

European Arrest Warrant Act is Void – The Decision of the German Federal Constitutional Court of 18 July 2005

By Simone Mölders*

A. Introduction

In its judgment of 18 July 2005,¹ the Second Senate of the Federal Constitutional Court (FCC) declared the European Arrest Warrant Act (*Europäisches Haftbefehlsgesetz*² – hereafter called the EAWA) of 21 July 2004 unconstitutional and void.

However, the result of total nullity of the EAWA, as well as certain points of the Court's reasoning were not undisputed within the senate, which becomes obvious with the dissenting opinions of the judges *Broß*,³ *Lübbe-Wolff*⁴ and *Gerhardt*.⁵ Beyond these judges, the ruling faced scholars' criticism as well⁶.

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¹ BVerfG, NEUE JURISTISCHE WOCHENSCHRIFT (NJW), 58 (2005), 2289.

² 2004 BGBl I at 1748. Concerning the legislative procedure, see Heiko Ahlbrecht, *Freier Personenverkehr innerhalb der Europäischen Union in Auslieferungssachen: Die Umsetzung des Europäischen Haftbefehls in das deutsche Rechtshilferecht*, 25 STRAFVERTEIDIGER 40, 41 (2005).

³ BVerfG (Dissenting Opinion Judge Broß), NEUE JURISTISCHE WOCHENSCHRIFT (NJW), 58 (2005), 2297.

⁴ BVerfG (Dissenting Opinion Judge Lübbe-Wolff), NEUE JURISTISCHE WOCHENSCHRIFT (NJW), 58 (2005), 2299.

⁵ BVerfG (Dissenting Opinion Judge Gerhardt), NEUE JURISTISCHE WOCHENSCHRIFT (NJW), 58 (2005), 2302.

⁶ See e.g., Michael Böhm, *Das Europäische Haftbefehlsgesetz und seine rechtsstaatlichen Mängel*, 58 NEUE JURISTISCHE WOCHENSCHRIFT 2588 (2005); Otfried Ranft, *Die Verfassungswidrigkeit des (deutschen) Europäischen Haftbefehlsgesetz: Bemerkungen zum Urteil des BVerfG vom 18.7.2005*, 24 ZEITSCHRIFT FÜR WIRTSCHAFTS- UND STEUERSTRAFRECHT 361 (2005); Ulrich Hufeld, *Der Europäische Haftbefehl vor dem BVerfG*, 45 JURISTISCHE SCHULUNG 865 (2005); Otto Lagodny, *Eckpunkte für die zukünftige Ausgestaltung des deutschen Auslieferungsverfahrens*, 25 STRAFVERTEIDIGER 515 (2005); Joachim Vogel, *Europäischer Haftbefehl und deutsches Verfassungsrecht*, 60 JURISTEN ZEITUNG 801 (2005); Robert Chr. von Ooyen, *(K)ein Raum der Freiheit, der Sicherheit und des Rechts?: Die Entscheidung des Bundesverfassungsgerichts zum EU-Haftbefehl*, 96

With the EAWA, which amended the *Gesetz über die internationale Rechtshilfe in Strafsachen* (Law on International Judicial Assistance in Criminal Matters - hereafter called the *IRG*) by part eight (§§ 78 *IRG*), the German legislature complied with its obligation to implement the Framework Decision on the European Arrest Warrant and Surrender Procedures between Member States of the European Union⁷ (hereafter called Framework Decision) according to Articles 34 (2) sentence 2 (b) EU and 31 of the Framework Decision. The EAWA came into effect on 23 August 2004 and was used on a regular basis until the day of the Court's ruling⁸. As a consequence of the ruling the extradition of a German citizen to a Member State of the European Union is not possible as long as the legislature does not adopt a new act implementing the Framework Decision. Because of that, Germany is now the only Member State of the European Union⁹ which has not yet effectively implemented the Framework Decision. That is why at present, Germany has to apply the European Convention on Extradition from 1957.¹⁰

