Re Greedale Developments (no. 3)* [2010] 2 I.R.514; *Re Vantive Holdings* [2010] 1 I.R.118.

45 For the proposal defence, the court assessed the case-law: *Hamburg Public Prosecutors Office v. Altun* [2011] EWHC 397; *Office of the Prosecutor General of Turin kontra Barone* [2010] EWHC 3004.

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28.9 Concurring Opinion of Justice Hardiman

It is very rare to experience such a partial court decision in a democratic state as that of Justice Hardiman. In his concurring opinion, he profoundly supports his conclusion from two different approaches. On the one hand, he placed particular emphasis on the unblemished character of Mr. Tobin portraying him as a fundamentally law abiding person, an average middle-class man towards whom it is easy to show empathy. On the other hand, the judgment portrays Mr Tobin as the victim of a crusade. Accordingly the concurring opinion specifies and refers at numerous points to the social recognition and excellent character of Mr. Tobin[46] and to the hostile attitude adopted towards him by the authorities.[47] The judgment also plays on the emotions using strong words (such as 'ordeal', 'anxiety', 'insecurity', 'distress', 'grief', or 'fear'), when discussing the effect of the legal process on

46 'The appellant, Mr. Tobin, is an Irish citizen of unblemished character who not merely has no previous convictions, but has had a distinguished career in an Irish public company'; 'The appellant, Ciaran Tobin, is an official of an Irish Public Company in which he has worked since he left school. While working full time with that Company he qualified first as a Certified Chartered Accountant (FCCA) and subsequently proceeded to the degree of Master of Business Administration (MBA). These are coveted qualifications, not achieved without serious and sustained endeavour and ambition by a person working full time. He has achieved a position of considerable seniority in his official career. He is married with two children and lives in Dublin. He is acknowledged to be a person of excellent character'; '[…] the State decided to oppose his release on bail, despite the fact that he was plainly a person of good character'; 'He was arrested there and held in custody until released on bail over the State's objections. The effect of this on a *perfectly respectable person*, and on his family, can perhaps be imagined' (emphases added).

47 'The State then proceeded with the case even though it must have been clear that *the factual basis for the allegation* that Mr. Tobin had fled *was gravely unsound*'; 'None of the enormous lapse of time chronicled above can be laid at the door of the appellant. He was the defendant or respondent at all stages of all of the *litigation, whose pace and repetition was dictated at all times by his opponents*'; 'By far the single longest period of delay – forty-four months or just short of four years in aggregate – was caused by the *misconceived attempt forcibly to deliver Mr. Tobin on the specious ground that he had fled from Hungary. There was never any evidential support for that* proposition. If the State did not know that, such ignorance must be due to *negligence of a dramatic sort*. If they did know it then they maintained proceedings which they knew to be based on a *falsity*'; 'The Central Authority persisted with *hopeless proceedings* and caused great expense to the public and distress to Mr. Tobin' (emphases added).

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Mr. Tobin's family including his small children.[48] Conspicuous by its absence is any reference to the Zoltai family, their losses, their pains or their social status.[49]

In drawing attention to Mr. Tobin's excellent character and his willingness to admit his criminal responsibility and accept punishment, Justice Hardiman pointed out that Mr. Tobin had voluntarily presented himself at a penitentiary institute in Ireland. The presentation of the facts is especially misleading, because Mr. Tobin only did this in the second round of the procedure, six months after the first-instance court in the second round ruled that he must be handed over to Hungary: in other words he moved in the penitentiary institute eleven years after the commission of the crime and 9 years after the final decision of the Hungarian Court when it seemed inevitable that he served the sentence. I would under no circumstance describe this act of his as voluntary, since he did this either because he saw no chance of getting out of the punishment and thought it would be best if the months he had spent in detention in Dublin would be included in the three-year sentence, or because he believed that this strategy would pay off in the trial. I am not saying this out of malice or out of spite – one should simply realize that Mr. Tobin did everything, and also the opposite of everything, in order to avoid punishment.[50]

It is also significantly conspicuous what is not included in the concurring opinion. For instance Justice Hardiman refers to the killing as an 'accident' instead of using the term

48 'The total period of time elapsed, as chronicled above, is 145 months, or just over twelve years. […] It represented all but nine months of the life of his son, and the whole of the life of his daughter. It represents a quarter of the appellant's entire life and approaching one half of his adult life. His children have spent the entire of their sentient lives under a severe threat that their father, who is greatly involved in their lives, education and recreational activities, would be led away and forcibly deported to what is to them a strange country'; 'It is difficult to believe that this is not a gravely disturbing experience, that it has not blighted their childhoods, and that it will not sour their recollections of childhood in the future. I hope it may have no worse consequence. But it is totally inconsistent with that sense of security which is an essential for the healthy development of children and which all parents endeavour to provide for their offspring. The authorities in this case have felt obliged to destroy the security of these childrens' [i.e. Mr. Tobin's children's] childhood'; 'The State does not deny the distress, grief, fear and insecurity caused to Mr. Tobin and his family but says it is legally irrelevant'; 'It requires no imagination at all to imagine the insecurity which this caused to children of ten and nine years respectively at the time, and the unhappiness caused to the adult members of the family on that account. They were indeed, in my judgement, "compelled to live in a continuing state of anxiety and insecurity".'

49 This becomes strikingly obviously in view of the diametrically opposite behaviors shown by Francis Ciarán Tobin and Bence Zoltai, respectively. Mr. Tobin did everything he could in order to avoid punishment, thus earning the wrath of both the Hungarian and the Irish people and pushing himself into an increasingly precarious position, to the point that now he has to spend more time in an Irish prison than he would have had to do if he had been willing to serve his time in a Hungarian prison; on the other side, the central media figure representing the family was the father, who displayed admirable perseverance in his fight for justice, presenting a reasonable, balanced and justifiable demand that the sentence be executed, in any country, and Tobin express remorse. The story begs for an artistic adaptation, and we shall be able to see the parallel fates of the families in a movie production soon. *See* the planned movie project Ginko, MTI, February 22, 2014.

50 *See* the abuse of the possibility of *in absentia* criminal trials under Continental law as described in Chapter VII.2 on '31.16 De lege ferenda – Harmonisation of Minimum Standards Reinforcing Mutual Trust'.

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of 'crime', or the denotes to the 71-80 km per hour speed without mentioning that the allowed speed limit in the concerned area was only 50 km per hour.

If we assume for the sake of an argument that Justice Hardiman was correct in the view that Mr. Tobin was ready to face his act, we may still ask why Mr. Tobin did not come immediately to Hungary and did not show up at the police station. Justice Hardiman's response to this question appears to lie in perceived discrepancies in the Hungarian legal system, a strong criticism of the Hungarian judgment, and Mr. Tobin's highly vulnerable situation in a Hungarian prison. At this point, he extremely criticizes the Hungarian judgement by reconsidering the facts, evidences and their assessment in details. He also argued that there could not, in any event, be mutual trust on his behalf with respect to the Hungarian legal system, since he did not even know it.

Then Justice Hardiman proceeds to the evaluation of the European arrest warrant, which is the duty of the Irish court in a surrender case. In this respect he notes that Hungary did not succeed to refer to the facts of the case in the same way and could not clarify what sanctions exactly were imposed on Mr. Tobin.

When looking into the permissibility of surrender Justice Hardimann raised questions in relation to Point A.a. on the abuse of proceedings and the realisation of due process. First he distinguished the case from the *Bolger* decision,[51] where the court held that as a general rule requests for extradition or surrender may be issued repeatedly, since decision on such requests does not constitute *res iudicata*. In order to do that Justice Hardiman invoked the *Henderson*[52] case, according to which the rationale behind abuse of process is that 'there should be finality in litigation and that a party should not be twice vexed in the same matter.'[53] Still, the court rarely determines abuse, only in cases where the judge can

> identify any additional element such as a collateral attack on a previous decision or some dishonesty, but where those elements are present the later proceedings will be much more obviously abusive, and there will rarely be a finding of abuse unless the later proceedings involve what the Court regards as unjust harassment of a party.[54]

Declaring harassment mainly depends on the time passed between the two repeated proceedings. According to Mr. Justice Hardiman, the length of the proceedings was significant and by referring to the European Convention on Human Rights pursuant to which

51 *See* footnote 36.
52 *Henderson v. Henderson* (2002) 118 LQR 397.
53 Lord Bingham discussing *Henderson v. Henderson* in *Johnson v. Gore Wood and Company* [2002] 2 AC 1.
54 *Ibid.*

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everyone shall be entitled for a trial within reasonable time,[55] we may say that Justice Hardiman indirectly encouraged Ciarán Tobin to file a Strasbourg application.

