

October 9, 2019

How the EAW is undermining fundamental freedoms: the Vincenzo Vecchi case.

1 / Presentation of the EAW

1.1 Mutual recognition and loyal cooperation

The EAW European Arrest Warrant is the result of a Framework Decision of the EU Council of 13 June 2002. It is a simplified cross-border judicial procedure for surrender for the purpose of criminal prosecution or the enforcement of a sentence or a security measure involving deprivation of liberty.

A warrant issued by a judicial authority of a country of the European Union is valid throughout the territory of the EU.

The EAW mechanism is based on the mutual recognition of judicial decisions, mutual trust and loyal cooperation within EU countries.

"This judicial procedure is based on the fact that the Union has set itself the task of establishing an area of freedom, security and justice by respecting fundamental rights, thus accepting the positive obligations it must fulfil (...) and that, in order to be effective, the principle of mutual recognition must be based on mutual trust, which can only be achieved if respect for the fundamental rights of suspects and accused persons and for procedural rights in criminal proceedings are guaranteed throughout the Union. " (2002 Framework Law)

The European Arrest Warrant mechanism has been in operation since January 1st 2004 and replaces extradition procedures. To this end, a constitutional amendment in France of 25/03/03 allows the application of the EAW and removes the fundamental principle according to which France reserves its right to refuse extradition for political offences within the EU.

In this context, for 32 categories of offences (including terrorism, participation in a criminal organisation, human beings trafficking, sexual exploitation of children and child pornography, drug trafficking, corruption, counterfeiting, etc.) it is not necessary to check whether the act in question constitutes a criminal offence in the countries concerned by the EAW [Manual on the issuance and execution of the EAW of 28/09/2017].

1.2 Double criminality established on the basis of comparative criminal law

For other offences, **the act in question must constitute an offence in the country of execution on the date of the offence (principle of double criminality).**

"The executing country must verify that the factual elements underlying the offence, as reflected in the judgment delivered by the competent authority of the issuing State, are also as such, in the event that they had occurred in the territory of the executing country, liable to criminal sanction in that territory".

1.3 The EU Charter of Fundamental Rights

Moreover, the legal decision must not conflict with Human Rights standards, as defined by the EU Charter of Fundamental Rights, which has become binding for the EU states since the 2007 Lisbon Treaty.

In this respect, it should be noted that mutual trust between states can only be achieved if respect of the fundamental rights of suspects and accused persons and respect for procedural rights in criminal proceedings are guaranteed throughout the Union.

However, problems have arisen, some of which are specific to the Framework Decision and result from its shortcomings, such as the lack of explicit references to fundamental rights guarantees or proportionality control, or its incomplete and inconsistent implementation. Other problems are common to all mutual recognition instruments due to an incomplete and unbalanced establishment of the Union's criminal justice area. **(See report of the Committee on Citizens' Freedoms and Rights, Justice and Home Affairs 01-2014)**

While, as the Commission on the revision of the EAW of January 2014 notes, there are many areas of concern, many of them being based on the conception of the Framework Decision, which is considered to be a cornerstone.

Indeed, for reasons related to the political context marked by the rise of terrorism (2001) but also other factors such as the length of extradition procedures... the 2002 Framework Decision on the EAW was fully in line with **a conception of European policies on judicial cooperation in procedural matters rather than on the harmonisation of criminal law at European level**. In the case of Mr. Vecchi, The founding pillars of the EAW are being weakened in many respects.

2/ The case of Mr. Vincenzo Vecchi and the Rocco law

On Thursday, August 8, 2019, Mr. Vincenzo Vecchi, who has been living in Rochefort-en-Terre in Morbihan for 8 years and is well integrated into local life, was arrested by the police. His arrest took place under a European arrest warrant. He was taken to the detention centre in Vézin le Coquet, near Rennes, for an expulsion procedure to Italy.

Mr. Vecchi participated in the 2001 Genoa demonstration against the G8 in Genoa, and in 2006 in an unauthorized antifascist counter-demonstration in Milan, and according to the Scelba law, the so-called "official" Milan demonstration, organized that day by the far-right party, "Fiamma tricolore", should have been banned for apology of fascism.