The decision, which was proceeded by interim measure by the *Bundesverfassungsgericht* in November 2004¹¹, stopped the complainant's extradition based on the following reasons: The complainant Darkazanli, a German and Syrian national, was to be extradited to Spain for criminal prosecution on the basis of a European Arrest Warrant from 16 September 2004. Darkazanli's extradition has been pending since 15 October 2004. He was accused of participation in a criminal association and terrorism. As a key figure in the European section of the terror network *Al-Qaida* he was said to control finances and to sustain contacts among other members. In the Spanish council's view, Darkazanli's actions were likely to

DIE POLIZEI 325 (2005); Ulf Buermeyer, *Grundrechtsschutz in Deutschland und Europa: Das BVerfG hebt die Umsetzung des Rahmenbeschlusses über den Europäischen Haftbefehl auf*, 6 HÖCHSTRICHTERLICHE RECHTSPRECHUNG STRAFRECHT (2005) 273, available at <http://www.hrr-strafrecht.de/hrr/archiv/05-08/index.php3?seite=6>.

⁷ See Council Framework Decision of 13 June 2002 on the European Arrest Warrant and the Surrender Procedures Between Member States, 2002/584 O.J. (L 190) 1, available at http://europa.eu.int/eurlex/pri/en/oj/dat/2002/l_190/l_19020020718en00010018.pdf.

⁸ See the following court judgments. Oberlandsgericht Celle, STRAFVERTEIDIGER FORUM, 36 (2005), 163; Oberlandsgericht Düsseldorf, STRAFVERTEIDIGER FORUM, 36 (2005), 207; Oberlandsgericht Hamm, NEUE ZEITSCHRIFT FÜR STRAFRECHT, 25 (2005), 350; Oberlandsgericht Karlsruhe, NEUE ZEITSCHRIFT FÜR STRAFRECHT, 25 (2005), 352; OLG Stuttgart, NEUE JURISTISCHE WOCHENSCHRIFT (NJW), 58 (2005), 1522.

⁹ Vogel, *supra* note 6, at 802.

¹⁰ European Convention on Extradition, Dec. 13, 1957, ETS 24 (entered into force on 18 April 1960).

¹¹ BVerfG, EUROPÄISCHE GRUNDRECHTE ZEITSCHRIFT, 32 (2005), 667.

represent participation in an association of terrorism which infringes Article 515 (2) and Article 516 (2) of the Spanish penal code. In his constitutional complaint, Darkazanli challenges the decision of the Oberlandesgericht Hamburg (Upper Regional Court of Hamburg) of 23 December 2004. This decision permitted Darkazanli to be extradited to Spain on the basis of the rules on the European Arrest Warrant. In addition, the constitutional complaint was directed at the decision of the Freien Hansestadt Hamburg of 24 November 2004. Darkazanli asserts the injury of his rights from Articles 2 (1), 3 (1), 16 (2), 19 (4) and 103 (2) of the *Grundgesetz* (German Constitutional Law - GG).¹²

B. The Court's Ruling

The Federal Constitutional Court's ruling is essentially based on the following considerations:

- The EAWA infringes the first sentence of Article 16 (2) GG because the legislature has not complied with the prerequisites of the qualified proviso of legality under the second sentence of Article 16 (2) GG when implementing the Framework Decision on the European Arrest Warrant.
- The EAWA infringes Article 19 (4) GG by excluding recourse to a court against the grant of extradition to a European Member State.

I. Injury of Article 16 (2) Sentence 2 GG

In the opinion of the Senate's majority the aim of the liberty right against extradition (Article 16 (2) sentence 1 GG) is not to *per se* protect German citizens against punishment.¹³ The Court states that this fundamental right rather safeguards citizens not to be removed without their will from a legal order in which they have confidence. Article 16 GG protects the citizens' special connection to their own state's legal order. Thus, German citizens cannot be excluded from the liberal democratic community they belong to.¹⁴ This does not mean that criminal offences committed by Germans abroad are legitimized since such offences are subject to criminal prosecution by German authorities according to §§ 5-7 of the

¹² For the English text of the Constitution, see: <http://www.iuscomp.org/gla/statutes/GG.htm>.