Justice Hardimann also draws the attention to the equality of arms and explains that there was an inequality between the means available for the state and the defence. In his view, breaching the principle of equality of arms could be supported by the reasoning that following the final judgement in the first round, the legislator was entitled to amend the law in a way that it is also applied to Mr. Tobin and thereby a possibility to carry out proceedings at second instance was provided. While, in case Mr. Tobin would have lost proceedings in the first round, he could not have amended the law in the way to enable reopening of proceedings for his benefit.

28.10 Concurring Opinion of Justice Fennelly

Justice Fennelly – together with Justice Hardiman – argued that the second round proceeding constituted abuse of process. According to Justice Fennelly in the *Tobin* case it was a legislative mistake and its correction that triggered two surrender proceedings (paragraph 10). Mr. Tobin won the case in the first round on the basis of a national law implementing the framework decision. It was never suggested that the law was erroneous; therefore once he successfully relied on its provisions, Mr. Tobin had no reason to expect that the law would be changed (paragraph 13). Neither the original mistaken implementation, nor its subsequent correction can be attributed to Mr. Tobin, therefore Justice Fennelly's view the repeated proceedings amounted to an abuse of process. While distancing himself from Justice Hardiman's interpretation of the equality of arms principle. Justice Fennelly otherwise expressed agreement with Mr Justice Hardiman's reasoning.

28.11 Evaluation of the Second Round Proceedings

The first argument elaborated by Justice O'Donnell – and also shared by Justice Hardiman – was that the right not to be surrendered is an acquired right. According to the Interpretation Act if an enactment is repealed, the repeal does not effect such rights, unless the contrary intention of the legislator could not be identified. Such legislative intent behind the modification of the Irish law on surrender could not be traced. Therefore surrender shall be denied according to O'Donnell due to the lack of the expression of an explicit legislative wish to deprive Mr. Tobin of his rights. This argumentation is a catch 22: had the legislator inserted a language into the 2009 amendment depriving Mr. Tobin from his rights expressis verbis, this clearly would have breached the principles of judicial independence

55 *See* Art. 6(1) of the European Convention on Human Rights.

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and separation of powers. Consequently, the judges would most probably have been against the surrender whatever the legislative solution was, only the basis for denying surrender would have been different. Attempting to make use of the modified act after Mr. Tobin's unsuccessful surrender in the first round is therefore either a violation of the Interpretation Act or a breach of separation of powers and judicial independence.

Reference to the low quality of the Hungarian legal system as the second argument for declining surrender is also problematic. I personally disagree with Justice Hardiman's first criticism concerning the Hungarian legal system, however my opinion is irrelevant from the perspective of the case. Interestingly Justice Hardiman's extremely critical opinion about the Hungarian criminal procedure is equally irrelevant according to the rules of EU criminal justice, i.e. analysis of the issuing Member State's legal system by the requested Member State's judiciary shall not matter. The Irish court cannot question mutual trust existing between Member States and there was no basis for essentially reopening and carrying out a further assessment on the substance of the criminal proceedings, as its competence should be strictly limited to the decision on surrender.[56]

The third argument is another piece of evidence proving that Justice Hardiman clearly does not understand the principle of mutual recognition: he states that if he had not refused the surrender on other grounds he would have assessed in details the raised questions, as from his side, who is not familiar with Hungarian law, the trust towards the Hungarian legal system cannot be reasonably expected.

From the perspective of EU law the fourth argument also authored by Justice Hardiman against surrender is also irrelevant: in his view, in a similar situation Hungary would not have extradited its own citizen but rather would have offered to execute the punishment. On the one hand, Ireland could equally have done this, if it had chosen to implement the relevant framework decision of 2008, and on the other hand – and this is the more important point of my critical remarks – the European arrest warrant does not operate on the basis of reciprocity.

As to Justice Hardiman's next point, altogether the fifth argument against surrender on Mr. Tobin's safety in a Hungarian prison, it is quite possible that the circumstances have by now deteriorated to the point where he would be exposed to danger. However, this is partly due to certain omissions on his part: had he reported for prison in 2002, within a few months after the second-instance decision had been issued, no lynch mob mentality would have developed. More importantly, the Hungarian state is under obligation to protect Mr. Tobin from any form of atrocity while the latter is serving time in a Hungarian penal institution, and the Hungarian state has displayed no partiality or discrimination

56 This was recognised by other judges who criticised the opinion of their colleague. *See* the dissenting opinions and the concurring opinion of Justice Fennelly.

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of any form in the case, therefore it was reasonable to assume that he would have received adequate protection.

While the sixth argument is valid, the Hungarian authorities were indeed 'clumsy' when formulating the arrest warrants, I am not convinced that for this reason Mr. Tobin was not aware of the punishment received, as he had prominent defence attorneys who must have prepared a profound word by word translation of the final judgement with an attached comprehensive explanation.

Seventh, arguing for abuse of rights on grounds of length of proceedings by an Irish judge is quite ironic given that the delay in processing Mr Tobin's case was mainly attributable to the Irish courts system,[57] which needed seven to eigth years to come to a final decision on surrender, despite the fact that the Framework Decision on the European arrest warrant prescribes strict deadlines, that is sicty days maximum and in extraordinary situations it could be ninety days in total.[58] In other words Justice Hardiman invoked the Irish courts' disregard for deadlines in violation of the Framework Decision on the European arrest warrant as a basis for the refusal of the request for surrender, i.e. a further violation of the very same Framework Decision. Whereas the state's mistake can obviously not be attributed to the person sought in a surrender proceeding, this reasoning ultimately uses a breach of EU law (with regard to the length of proceeding) to justify another breach of the same EU law (not surrendering the convict in a situation where all requirements for surrender under the Framework Decision are met and upholding a sentence based on the erroneously implemented European law).[59]

As to the eighth argument, it is doubtful whether the equality of arms doctrine could be extended thus far, but the argument is also problematic, since it has been proven that the Irish Parliament did not intend to overwrite the first round judgment, rather it wanted to bring Irish law into conformity with EU law. This was the basis for refusal of surrender on statutory interpretation grounds as discussed above. Therefore the first and the eighth arguments against surrender – to both of which Justice Hardiman subscribes – are mutually exclusive.

The final argument as discussed by Justice Fennelly on abuse of process is very hard to distinguish from the concept of *res iudicata*, although there was a unanimous agreement among the judges that this concept does not govern procedural matters.

57 The judgements issued in 2007 and 2012 were both adopted within two and a half years.

58 Art. 17 of the Framework Decision.

59 The scenario is well-known from criminal procedure, when the state's fault results in the inapplicability or invalidity of a state measure. *See* for example the fruit of the poisonous tree doctrine, according to which illegally acquired evidence must not be used in a criminal proceeding. (The term originates from the US Supreme Court, *Silverthorne Lumber Co. v. United States*, 251 U.S. 385 (19200)).