In Genoa, many demonstrators were arrested (more than 600 arrests) and ten people were sentenced for example to harsh sentences ranging from 6 to 15 years. These convictions were handed down on the charge of "devastation and looting" of the Italian penal code, the Rocco code, introduced by the fascist regime in 1930 and woken up for the first time against **street demonstrations** in the Milan trial and then the Genoa trials in order to justify the abusive repression. (Milan trial which took place before the Genoa trial while the events were posterior). **It should be noted that in 2001, the offences retained to convict Mr. Vecchi on the charge of "devastation and looting" under the principle of dual criminality did not exist in French law.**

2.1 The Rocco Law: moral support and devastation and looting

In fact, the elements of the Rocco code used (moral support and devastation and looting) have been enshrined in law to deal with war crimes or insurrectional situations),

It should be noted that **this law intimately links the two charges insofar as it is based on collective responsibility, the crime of devastation and looting does not have to be proven.**

This conception of justice is **in contradiction with the EU Charter of Fundamental Rights** and the common conceptions of most of the criminal law provisions of EU countries **for which guilt is based on the existence of tangible evidence and individual responsibility**.

In practice this law has been used very little since the Mussolini period and **never for demonstrations before Milan and Genoa**.

Since Milan and Genoa, the use of the charge of "devastation and looting" has become more frequent: 2008 in Bari, Sicily and Milan; 2011 in Rome (ongoing case); 2015 in Cremona and during the May 1st parade in Milan for which 4 people are waiting for their trial to begin.

The application of the Rocco code will result in very severe penalties for demonstrators. Thus, "the ten of Genoa" including Mr. Vincenzo Vecchi were sentenced to aberrant sentences: for Mr. Vecchi, a sentence of 12 years and 6 months! Faced with this disproportionate and unfair sentence given the difference in treatment between the accused demonstrators and the accused police officers (the latter when they were convicted never served their sentences), he decided to escape this sentence and took refuge in France.

2.2 Lack of judicial equity

It should be noted that **the lack of judicial equity between convicted demonstrators (damage to property) and convicted police officers (damage to persons) is indicative of a weakening of the values of the rule of law** (the notion of the rule of law implies the primacy of the law over political power, equity through obedience to the law for all and respect for the Constitution through law) and is also in serious contradiction with the EU Charter of Fundamental Rights and the opinions of the European Court of Justice.

We underline that the European Arrest Warrant (EAW) for Genoa is **incomplete and inconsistent** as acknowledged in Rennes by the Court, the Advocate General and the Defence Advocates at the different hearings (August 14th, 23rd and October 24th).

As for the EAW **concerning Milan, the latter should not have been issued by the Italian courts** since, as revealed by the Italian lawyers, Mr Vecchi has **already served** this sentence (an EAW cannot be issued for a sentence already served).

The Italian court at the time of the issuance of this EAW could not therefore ignore the decision of the Milan Court of Appeal of 9 January 2009 certifying the execution of the sentence for the alleged facts of 2006. **The Italian judiciary has therefore purposely lied about Mr. Vecchi's real situation and is therefore disloyal to the French judiciary**, which questions the "mutual trust" between courts that is one of the foundation of the EAW.

3/ Misguided EAWs - violations of the EU Charter of Fundamental Rights

In practice, the use in Milan and then in Genoa of the Rocco law and of the notion of "moral support" for events, makes it possible to punish, under the charge of "Devastation and looting", to very heavy prison sentences (from 8 to 15 years), the mere presence or participation without having to prove the guilt of the defendants in demonstrations.

We must note the following malfunctions:

- **Infringement of individual freedoms and of the presumption of innocence**

The notion of "moral support", by its collective approach, introduces an infringement of individual freedoms in deviation from the EU Charter of Fundamental Rights, but also de facto, an absence of presumption of innocence which contradicts Article 48 of the EU Charter of Fundamental Rights as well as Article 6 § 2 of the ECHR (European commission for Human rights) which explicitly incorporates the presumption of innocence as a general principle of criminal procedure.

- **Principle of legality**

The charge of "devastation and looting" and the heavy penalties associated with it are correlative to the use of the "moral support" during the demonstration in Genoa in 2001 (and then in Milan in 2006). **This indictment could not be known either by the citizens or by the demonstrators since this law had not been used, and was no longer in use for demonstrations, in Italy since the Mussolini period.**

Again, **the charges contravene Article 49 of the EU Charter of Fundamental Rights**, which states that "no one may be convicted of an act or omission which, at the time it was committed, did not constitute an offence under national and international law", which implies that **the law must be certain and verifiable** (principle of legality).