¹³ BVerfG, NEUE JURISTISCHE WOCHENSCHRIFT (NJW), 58 (2005), 2290; BVerfGE 29, 183 (193).

¹⁴ BVerfG, NEUE JURISTISCHE WOCHENSCHRIFT (NJW), 58 (2005), 2290.

Strafgesetzbuch (German penal code - *StGB*)¹⁵ and § 1 of the *Völkerstrafgesetzbuch* (German statute on international criminal law - *VStGB*).¹⁶

However, the protection of German citizens from extradition, may be restricted by law due to certain prerequisites found in sentence 2 of Article 16 (2) of the GG. In this context the Court asserts, that Article 16 (2) sentence 2 of the GG does not violate Article 79 (3) (*Ewigkeitsgarantie*) or Article 23 (1) GG (*Integrationssschranke*).¹⁷

Article 16 (2) sentence 2 of the GG permits as “*qualifizierter Gesetzesvorbehalt*” (qualified legal proviso) the extradition of Germans “*soweit rechtsstaatliche Grundsätze gewahrt sind*” (to the extent that the principles of constitutionality are not infringed upon). The Court interprets this as a requirement of “*Strukturentsprechung*” (‘structural correspondence’). Thus, the German legislature needs to examine thoroughly whether these principles of a constitutional state are guaranteed by the Member State issuing the Arrest Warrant. A mere reference to Article 6 of the EU-Charter is not sufficient.¹⁸ Beyond this the *Bundesverfassungsgericht* stresses the principle of proportionality which must be respected when fundamental rights are interfered with.

This means that it must be ensured that the implementation of the Framework Decision must not lead to an unproportionate restriction of the fundamental right to freedom from extradition. In particular, the legislature had to see to it that the encroachment upon the scope of protection provided for by Article 16 (2) sentence 2 of the GG is not infringed upon.¹⁹ This is even more applicable since it concerns the intergovernmental “Third Pillar” of the European Union (police and judicial cooperation in criminal matters).²⁰ As to the premises for the extradition of a German citizen that is in line with the principle of proportionality, the Court differentiates between three categories:

- In those cases which mainly concern domestic aspects, (“*maßgeblicher Inlandsbezug*”, genuine domestic link) the extradition of a German citizen is, in

¹⁵ An English text is to be found at: <http://www.iuscomp.org/gla/statutes/StGB.htm>.

¹⁶ BVerfG, NEUE JURISTISCHE WOCHENSCHRIFT (NJW), 58 (2005), 2290; For an English version of the VStGB, see 1 AGEL 667 (2003).

¹⁷ BVerfG, NEUE JURISTISCHE WOCHENSCHRIFT (NJW), 58 (2005), 2290.

¹⁸ *Id.* at 2291.

¹⁹ *Id.*

²⁰ *Id.*

principle disproportionate and illegitimate. This is the case if substantial parts of the site of a criminal action committed by a German are on German territory. No German national needs to fear extradition to another country when committing a criminal offence in their own legal order, rather national prosecution authorities are to handle such cases. Otherwise the extradited German citizen would have to face prosecution based on material criminal law which, unlike national criminal law, he does not necessarily have to know, and in whose democratic legislative process he did not participate.²¹ On the basis of these facts, the Court criticized that the EAWA does not implement Article 4 (7)(a) and (b) of the Framework Decision.²² This Article permits judicial authorities to refuse the execution where the European Arrest Warrant relates to offences which according to the law of the executing Member State have been committed in whole or in part in the territory of the executing Member state or in a place treated as such. It also permits refusal of execution where the offences were committed outside the territory of the issuing Member State and the law of the executing Member State does not allow prosecution for the same offences when committed outside its territory.