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28.12 Extralegal Factors

The judgement adopted in 2012 ended judicial proceedings with respect to Mr. Tobin and it would be impossible and unreasonable to recommence the case on the same grounds. Therefore, surrender was discussed in terms of diplomatic solutions. In this respect, by an official letter, Tibor Navracsics, the Hungarian Deputy Prime Minister, turned to Viviane Reding, Justice Commissioner of the EU, to request clarifications regarding opportunities available after the adoption of the Irish second instance judgement in the second round refusing the surrender of Francis Tobin Ciarán.[60] In response Vivane Reding sent a letter on 27 June 2012, urging a tripartite meeting with the Irish justice minister, partly to resolve the *Tobin* case and partly to explore the reasons causing the undoubtedly deficient operation of the European arrest warrant.[61]

On 11 July 2012, few days prior to the tripartite meeting,[62] Tibor Navracsics sent another letter to Viviane Reding and urgently requested the Commissioner to achieve 'Irish cooperation and constructivism with respect to regulatory matters and actual cases.'[63] On 21 September 2012 the Deputy Prime Minister reminded Ms Reding another time to the importance to resolve the situation[64] in respect of which he received the answer that pursuant to the conclusions of the meeting held in Brussels in July the parties 'did not disclose any systemic problem with the operation of the European arrest warrant',[65] however she believed that 'officials of both Member States should continue to conduct informal consultations on the case and examine the feasibility of the enforcement in Ireland of the sentence imposed against Mr. Tobin in Hungary.'[66]

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60 MTI, Navracsics a Tobin-ügyről: 'én most optimista vagyok', 28 June 2012, http://hvg.hu/vilag/20120628_tobin_navracsics; András Kósa, Navracsics: elszigeteli Írországot Ciarán Tobin ügye, 2012. június 29, http://hvg.hu/itthon/20120629_navracsics_tobin_reding.

61 MTI, Brüsszel fog közvetíteni az ír gázoló ügyében, 28 June 2012, http://hvg.hu/itthon/20120628_eb_ir_gazolo.

62 'Viviane Reding, the Commissioner responsible for justice, convened the legal experts of the Hungarian and Irish ministry of justice to discuss the case of the Irish reckless driver on 17 July.' MTI, Nincs vége a leányfalui gázoló ügyének, 13 July 2012, http://hvg.hu/vilag/20120713_tobin_ugy_brusszel.

63 MTI, Tobin-ügy: Navracsics újabb levelet írt Brüsszelnek, 11 July 2012, http://hvg.hu/itthon/20120711_navracsics_tobin.

64 Gábor Károly: Tobin-ügy: Navracsics újabb levelet írt, 22 September 2012, Magyar Nemzet, http://mno.hu/magyar_nemzet_k_ulf/tobin-ugy-navracsics-ujabb-levelet-irt-1106879.

65 MTI, Navracsics hiába ír leveleket az ír gázoló ügyében, 24 September 2012, http://hvg.hu/vilag/20120924_Navracsics_hiaba_ir_leveleket_az_ir_gazol. This statement is obviously true merely with respect to the provision enforcing national implementation in relation to a possible fleeing from the country following the adoption of the final judgement. As to the deep problems unrelated to the case, but related to the European arrest warrant *see* for example Gert Vermeulen et al. (Eds.), *Rethinking International Cooperation in Criminal Matters in the EU. Moving beyond Actors, Bringing Logic Back, Footed in Reality*, Antwerpen, Apeldoorn, Portland, Maklu, 2012; Council of the European Union, *Replies to questionnaire on quantitative information on the practical operation of the European arrest warrant – Year 2011*, 9200/6/12, REV 6, COPEN 97, EJN 32, EUROJUST 39, 2012 szeptember 28; JUSTICE, *European Arrest Warrants: Ensuring an effective defence*, London: Justice, 2012.

66 MTI, Ír gázoló: Viviane Reding kiáll a büntetés letöltése mellett, 25 September 2012, http://hvg.hu/vilag/

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At this point, an extremely derogatory discussion and pointless debate has begun. In his letter sent on 28 September, Mr. Navracsis disputed Ms Reding's conclusions and argued that it is a systemic problem 'if an EU citizen hits to death two innocent children and the country where the action has occurred does not have the possibility to punish the offence.'[67] Tibor Navracsics also noted that he expects from the EU a solution, not mediation.[68] On 3 October, Viviane Reding disappointedly acknowledged that the arguments of Tibor Navracsics are 'directed to the inadequate person' and requested the Deputy Prime Minister to 'adhere to the facts and law.'[69] Kinga Gál, Member of the European Parliament, submitted a written question to the European Commission on 16 January 2013 and asked what instruments the Commission had at its disposal to help this case to reach a conclusion that satisfies not just the letter of the law, but also the interests of justice, thus ensuring the proper functioning of the area of freedom, security and justice.[70]

The diplomatic scandal escalated rapidly. It was the time, when the Hungarian Parliament prepared the fourth amendment to the Fundamental Law[71] and Hungary was placed into an international spotlight[72] when in an unfortunately composed sentence Viviane Reding visualised a causal relationship in respect of isolated issues. She invoked the tragic case in a completely unrelated political debate when on 9 March 2013 she gave an interview

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20120925_Ir_gazolo_Viviane_Reding_kiall_a_buntetes.

67 MTI, Hazugsággal vádolja Viviane Redinget a KIM, 19 March 2013, http://hvg.hu/vilag/20130319_Hazugsaggal_vadolja_Viviane_Redinget_a_KI.

68 *Ibid*.

69 *Ibid*.

70 'Deficiency in the operation of the Area of Freedom, Security and Justice', Question for written answer from the Commission, E-000388-13, 16 January 2013.

71 The Fourth Amendment to the Fundamental Law of Hungary, 25 March 2013 being effective from 1 April 2013.

72 *See* for instance the Statement from the President of the European Commission and the Secretary General of the Council of Europe on the vote by the Hungarian Parliament of the Fourth Amendment to the Hungarian Fundamental Law European Commission, MEMO/13/201, 11 March 2013; Venice Commission, European Commission for Democracy Through Law, Opinion on the fourth amendment to the FL of Hungary, Adopted by the Venice Commission at its 95th Plenary Session, Venice, 14-15 June 2013; and Tavares Report, European Parliament resolution of 3 July 2013 on the situation of fundamental rights: standards and practices in Hungary (pursuant to the European Parliament resolution of 16 February 2012) www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P7-TA-2013-0315+0+DOC+XML+V0//HU. The idea to conduct proceedings pursuant to Art. 7 was raised, *see* Commission Vice-President Neelie Kroes threatening to use Art. 7 www.europarl.europa.eu/news/en/news-room/content/20120206IPR37350/html/Hungary-MEPs-hear-from-civil-society-media-and-the-government; Greens/ALDE proposals to launch Art. 7 proceedings, most recently in July 2013, www.alde.eu/press/press-and-release-news/press-release/article/hungary-if-the-ep-is-serious-about-fundamental-rights-it-must-apply-article-71-teu-41836/. International human rights law organisations also strongly criticised the Fourth Amendment: Amnesty International – European Institutions Office, Amnesty International's Concerns about the fourth amendment to Hungary's Fundamental Law, March 2013, www.amnesty.eu/content/assets/Doc2013/AI_concerns_about_the_Fourth_Amendment_to_Hungarys__Fundamental_Law_March_2013.pdf; Human Rights Watch, Wrong Direction on Rights, Assessing the Impact of Hungary's New Constitution and Laws, 978-1-62313-0107, May 2013, www.hrw.org/sites/default/files/reports/hungary0513_ForUpload.pdf.

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to the Frankfurter Allgemeine Zeitung saying that she was not surprised that the Irish authorities did not extradite their citizen to a country in respect of which serious worries have arisen regarding the independence of justice.[73] Tibor Navracsics responded to Viviane Reding in an open letter on 15 March considering the Commissioner's statements outrageous and unacceptable.[74] The Government found intolerable in its report number J/10517 that the Commissioner 'drew a parallel between the execution of a judgement adopted in a particular case and the independence of justice.'[75] With his typical explicitness and firmness, the father of the direct victims, Bence Zoltai requested the Commissioner on 19 March to pay more respect to the piety feelings of the individuals affected in the matter.[76]

Tibor Navracsics also resented that Reding did not reply to his official letters relating to the case.[77] The spokesperson of Ms Reding confuted this statement[78]; nevertheless the Ministry of Public Administration and Justice confirmed it.[79] In her response to Kinga Gál sent on 25 March, Viviane Reding acknowledged that 'no further action could be taken.'[80] In its response letter sent on 25 March 2013, the Council emphasised that it was not for

73 'In the past year, representatives of the Hungarian justice system submitted several complaints to me blaming the Supreme Court of Ireland for not willing to transfer an Irish citizen, who is accused with negligent homicide, in Hungary. I am personally not surprised about the Irish attitude, since parallel to this, Hungary adopted several instruments which raise concerns in relation to the impartiality of the justice system.' Im Gespräch: Viviane Reding, EU-Kommissarin für Justiz 'Künftige EU-Erweiterungen gut abwägen', *Frankfurter Allgemeine Zeitung*, 9 March 2013, Nr. 58, p. 5.