- **Principle of proportionality**

Finally, the prison sentences imposed for "devastation and looting" are very heavy (12 years and 6 months on the events in Genoa for Mr Vincenzo Vecchi) and contravene Article 49 of the EU Charter of Fundamental Rights (principle of proportionality) which states that **"the intensity of the sentences must not be disproportionate to the offence" as enshrined in the constitutional traditions common to the Member States and the case law of the European Court of Justice**. In France, for example, such high sentences would be imposed for murder.

These elements above show that the European arrest warrant against Mr Vecchi concerning the judgment on the events in Genoa and the decision of the Court of Cassation of 2012 strongly contravene central points in the provisions of the EU Charter of Fundamental Rights.

The Italian judiciary could not ignore it since Italy is a signatory to the 2007 Lisbon Treaty, where this Charter of Fundamental Human Rights of the EU became mandatory.

3.1 Contextualization of the Genoa trial

This situation obviously leads us to ask on these objective bases that **the EAW against Mr Vecchi concerning Genoa be broken**, while the one concerning Milan is not valid since the sentence has already been served.

We cannot ignore the fact that, at the Genoa demonstration, police repression was condemned by the European Court of Human Rights (ECHR): some perpetrators of police violence against demonstrators have not been prosecuted yet or, to date, those who were prosecuted have not carried out any punishment. However, this police repression had led to inhuman and degrading treatment of demonstrators on the fringes of the summit and of the march. According to the ECHR, these treatments can be considered as "acts of torture". This, of course, raises questions on the legitimacy of the judgment, of the required prison sentences and those suffered by the demonstrators.

As we have already pointed out previously, **all the components of the situation** leading to the Genoa trial and the conviction of Mr Vecchi and the decision of the 2012 Court of Cassation **are marked by such a powerful democratic denial** that it questions the rule of law and the excesses of a country that was nevertheless one of the founding countries of the EU:

- ⇒ Use of a fascist liberticidal law that finds all demonstrators guilty in advance and introduces an attack on individual freedoms,
- ⇒ Absence of the presumption of innocence, which is nevertheless a general principle of all criminal proceedings
- ⇒ Disproportionate sentences according to the customs of the law of most of the EU countries, which is moreover also combined with an unfair judicial treatment between convicted demonstrators and convicted police officers
- ⇒ All these components of the Milan and Genoa trials are in contradiction with the EU Charter of Fundamental Rights, which is nevertheless required in the EU.

3.2 Impartiality between the judiciary and political power?

The European arrest warrant is intended to be a tool of criminal judicial procedure aimed at prioritising the purely legal analysis of a crime or a misdemeanour over any political consideration.

The situation mentioned above raises the question of what may happen to such a mandate if the independence of the judicial authority from the executive power is challenged in a country of the European Union.

Thus, a significant number of EAWs issued by Romania (corruption offence...) but also by other countries show that the required impartiality between the judiciary and the political power, which is one of the central conditions for the fair functioning of the EAW, is distorted. This "non-loyalty" and the resulting violations of European fundamental rights are particularly highlighted by the NGO Fair Trials, the NGO Human Rights Without Frontiers and the European Court of Justice.

The legitimacy of all the requests made by these countries and their motivations are questionable: are we totally in a common law judicial logic, or would we seek to use a procedural tool for at least partially political purposes?

Should Italy be considered in the issuance of European mandates concerning Milan and Genoa as part of this whole?

In view of all the denials of democracy, the denial of judicial rules common to the majority of EU countries and the failure to respect the EU's fundamental rights at the Genoa trial, it seems to us that Italy has very clearly used the EAW procedural tool against Mr Vecchi for purely political purposes.

This is corroborated by the issuance of the EAW against Mr. Vecchi concerning Milan (many judges had at the time refused the trial file) which turns out to be a "gross manipulation":

- The latter has already served this sentence and an EAW cannot be issued for a sentence already served....
- The Italian court could not therefore ignore the decision of the Milan Court of Appeal of 9 January 2009 certifying the execution of the sentence for the alleged facts of 2006.