- The result of the assessment should be different, however, where the alleged offence shows a significant connection to a foreign country. In these cases there is no concern about the extradition of German citizens to a Member State. This applies likewise to acts of transnational dimension and gravity (e.g. international terrorism and organized illicit trafficking in drugs or human trafficking). Whoever acts within another legal system must suppose him or herself being held responsible within that system.²³

- The Court held that a third category requires a thorough assessment in each individual case, if the criminal action takes place in Germany whereas the site of the crime is abroad. Here, it is obligatory to weigh the effectiveness of the prosecution on the one hand against the fundamental rights of the defendant on the other. In the Senate's opinion the EAWA does not meet this standard.²⁴

The legal regulation provided for by the German legislature in § 80 *IRG* permitting the extradition of Germans for prosecution only if the issuing Member State assures that the person who is the subject of the European Arrest Warrant, after being heard, will be returned to the executing Member State in order to serve the

²¹ *Id.* at 2292.

²² *Id.*

²³ *Id.*

²⁴ *Id.*

custodial sentence or detention order passed against him in the issuing Member State, does not meet the requirements set by the German constitution.²⁵ The German legislature could have chosen an implementation that showed higher consideration in respect of the fundamental right concerned without forcing implementation of the binding objectives of the Framework Decision. The EAWA encloses a “*Schutzlücke*” (gap of protection) concerning the execution based on acts with a significant domestic connecting factor. The encroachment upon the freedom from extradition increases if the European Arrest Warrant concerns an act punishable under the law of the issuing Member State but not of the executing Member State (Germany).²⁶

Apart from this, from the point of view of the Court, the EAWA shows a gap of protection concerning the possibility of refusing extradition due to criminal proceedings that have been instituted in the same matter in the domestic territory or because proceedings within the domestic territory have been refused. As to this the Court criticizes the non-observance of the optional ground for refusal of Article 4 (2) of the Framework Decision. In this context, the legislature should have examined the provision of the “*Strafprozessordnung*” (Code of Criminal Procedure - *StPO*)²⁷ to verify whether decisions by the national Public Prosecutor’s Offices to refrain from criminal prosecution must be subject to judicial review regarding a possible extradition.²⁸ The *Bundesverfassungsgericht* held that preliminary investigations have, in this respect, an additional function to protect individuals’ rights.²⁹

II. Breach of Article 19 (4) of the GG

Moreover, the EAWA infringes Article 19 (4) of the GG and therefore the guarantee of access to a court by excluding the avoidance of the grant of extradition to a European Union Member State in accordance with § 74b IRG.³⁰ § 83b IRG splits up the extradition procedure into a procedure for admissibility extradition by the *Oberlandesgerichte* and a procedure for granting extradition by the *Bundesregierung* (Federal Government). The procedure for granting extradition is complemented by

²⁵ *Id.* at 2293.

²⁶ *Id.*

²⁷ An English text is to be found at: <http://www.iuscomp.org/gla/statutes/StPO.htm>.

²⁸ BVerfG, NEUE JURISTISCHE WOCHENSCHRIFT (NJW), 58 (2005), 2293.

²⁹ *Id.*

³⁰ *Id.* at 2294.

specified grounds for optional non-execution of the European Arrest Warrant that are provided in the Framework Decision. Correspondingly, the authority responsible for granting the extradition no longer merely decides on foreign-policy and general-policy aspects of the request for extradition but also has to enter into a process of weighing up whose subject is in particular criminal prosecution in the home state of the person affected.³¹ For this reason, the German legislature was obliged to open recourse to the Courts not only concerning the admissibility but also concerning the grant in order to protect the prosecuted person's fundamental rights (Article 19 (4) GG).³²