74 Tibor Navracsics properly summarises in his letter the problems of Viviane Reding's statement in which the Commissioner mixes unrelated issues. 'It does not seem accurate if the Commissioner responsible for fundamental rights mixes a claim to enforce a court judgement adopted in 2002 with respect to a case where the perpetrator caused the death of two children by reckless driving with current political disputes concerning the independence of the Hungarian judiciary. Moreover, she dares to say that in fact it is understandable that the Irish authorities are not willing to transfer the perpetrator to Hungary in order to avoid serving his punishment.' Quoted by András Kovács, Halálos gázolás: Navracsics keményen nekiment Redingnek, 17 March 2013, http://mno.hu/belfold/halalos-gazolas-navracsics-kemenyen-nekiment-redingnek-1145408.

75 Government Report Nr. J/10517; Questions on the actions to be taken in relation to the *Tobin* case by Viviane Reding, the Commissioner of the European Commission responsible for justice, fundamental rights and citizenship, March 2013. The Hungarian Parliament also confirmed that the Hungarian State 'considers unacceptable that Viviane Reding as the Commissioner responsible for justice, fundamental rights and citizenship finds verifiable the proceedings conducted by the country of citizenship of the condemned, which is a Member State of the EU, pursuant to political assumptions without suspending it by facts.' Parliamentary Decree Nr. 34/2013 of 9 May 2013 on the approval of the report relating to the questions on the actions to be taken in relation to the *Tobin* case by Viviane Reding, the Commissioner of the European Commission responsible for justice, fundamental rights and citizenship. The Decree was approved by the Parliament on 29 April 2013.

76 Reference to Government Report No. J/10517, *ibid.*

77 *Ibid.*, Government Report No. J/10517 explores it in details: 'The Minister of Public Administration and Justice urged the realisation of a high level meeting several times. The minister expressed his intention in his letters sent to Reding on 28 June 2012, 9 July, 21 September, 28 September, 4 October, 13 November, 26 November, nevertheless Commissioner Reding left these initiatives unanswered.'

78 The Ministry of Public Administration and Justice accuses Viviane Reding with lie, *ibid.*

79 *Ibid. See also* the Government Report No. J/10517.

80 Response of Viviane on behalf of the European Commission, E-000388/2013, 25 March 2013.

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them to comment on decisions taken by national courts and by respecting the principle of separation of powers they did not intend to form an opinion on the operation of Irish courts.[81]

28.13 The Solution to the Case

In the course of March 2013, István Tóth, the attorney of the family Zoltai has played his trump card. Mr. Tobin authorised a Hungarian defence attorney in 2006 and pursuant to the documents the authorisation was signed by Mr. Tobin in Budapest. However, at that period Mr. Tobin was in Dublin for a long time, therefore the suspicion arose that he falsely indicated Budapest as the location of the document's signature, but signed it in Ireland. Should he have done so, this amounted to private document forgery which is a crime according to the Hungarian Criminal Code and therefore Hungary could have requested his surrender on this basis. In the very unlikely situation, if he had truly travelled back to the Hungarian capital, Budapest, to sign the authorisation, he would have fulfilled the conditions of the Irish law transposing the Framework Decision by returning to Ireland, because then he 'fled' from Hungary as a condemned person. The presented strategy of the attorney is reasonable and understandable; however it is less likely that this was the major reason why Mr. Tobin subjected himself to the punishment. It is possible that legal proceedings with respect to private document forgery could have been initiated and on this ground Hungary could have requested the surrender of Mr. Tobin from Ireland for the sake of conducting a criminal process, nevertheless considering the principle of speciality, the punishment imposed on him in a different proceeding, i.e. the prison sentence for the lethal road traffic accident could not have been executed.[82] Furthermore, if Mr. Tobin really had signed the authorisation in Hungary and consequently 'fled' from the country back in 2006, it is hardly possible that the case could be recommenced without taking into consideration that the relaunching could be qualified as abuse of process or harassment by the authorities according to common law, and therefore surrender would be again denied. There must have been some other reasons why Mr. Tobin undertook the responsibility and subjected himself to the punishment. In the following I am going to assess these possible reasons.

81 Parliamentary questions, 15 May 2013, E-000387/2013, Response of the Council. In accordance with the proposal of the Hungarian State (*see* Government Report No. J/10517), the Council referred to the Council framework decision regarding mutual recognition and enforcement of judgements, however in merits, the reference does not affect the circumstance that the Council does not intend take side in relation to the judgements of Irish courts.

82 Section 1 of Art. 31 Act CXXX of 2003 on the implementation of the Framework Decision; Section 1 of Art. 30 of Act CLXXX of 2012, which was promulgated on 30 November 2012, takes over the previous regulation regarding the rule of speciality.

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'Aut dedere aut punire' as Hugo Grotius says in his masterpiece published in 1625 with the title of *De iure belli ac pacis*,[83] which is the fundament of the law regarding surrender and extradition. In proper translation it simply means: 'surrender or punish'.[84] My standpoint is that exactly this would have been the duty of Ireland. The first option was barred by the judicial decisions, and the second was seemingly also excluded by the laws in force. According to the Irish Transfer of Execution of Sentences Act adopted in 2005, Ireland as an executing state only permits the acknowledgment of criminal judgements adopted in other states, if the condemned person fled from the requesting state before he commenced to serve his punishment, or while serving his punishment.[85] (The wording should be familiar, as it corresponds to the Irish act implementing the Framework Decision on the European arrest warrant.[86]) There is however a fundamental flaw with the mentioned 2005 Act. It should not have been discussed in the first place, since it refers back to a Council of Europe convention on the transfer of sentenced persons of 1983 and the Additional Protocol thereto of 1997, while these were superseded by a 2008 EU framework decision on the enforcement of judgements in criminal matters imposing custodial sentences. The framework decision should have been implemented by all Member States including Ireland at the time of adopting the Tobin judgement.[87] However the Irish legislator had failed to implement this legal instrument by the deadline, i.e. 5 December 2011, and to make matters worse the legislatoure also attached an erroneous declaration to it. The framework decision provided an opportunity for Member States to request prior to the implementation deadline, that is 5 December 2011,[88] to apply the existing legal instruments with respect to the transfer of sentenced persons. Accordingly, Ireland made a declaration on 29 March 2012 stating that for the execution of final judgments passed prior to 5 December 2011 – including the second instance judgement in the *Tobin* case – it will apply legal instruments

83 Hugo Grotius, *De jure belli ac pacis libri tres: in quibus jus naturae & gentium item juris publici praecipua explicantur,* Washington, DC, Carnegie Institution of Washington, 1913.

84 Nyitrai explains that using the often referred term of 'extradite' is inaccurate regarding the translation as Latin language in the middle ages did not know the verb of 'extradere'. Péter M. Nyitrai, *Nemzetközi bűnügyi jogsegély Európában*, Budapest: KJK-Kerszöv, 2002, p. 29.

85 Transfer of Execution of Sentences Act 2005, Art. 7 (1).

86 The wording corresponds to the Irish act implementing the Framework Decision on the European arrest warrant. With respect to the cited Irish execution act, Mr. Tobin urged the deletion of the word of 'fled' by arguing that in order to ensure consistency in the legal system, the law should have been harmonised at the time when the implementation act regarding the Framework Decision, which was adopted in 2002, was amended as a consequence of his case. In other words the language that saved Mr. Tobin in the first round to have him surrendered, was disadvantageous to him when the execution of his prison sentence was concerned, and therefore he proposed to delete it. *See* Supreme Court of Ireland, *Minister for Justice Equality and Law Reform v. Tobin* [2012] IESC 37, 19 June 2012, Para. 28 of concurring opinion of Justice O'Donnell.