4/ The revision of the European arrest warrant

The situation presented above fully confirms some of the Commission's concerns about the January 2014 revision of the EAW, from which we can extract some elements:

- The absence in the Framework Decision 2002/584/JHA and other mutual recognition instruments of **an explicit ground for refusal** where there are serious reasons to believe that the execution of a European arrest warrant would be incompatible with the obligations of the executing Member State under Article § of the EU Treaty and the EU Charter of Fundamental Rights ("The Charter").
- The absence in the same Framework Decision and the other instruments of mutual recognition of **provisions on the right to an effective appeal solution** within the meaning of Article 47 of the Charter, which should be governed by national law, gives rise to insecurity and divergent practices from one Member State to another.
- The absence of a right to an effective option, in accordance with the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), such as **the right to appeal against the requested execution** of an instrument of mutual recognition in the executing State and **the right of the requested person to challenge in court any failure by the issuing State to respect the guarantees provided to the executing State**.

This commission will also recommend **"the withdrawal of EAWs and corresponding alerts...** for binding reasons, for example because of the principle of ne bis in idem (no one may be prosecuted or punished for the same acts", which is the case with the Milan EAW) or for the violation or incompatibility with human rights obligations.

The proposals for revisions of the EAW, the "dysfunctions" that result from this analysis by the Commission on the revision of the EAW in January 2014, have been largely revised downwards by the European Parliament: **neither the inclusion in the Framework Decision of an explicit ground for refusal, nor the one concerning the right of appeal have been incorporated by the Parliament**. The revision of the EAW "deprived of its core substance" could therefore be very widely adopted (495 votes in favour, 51 against and 11 abstentions)

At that time, the only significant change in the EAW guide (2017 versus 2014) concerns the case of life imprisonment, which may give rise to the right to request a review after a certain period of time. To date, the commission's other strong recommendations have remained a dead letter...

We will add to these recommendations:

- ⇒ The need for **a genuine independent a priori review of the procedure under the EAW** that would make it possible to secure the functioning of this mandate and go beyond the credo of the necessary mutual trust and cooperation between the courts of two States, which sometimes - too often ?- seems weakened.
- ⇒ And in **the event that the country of execution of the EAW breaks the procedure, the possibility that this evolution will be extended to all EU states** as one of the elements of mutual trust and cooperation between EU countries' courts.

Finally, in response to the problems posed by the EAW, which may, of course, concern EAWs that we can describe as "political" where dual criminality remains the only aspect that can lead to the cassation of the mandate, the European Court of Justice has delivered four judgments (C-216/18 PPU ; C-268/17 ; C-220/18 PPU ; C-327/18 PPU) which introduce the **notion of "exceptional circumstances"**.

These exceptional circumstances may be used **as grounds for refusal to comply with an EAW and are based on systemic or widespread failures of detention conditions in the issuing**

country. National judges are in charge of verifying the risks incurred by the person for inhuman or degrading treatment.

5/ Criminalization of social movements and invisible political prisoners

Ultimately, and beyond the profound disloyalty on the EAWs issued by the Italian courts concerning Milan and Genoa; Mr Vincenzo Vecchi, like the ten others in Genoa and Milan, is a **political prisoner** sentenced, **without the Italian courts having had to prove his guilt**, to disproportionate and, de facto, illegal penalties **since he has no respect for common judicial procedures and the EU Charter of Fundamental Rights.**

This observation cannot be considered as an exception and must be seen in relation to the growing development of a trend towards the criminalization of social movements.

Indeed, in a European Union that could not envisage, before the 2000s, given the democratic systems in place, the existence of political prisoners within it, the current situation shows a clear shift. The current political situation in EU countries is marked by the rise of authoritarian and populist regimes as well as by a growth of liberticidal provisions in the common laws and penal codes of many EU countries:

- [The NGO FairTrials](#), supported by the European Commission, explains that "every day across Europe, the most basic rights are being violated in police stations, courts, and prisons.»
- In Italy, since Milan and Genoa, convictions for "devastation and looting" are on the rise for increasingly minimal acts during social demonstrations.
- In France, the liberticidal orientations of the government, which are beginning to be implemented under the labour law and therefore well before the "anti-devastation law of 2019", but also the behaviour of the police forces in completely legal demonstrations, make us fear an even greater development of this "judiciarisation" and "criminalisation" of social movements but also of simple demonstrations.

These developments in a number of EU countries can only lead to an increase in the number of "political" prisoners within the European Union area who are invisible because they are tried for any other reason, some of whom will be forced into hiding.

The Vincenzo Vecchi Support Committee