87 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.

88 Art. 29(1) Member States shall take the necessary measures to comply with the provisions of this framework decision by 5 December 2011.

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adopted prior to the entry into force of the framework decision, i.e. the 2005 act on the basis of which execution of the Hungarian sentence was impossible. In the course of 2013, the Hungarian Ministry of Public Administration and Justice considered that the declaration was invalid as it could only have been formulated in 2008 at the time of the 'adoption of the framework decision', and not later, especially not after the implementation deadline had passed.[89] Viviane Reding confirmed the Hungarian standpoint in her letter of September 2013: the declaration was indeed invalid, therefore the temporary exemption never entered into force.[90]

Currently the Commission has no legal means to make Ireland responsible for non-compliance with the above EU norm, but in December 2014, at the fifth anniversary of the Lisbon Treaty's entry into force, opportunity will be provided to launch infringement proceedings regarding the faulty implementation of framework decisions. From the perspective of Mr. Tobin this is the most dangerous legal option, which may have been a reason why Mr. Tobin decided to serve his punishment. Once Ireland was required to regard the declaration as void and therefore enforce prison sentences imposed in another Member State in accordance with the 2008 framework decision, Mr. Tobin would in any event have had to serve his prison sentence anyway. Once he realised imprisonment was unavoidable, he decided to serve it sooner than later. Alternatively, it may have been his conscience that led him to serve out his punishment.

Since for the time being there were no means to enforce the prison sentence, he could design the choreography of events to some extent. After lengthy negotiations he travelled to Hungary, spent five days in a Budapest prison in the course of January 2014, then he requested his transfer to Ireland. The Hungarian and Irish justice ministers, in addition to the Irish supreme court approved the request,[91] thus with the assistance of the Interpol's associates Mr. Tobin was transferred to Ireland on 17 January 2014 in order to serve the remaining part of his custodial sentence.[92]

We may reasonably ask the exact duration of his remaining sentence and whether Mr. Tobin could be released after serving half of his punishment. The Buda Surroundings District Court sentenced Mr. Tobin for three years imprisonment and the Pest County Court upheld the decision provided that he is exempted from the general rules and can be released on probation sooner than after having served two-thirds of his prison sentence.

89 Art. 28(2) of 2008/909/JHA framework decision.

90 MTI, Tobin-ügy: Magyarország eljárást indíthat Írország ellen, 26 September 2013, http://hvg.hu/itthon/20130926_Navracsics_Reding_szerint_is_igazunk_van.

91 Az ír hatóságok engedélyezték, hogy Tobin a hazájában töltse le büntetését, 17 January 2014, www.kormany.hu/hu/kozigazgatasi-es-igazsagugyi-miniszterium/hirek/az-ir-hatosagok-engedelyeztek-hogy-tobin-a-hazajaban-toltse-le-bunteteset; Brigitta Lakatos, Papp Gergő: Végre börtönbe került az ír gázoló!, 14 January 2014, www.hir24.hu/bulvar/2014/01/14/papp-gergo-vegre-bortonbe-kerult-az-ir-gazolo/.

92 Jövő szeptemberig börtönben marad az ír gázoló, 14 January 2014, www.kormany.hu/hu/kozigazgatasi-es-igazsagugyi-miniszterium/hirek/jovo-szeptemberig-bortonben-marad-az-ir-gazolo.

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According to the court of second instance Mr. Tobin could be released for probation after serving half of his punishment, because 'executing the imposed sentence involves an increased burden for a foreign citizen who lacks the knowledge of Hungarian language.'[93] However, in case Mr. Tobin serves the remaining part of his sentence in his motherland, not far away from his home, nothing justifies the exemption.

In a letter dated 21 May 2010, Ireland's Ministry of Justice, in its capacity as the central authority, wanted to know why the change according to the second instance ruling of the Hungarian Court had not been mentioned in the European arrest warrant, and also asked for clarification if the second-instance decision had in any way been different from the first instance ruling. In a letter dated 14 June 2010, the Ministry of Administration and Justice confirmed that 'the remaining prison sentence is 3 years,'[94] making no mention in the reply of the earliest time of conditional release. This effectively meant that the Hungarian party left it to the Irish law enforcement agency to determine after what time the convict would, if at all, become eligible for conditional release. Framework Decision 2008/909/IB regulates the recognition of criminal sentences and their execution in another Member State, although, as I have already pointed it out, the Irish authorities had failed to ratify it before the set deadline of 5 December 2011.[95] Still it is worth discussing the possible results of an EU conform interpretation. The framework decision states that an application for the recognition of a sentence can be submitted, among other cases, when the convict lives in the state executing the sentence, either as a citizen or as a resident. The execution of the sentence can only be denied if any of the conditions listed in Article 9 exists, but none of them applies to the *Tobin* case.[96] According to Article 8 paragraph (2) if

> the sentence is incompatible with the law of the executing State in terms of its duration, the competent authority of the executing State may decide to adapt

93 *See* footnote 9.

94 Quoted by the Supreme Court, *Minister for Justice Equality and Law Reform v. Tobin* [2012] IESC 37, 19 July 2012 in the concurring opinion of Justice Hardiman.

95 Having failed to meet the deadline of 5 December 2011 by a wide margin, the Irish authorities are yet to implement the framework decision at the time of writing the present paper. Ireland is not the only country, by the way: half of the EU Member States have failed to ratify this particular EU law. *See* the website of EuroPris (European Organisation of Prison and Correctional Services): www.europris.org/state-of-play-eu-framework-decisions-909-947/.

96 Such examples are, for example, when the certificate is evidently faulty; when it does not correspond with the sentence; when the execution would violate the principle of ne bis in idem; when the condition of double incrimination regarding non-privileged category of criminal acts is not met; when the statute of limitations for that particular criminal case has expired according to the legal system of the country of execution; when there is an exemption for the convict or when age considerations come into play; when less than six months of imprisonment is left; when the sentence had been passed *in absentia*, except for the case when other guarantees have been met by the applicant state; when the nature of the sentence includes a measure of psychiatric or health care and the health care system of the executing state is not adequate for the task; or when the sentence concerns a criminal act that had been carried out, at least partially, within the territory of the executing state.

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> the sentence only where that sentence exceeds the maximum penalty provided for similar offences under its national law.

In the *Tobin* case however this exemption from the general rule does not need to be invoked, since Section 53 of the applicable Road Traffic Act of 1961 imposes up to five years imprisonment to dangerous driving causing death.[97]

The next question is whether the seven months spent in Irish detention can count towards the total prison sentence. In this particular case, answering the question is made easier by the fact that Ireland had failed to implement Framework Decision 2008/909/IB. If it had done so, and if Ireland had to recognize the Hungarian sentence, it is unclear whether the 'recognition' of the court decision would also have included the recognition of the possibility of conditional release after 18 months. Further difficulties derive from the fact that, according to Hungary's laws on pre-trial detention, the time spent in pre-trial detention counts towards the total prison time,[98] while in Ireland, which belongs to the Anglo-Saxon legal tradition, this is not necessarily the case.[99] Paragraph (1) of Article 26 of the Framework Decision on the European arrest warrant mentions the issue of time deduction, but only in the reverse case: the provision only obliges the issuing, but not the executing state to 'deduct all periods of detention arising from the execution of a European arrest warrant from the total period of detention to be served in the issuing Member State as a result of a custodial sentence or detention order being passed.' Therefore, the framework decision is not helpful in figuring out the question whether Ireland should take into account the time the convict had spent in surrender custody in Ireland. However, there might be a way to sort out this problem. Since Mr. Tobin had begun his sentence in Hungary, we could argue that according to both the Hungarian legislation and the (unimplemented) framework decision the time spent in pre-trial detention in the executing state, Ireland, should be taken into account in Hungary, the state requesting extradition; therefore, regardless of the fact that the convict left the country after five days and Ireland took over

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97 Road Traffic Act, 1961.
'Dangerous driving.
53.—(1) A person shall not drive a vehicle in a public place at a speed or in a manner which, having regard to all the circumstances of the case (including the nature, condition and use of the place and the amount of traffic which then actually is or might reasonably be expected then to be therein) is dangerous to the public.
(2) A person who contravenes subsection (1) of this section shall be guilty of an offence and—
(a) in case the contravention causes death or serious bodily harm to another person, he shall be liable on conviction on indictment to penal servitude for any term not exceeding five years or, at the discretion of the court, to a fine not exceeding five hundred pounds or to both such penal servitude and such fine.'

98 Para. 1 Art. 92 of Act C of 2012 on the Criminal Code: 'The entire duration of preliminary detention and house arrest shall be included in the final sentence, whether it is a term of imprisonment, custodial arrest, community service work or a fine.'

99 Anton M. van Kalmthout et al. (Eds.), *Pre-trial Detention in the European Union: An Analysis of Minimum Standards in Pre-trial Detention and the Grounds for Regular Review in the Member States of the EU*, Nijmegen, Wolf, 2009, p. 521.

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the execution of the sentence, the Hungarian laws are to be followed and the months spent in custody should be taken into account. In this way Ireland should take over the execution of the sentence with the Hungarian prison time already deducted. This legal opinion can be ascertained from the 2012 decision of the Supreme Court, or more precisely, from Justice O'Donnell's concurring opinion, in which he refers to the letter by the Chief Prosecutor of Ireland, which shares that opinion.[100]

In summary, therefore, the time spent in Irish custody counts, while nothing can justify the moving forward of the date for early release. It seems that the Supreme Court of Ireland agreed with this reasoning, therefore the court decided that Mr. Tobin could be released for probation after serving 595 days, that is almost 20 months, at the earliest.[101]

In his letter dated on 5 February 2014 Ciarán Tobin expressed his regrets and for the first time apologised from the Zoltai family directly. Bence Zoltai deems the case as finished,[102] and it seems, the *Tobin* case came to an end from a legal point of view, too.

28.14 The Legal Theory Background as the Critique and Explanation of Refusing Surrender

The existence of principles such as mutual trust and confidence is

> certainly a very interesting question, and if it arose for discussion in any other forum than a court dealing with an application […] for surrender, it would undoubtedly generate considerable academic and interesting debate

said Judge Peart in his decision refusing surrender in the first round.[103] The current study however is an adequate forum to discuss the issue. In the following, in the first part of Chapter VII, I will summarise the lessons learned from the operation of EU criminal justice functioning along the lines of intergovernmentalism and the importance of comparative law in the area of freedom, security and justice. In the second part of Chapter VII, I will show how the *Tobin* case proved my two hypotheses: first, that EU criminal justice needs to move away from intergovernmentalism and second I will argue for the need for minimum harmonisation of procedural guarantees and prison law in order for mutual trust-based instruments to work.

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100 Supreme Court of Ireland, *Minister for Justice Equality and Law Reform v. Tobin*, *see* footnote 28.

101 Attila Fekete Gy., 'Nyolc hónappal többet ülhet az ír gázoló', 21 January 2014, http://nol.hu/belfold/20140121-nyolc_honappal_tobbet_ulhet.

102 14 év után: Különös dologra szánta rá magát az ír gázoló, 5 February 2014, http://hetivalasz.hu/vilag/az-apa-ezzel-lezartnak-tekinti-az-ugyet-7291.

103 High Court, *see* footnote 19.

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28.15 De lege lata: Case-by-Case Evolution of European Criminal Justice and the Importance of Comparative Law

The notion of legislation based on a single case is generally repudiated by legal experts, who view the idea as a mindless political act jeopardizing the coherence of the legal system and transgressing important legal principles. While this is certainly true at the national level, one must be guarded in one's criticism with regard to EU criminal law, where legislative response to case-law should be attributed to the weaknesses of the halting inter-governmental cooperation in the enforcement of criminal law. In the former third pillar, legislation adopted in response to the shortcomings of judicial cases and the rectification of the resulting mistakes were the necessary accompaniments of the evolution of EU law. The laws that became enacted were carefully drafted framework decisions mainly restricted to defining the goals without prescribing the modes of implementation, in congruence with the principle of inter-governmentalism that characterized the earlier cooperation in fighting against crime. EU interference in the regulation of criminal law, regarded to be a core issue of national sovereignty, would have offended the sensitivity of the Member States, with the result that any discontented state could easily have vetoed the passing of the draft bill, as the third pillar required unanimity in legislation. For this reason, third-pillar instruments conferred Member States considerable with a significant margin of discretion in the phase of implementation, while there were practically no sanctions for failure to transpose, faulty or non- implementation or erroneous legal interpretation. The framework decisions per definitionem had no direct effect, the Committee could not initiate legal proceedings, and the sphere of influence of the Court was extremely limited.[104] The *Tobin* case can also serve as an excellent example to demonstrate how the Member States were able to practice self-correction, as they learned from the miscarriages of the law and, gradually and step by step, they rectified the mistakes resulting from the jealous protection of their sovereignty and improved cooperation in criminal justice.

After the failed attempt at Mr. Tobin's surrender – in recognition of the differences between the Anglo-Saxon and the continental legal systems and in order to avoid repetition of such an embarrassing situation – the Irish legislature introduced comprehensive changes in their criminal code by Act 28 of 2009, which, in Section 6, eliminated all obstacles from the path of Francis Ciarán Tobin's extradition.

The Irish implementation of the Framework Decision not just draws the attention to the difficulties of intergovermentalism, but also emphasises the importance of comparative law. Ex post facto it has become clear that the legislator did not intend to bypass EU law,

104 Still, the European Court of Justice engaged in a rather extensive interpretation once it had the chance to rule on a framework decision, which was a victims' rights intrument in this case. *See Criminal Proceedings against Maria Pupino*, footnote 38.

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but the lawmaker simply proceeded in accordance with its own procedural legal system and in the course of implementation it merely considered the possibilities provided by common law. The in absentia hearing is unconceivable in common law systems, i.e. in legal systems where the emphasis is on the hearing and verbosity, parties determine the issues that need to be proven, and where the importance of direct and cross-examination is highly appreciated. Expressing national procedural law chauvinism is a clear fault in the context of a legal instrument that is concerned precisely with cooperation between different law systems,[105] and this legislative mistake is the major reason why the Irish court could not and did not surrender Mr. Tobin.

The Irish legislators have failed to take into account the differences between the Anglo-Saxon and the continental legal systems, and this omission was partly due to the fact that both the Tampere conclusions[106] and the first recital of the Framework Decision on the European arrest warrant were concerned with the issue of fleeing from justice after a final court decision. According to the latter, 'the formal extradition procedure should be abolished among the Member States in respect of persons who are fleeing from justice after having been finally sentenced and extradition procedures should be speeded up in respect of persons suspected of having committed an offence.' (emphasis added) Therefore, the first recital of the Framework Decision apparently recognizes arrest warrants issued to order the execution of a final sentence only in the case when the convicted person flees justice; in other respects, it only permits surrender to facilitate a criminal procedure. The recital also makes reference to the conclusions of the Tampere council, although its phrasing is much broader: for those cases, where the convicted person flees the given country after receiving the final sentence, it recommends a simple extradition procedure, while generally it proposes speeding up the surrender procedure, but without limiting the latter to the cases of conducting criminal procedures and therefore extending it also to the execution of sentences, regardless of the first part of the sentence.[107] However, these fine nuances are irrelevant from the perspective of the implementation, since it is not the Tampere conclusions that the Member States are obliged to transplant, while the recitals have, by their nature, an explanatory function and under no circumstances can be regarded as 'hard' law. What should have been properly executed are those provisions of the Framework Decision, where the relevant definition was provided in Paragraph (1) of Article 1, which defined the legal institution of the arrest warrant as follows:

105 Károly Bárd, Vádlottak jogai és sértettek érdekei a nemzeti és nemzetközi büntetőeljárásban, Kézirat, 2013; Károly Bárd, Fairness in Criminal Proceedings, Budapest: Magyar Közlöny Lap- és Könyvkiadó, 2007, pp. 11-12.

106 Council of the European Union, Presidency Conclusions, Tampere European Council, 15-16 October 1999, 16 October 1999, Para. 35.

107 *Ibid.*

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> 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*. [emphasis added]

Therefore, the main text makes no mention of absconding. Accordingly, the implementation should have taken into account the possibility of prosecution in absentia, which is legal under continental law.

In the interest of making the picture more complete, it is worth mentioning that Hungary also modified its criminal code as a consequence of the *Tobin* case: effective from 1 September 2008, Act XXVI of 2008 narrowed the possibility of depositing security.[108] It gives the following reasoning:

> At the moment the regulation does not specify the range of criminal acts qualifying for depositing security. The law only states that it is permitted in cases where the accused, if found guilty, is likely to be given a sentence involving either a fine or a suspended prison term (possibly supplemented by a fine). The possibility however cannot be ruled out that the accused, who flees the country after depositing security, will eventually receive an actual prison sentence. In this regard, the court has wide latitude. Narrowing the area where the application of security is permitted is justified, in order to avoid the problems that arise in current sentencing practice.[109]

Accordingly, for the future the option of release on security is only allowed in the case of criminal acts punishable by a prison term of less than eight years on the one hand, and it is not allowed at all if the criminal act resulted in death, on the other. It is also a new feature of the 2008 modification that the accused has to state explicitly in the request whether he or she will return to Hungary, if the execution of the judicial decision so requires.[110]

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108 The bill was passed in Parliament with 355 MPs voting 'yes' and one voting 'no'. The subject matter of the law was actually rather different: Act XXVI of 2008 modified the rules of the application of the legal instrument of security as defined in Art. 20, Para. (1) of Act CIV of 2001 on the penal sanctions applied to legal persons.

109 The reasoning of Act XXVI of 2008 modifying Act CIV of 2001 on penal sanctions against a legal person. A detailed reasoning for Art. 20.

110 The modified provision of Act XI of 1998 on the Criminal Procedural Code is the following:
'Article 586, § (1) Upon the request of a defendant living abroad, up to the filing of the indictment the prosecutor, thereafter the court may permit the deposit of a security, *in case the criminal act involved is punishable with less than eight years imprisonment*. In such a case the procedure may be conducted in the absence of the defendant. *Security may not be deposited if the crime resultd in death.* […]
(3) In the request for permission of depositing a security, the defendant shall authorise the defence counsel to receive the official documents addressed to the defendant (mailing agent), *furthermore the defendant has*

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The Hungarian legislation – unlike the occasional self-correction that is a necessary side-effect of inter-governmentalism – is a text-book case of unnecessarily creating laws in reaction to actual cases that have produced great public outcry. Had the court used the institution of security correctly, possibly as bond for the legal costs of the case, but not as bail, then the problems of surrender would never have risen, since in that case it would have been clear that the security was not meant to guarantee the return of the accused in case of being convicted, and so this purpose should have been achieved in some other way. On top of that, the new law fails to solve the problem arising in criminal acts where the death of the victim follows the time of the accused foreigner's departure from Hungary,[111] nor does it answer the question of what should happen to an accused foreigner who is ordered to stay in Hungary until the final sentence is issued, which could take years. The new law also creates practical difficulties every year for about thirty to sixty foreign defendants,[112] who probably speak no Hungarian, or not well enough to find a job, and who cannot be expected to bring their entire family to Hungary for the duration of the proceedings. Presumably, the option of forcing them to reside in a foreign country is not the least restrictive of all the possible methods to secure the execution of their punishment.

28.16 De lege ferenda – Harmonisation of Minimum Standards Reinforcing Mutual Trust

People who drive have one foot in the grave and the other in prison, the Hungarian saying goes. But one must be held responsible for it, anyway. What is more, one must be held responsible according to the law of the country where one has caused the accident, even in the case when the driver would not have been held criminally responsible, or would have received a milder punishment, such as a conditional prison sentence, for the same act in his or her own country. Evidently, Francis Ciarán Tobin found it difficult to accept this. As Tibor Navracsics has put it, 'Tobin has failed as a human being.'[113] Not necessarily for what he has done, which is something he will have to live with for the rest of his life and that is punishment enough, but for his determination to do everything in his power

to state in the request that he or she will return to the territory of Hungary if needed for the sake of enforcing a prison sentence. […]' (modifications in emphasis, emphasis added by the author).

111 A case in point is the criminal proceedings against Radimir Cacic, Croatia's former Deputy Prime Minister, who in January 2010 was driving along the Hungarian motorway M7 under extremely poor weather and road conditions, in pelting rain and dense fog, without fog light, causing a road traffic accident where two people were injured and two persons died. Still on the day of the accident, Cacic deposited security and left Hungary, which he was able to do because all the victims were still alive on the day of the accident. Two of them died later of their injuries: one passed away the following day, and the other six month later.

112 Data provided by the Hungarian Central Statistical Office.

113 *See* the press conference by Mr. Tibor Navracsics conveined on 5 December 2014. The original can be downloaded from the following webpage: www.rtlklub.hu/hirek/belfold/video/230207.

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to avoid paying the legal consequences, up to the point of acting in bad faith and abusing the law, which he did when he broke contact with his lawyer so that he could refer to a trial in absentia, when in fact he had clearly benefitted from being defended by a Hungarian legal attorney while he could return to his home country. It also speaks volumes that right until 5 February 2014 he never bothered to show remorse directly to the Zoltay family: he invariably expressed remorse only in letters addressed to the appropriate authorities, and always at a time when he hoped to gain some procedural advantage from it. Mr. Tobin pushed himself into more and more indefensible positions, and with every new legal trick he applied in the course of his legal defense, the people's wrath against him was growing. After a certain point his aversion to serve his time in a Hungarian prison became understandable, yet if he had surrendered himself to the Hungarian authorities in 2002, the situation would have been entirely different. Recognising the limited capability of national and Union legal actions, many outraged Hungarian citizens advocated the taking back of criminal justice and intended to retaliate personally.[114] It was not the crime itself that raised hatred against Mr. Tobin, but the realisation that the perpetrator abused the law or rather effectively used the gaps in the legal systems and the mistakes of implementation. This is what triggered visceral reactions that were highly destructive. Still, one should not expect the solution to a bungled criminal proceeding to come from the convict, and obviously the case has interest for legal scholars not on account of Mr. Tobin's psychological profile, but because it sheds light on the importance of cooperation in the area of European criminal justice and its current weak sides.

This case confirms the hypothesis that without laws passed on the basis of the principle of supranationalism the EU justice system will not work. Neither national legislations nor an extensive judicial interpretation of the laws can make up for the cumbersome legislation process, the resulting laws of shallow and poor quality and the lack of enforceability. The criminal justice regime of an ever closer European Union can only be made more effective by a closer cooperation between the Member States based on EU law. If the Member States had not protected their national sovereignty in the area of criminal justice, then a Luxemburg decision would have preceded the ruling of the Irish Court under the preliminary ruling procedure, which would obviously have come down on the side of Mr. Tobin's surrender. If the third pillar, similarly to the first pillar, could have functioned in compliance with the principle of supranationalism, then the Commission could have initiated an infringement procedure for the faulty national implementation. Finally, if the Court of Justice had more authority, it could have faulted Ireland for failing to keep the deadlines of 60 days and 90 days, respectively, and thus the issue of harassment by the state would

114 *See* for example a Hungarian language web-based discussion forum about reckless drivers and another one created in memoriam of 'two little persons': http://forum.index.hu/Article/showArticle?t=9016937; http://forum.index.hu/Article/showArticle?na_start=1618&na_step=30&t=9015567&na_order.

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never have risen in the domestic Irish court. At the same time, we must also see that cooperation in criminal justice can produce positive results even when it is operated along the principle of inter-governmentalism: in the absence of the nascent criminal justice regime of the European Union the problems outlined in the present study would never have come to light, as the surrender by a Member State of its own citizen had not been made mandatory by any international legal instruments before the enactment of the Framework Decision on the European arrest warrant. If there was no European Union, there wouldn't be a *Tobin* case: the option of surrender would never have arisen and the blame for releasing the defendant without appropriate guarantees for his return would squarely be laid on the doorsteps of the Hungarian court. In summary, therefore, we can conclude that without the European Union and without EU criminal justice there would be no *Tobin* case, while on the other hand, more EU laws would have resulted in a more efficient administration of justice.

I believe the core of the problem of not having 'enough EU law' can be traced back to the lack of mutual trust. Even though at the Tampere summit back in 1999 the principle was named as the cornerstone of judicial cooperation on which European criminal justice should have been based, mutual trust is still not fully realised among Member States. The Framework Decision under scrutiny clearly shows this lack of trust. This can be traced in both the codification technique of the instrument and also its application in practice. In the European arrest warrant context, had mutual trust existed, both the mandatory and conditional grounds for non-execution would have been redundant as judgements of a Member State would automatically be enforceable in any other Member State without the need for formulating exceptions. Guarantees would not be necessary either if human rights would uniformly be respected and enforced. The full realisation of this principle or rather vision however is in an unpredictable distance. Consider for instance the diverse interpretations of the sanction of real life imprisonment, or life imprisonment without the possibility of parole, as representatives of other jurisdictions name it. The practical enforcement of human rights standards also implies enormous differences across the EU. As long as this remains to be the case, mutual trust does not exist and can not exist either. As long as certain Member States are worried about their citizens' basic rights and respect for their procedural guarantees due to different fundamental rights standards, they leave short-cuts in their legislation not to enforce EU law and at the same time they interpret EU law in a restrictive way.[115] As we have seen in the case under discussion, especially the decision of the court of second instance in the second round, the judiciary may further expand the scope of exceptions and create novel grounds for refusal of requests for surrender. As long

115 Gert Vermeulen et al. (Eds.), *Rethinking International Cooperation in Criminal Matters in the EU. Moving beyond Actors, Bringing Logic Back, Footed in Reality*, Antwerpen, Apeldoorn, Portland, Maklu, 2012, pp. 269-270.

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as the Member States – with or without good reason – have no faith in each others' human rights protection mechanisms, the administration of EU criminal justice will remain cumbersome and – what could potentially have fatal consequences to the EU legal system – the Member States may invoke the protection of basic human rights in order to permit exemptions from the principle of primacy of EU law.[116] The establishment of a uniform EU human rights regime might be the answer to this problem.

Interestingly enough, however, if the so-called fundamental rights culture of the EU were to take roots[117] and were to fully cover the area of the third pillar, this would once again – this time originating from top down, from the international level – give rise to exemptions from the administration of criminal justice. Currently the nation-states are the ones who try to phrase the written legal instruments with due caution, while attempting to block their execution in practice, but for the future it might the courts in Luxemburg and Strasburg who might limit the application of the relevant framework decisions and directives – on the basis of human rights considerations that are practically very similar to those used by the Member States. If a Member State fails to implement the human rights regime at the appropriate level, not only will it no longer have the level of trust that forms the basis of the legal instruments of criminal justice, but it will also be against the law to execute them. To put it differently, if it should turn out in the future that the Member States rightly do not trust each other with regard to fundamental rights, procedural guarantees, and prison law, this will justify, and even make mandatory, departure from the primacy of EU law.[118]

Nevertheless, according to Károly Bárd

> the lack of trust will not result in the return to the traditional principles of criminal cooperation as these principles clearly slow down cooperation and weaken the effectiveness of criminal investigations. Rather there is a significant interest towards criminal investigation and cooperation. Therefore I don't

116 *See* the seminal Solange cases of the German Federal Constitutional Court: *Solange I*, BvL 52/71, BVerfGE 37, 271, 29 May 1974; *Solange II*, 2 BvR 197/83, BVerfGE 73, 339, 22 October 1986.

117 *See* footnote 3.

118 I was approached by UK attornies trying to prevent the surrender of their Roma clients to Hungary by arguing that they would be discriminated against by the justice system during a criminal procedure. Among others they try to underpin this by country reports of the European Commission against Racism and Intolerance and the UN's Special Rapporteur on contemporary forms or racism, xenophobia and related intolerance. *See* the ECRI report on Hungary (fourth monitoring cycle), 20 June 2008, www.coe.int/t/dghl/monitoring/ecri/country-by-country/hungary/HUN-CbC-IV-2009-003-ENG.pdf, especially Para. 186; UN's Special Rapporteur on contemporary forms or racism, xenophobia and related intolerance ('Special Rapporteur') report, 23 April 2012, www.ohchr.org/Documents/Issues/Racism/A.HRC.20.33.Add.1_en.pdf, Para. 58. In a different context, but about the obligation to depart from an EU law's general rules in order to give preference to individuals' human rights *see* European Court of Human Rights, *M.S.S. v. Belgium and Greece*, Appl. No. 30696/09, 21 January 2011.

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> envision a return to the principles of traditional legal assistance – along the lines of mutual diffidence –, but I suspect the harmonisation of procedural guarantees, which will create trust for the future.[119]

The heads of states and governments reached the same conclusion in the Stockholm program that is surprisingly honest regarding the principle of mutual recognition. The Stockholm program expresses a straightforward criticism and intends to establish that mutual trust which was the alleged cornerstone of several documents adopted after 11 September 2001 was in reality not there. In order to remedy the problem and create trust, the multi-annual program propagates legal harmonisation. 'The approximation, where necessary, of substantive and procedural law should facilitate mutual recognition.'[120] By 2012 several important EU laws were passed to this effect, for instance laws on the right to interpretation and translation in criminal proceedings, the right to information in criminal proceedings and the establishment of minimum standards on the rights, support and protection of victims of crime.[121]

The above illustrated development of judicial cooperation supports the neo-functionalist explanation of the evolution of European integration. At the early stage of integration, Members States declined each and every rudimentary formal criminal cooperation. The free movement of persons in respect of the area of freedom, security and justice, in addition to the formation of subjects of legal protection at Community level necessitated common criminal investigation and cooperation in European decision-making (first spill-over effect).[122] The initially stalling criminal cooperation and the fear of Member States of losing a considerable segment of their national criminal sovereignty resulted in the formation of norms that are highly influenced by politics, hardly enforceable and represent lower level of cooperation: instead of legal harmonisation the adopted provisions comply with the principle of mutual recognition. However, in the lack of adequate, communautarised, enforceable minimum procedural guarantees and human rights mechanism, such provisions were not able to operate effectively. Currently, we are witnessing how due process guarantees complement existing provisions and how an EU criminal procedural law system evolves, as a second spill-over effect, in order to maintain and promote an effective criminal

119 Károly Bárd, 'Az igazságszolgáltatási rendszerek összehasonlító vizsgálata – jogközelítés – vádlotti jogok', in Balázs Gellér (Ed.), *Békés Imre emlékkötet*, Budapest, Tullius Kiadó, 2013, pp. 16-34, 29.

120 Stockholm Programme, Section 3.1.1.

121 Directive 2010/64/EU of the European Parliament and of the Council of 20 October 2010 on the right to interpretation and translation in criminal proceedings; Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings; Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA.

122 Ernst B. Haas, *Beyond the Nation-State*, Stanford, Stanford University Press, 1964; Philippe C. Schmitter, 'Three Neo-Functional Hypotheses about International Integration', 23(2) *International Organization* (1969), pp. 161-166.

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cooperation. This is how minimum harmonisation of due process guarantees permits mutual recognition-based laws to survive.

Bence Zoltai, the victims' father recognised both the importance of enforcing the state monopoly on coercion and criminal power, and also that this criminal power is located at various levels of governance in the European Union. He said he was 'truly concerned that most of the people merely believe in personal revenge, but intended to prove that the state is able to adequately accomplish criminal justice. As we are living in the European Union, justice shall not rely on whether we are in Hungary or in Ireland.'[123] Agreeing with Mr. Zoltai I believe that criminal law needs to be adjusted to the reality of multi-level governance and substantial parts of national sovereignty need to be transferred to actors other than the nation state. This again can only be realized with the completion of the EU's fundamental rights culture in the area of criminal justice.

123 Péter Cseri, 'Tobin-projekt lépésről lépésre', *Népszabadság*, 24 July 2012.