C. The Concurring and Dissenting Opinions

I. Judge Broß's Dissenting Opinion

Judge *Broß* concurs with the result of the decision of the Senate's majority but not with its reasoning. In his opinion, the EAWA is unconstitutional because it does not take account of the principle of subsidiarity, Article 23 sentence 1 of the GG.³³

II. Judge Lübbe-Wolff's Dissenting Opinion

Judge *Lübbe-Wolff* shares the Senate's majority's opinion that the EAWA does not take sufficient account of the fundamental rights of persons potentially affected by it, but she does not agree with parts of the grounds and with the dictum on the legal consequences. In her opinion, the declaration of nullity of the EAWA was not necessary.³⁴ Furthermore she states that in order to rule out violations of the constitution, it would have been sufficient to establish that in certain specified cases, extraditions on the basis of the Act are inadmissible until the new regulation is made effective that is in line with the Constitution.³⁵

III. Judge Gerhardt's Dissenting Opinion

Judge *Gerhardt* takes the view that Darkazanli's constitutional complaint would have had to be rejected as unfounded. The Senate majority's decision contradicts

³¹ *Id.* at 2295.

³² *Id.* at 2296.

³³ *Id.* at 2297.

³⁴ *Id.* at 2299.

³⁵ *Id.* at 2301.

the case law of the Court of Justice of the European Communities. In its *Pupino* judgment, the Court emphasised that the principle of the member states' loyal cooperation in the area of police and judicial cooperation in criminal matters must also be respected by the member states when implementing framework decisions within this field.³⁶ Concerning the legal consequences he agrees with judge *Lübbe-Wolff's* opinion.³⁷ He states that the declaration of nullity of the EAWA is not in harmony with the precept under constitutional and European Union law of avoiding violations of the Treaty of the European Union wherever possible.

D. Critical Remarks

At first the decision of the *Bundesverfassungsgericht* is to agree therein, that the Court limited its examination of the EAWA under constitutional law to the scope afforded by the Framework Decision. As far as the Framework contains binding objectives to the domestic law, the protection of fundamental rights is exclusively ensured at a European level.³⁸ In this respect the ECJ has to review the Framework Decision concerning its compatibility with the fundamental rights guaranteed by Article 6 (2) EU (Article 46 (d) in conjunction with Article 35 EU).³⁹

The Framework Decision implies the possibility to refuse extraditions of nationals (see Article 4 of the Framework Decision) as well as the possibility that the execution of the European arrest warrant by the executing judicial authority may be subject to conditions (see Article 5 of the Framework Decision).

It is to be challenged, whether as reprimanded by the Senate the German legislature falsely ignored Article 4(2), (3) and (7) of the Framework Decision and actually violated the principle of proportionality as well as Article 19 (4) GG with the adoption of the EAWA (I). Eventually, I will discuss whether the Senate majority's reasoning deals with all the important problems concerning the EAWA (II).

³⁶ *Id.* at 2302.

³⁷ *Id.* at 2303.

³⁸ See Martin Böse, § 78, in INTERNATIONALE RECHTSHILFE IN STRAFSACHEN, margin number 8 (Grützner & Pötz eds., delivery complement 06/2005); Martin Böse, § 80, *id.* at margin number 2; Nicola Vennemann, *The European Arrest Warrant and its Human Rights Implications*, 63 ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT 103, 119 (2003); but see Andreas Zimmermann, *Die Auslieferung Deutscher an Staaten der Europäischen Union und internationale Strafgerichtshöfe*, 56 JURISTENZEITUNG 233, 234 (2001); Bernd Schünemann, *Fortschritte und Fehlritte in der Strafrechtspflege der EU*, 151 GOLDAMMER'S ARCHIV 193, 206 (2004).

³⁹ Böse, *supra* note 38.

*I. The Freedom of Extradition**1. Article 16 (2) GG*

The classification of offences into three groups to point the legal stipulations to extraditions of German citizens is convincing.⁴⁰ However, Judges *Lübbe-Wolff*⁴¹ and *Gerhardt*⁴² criticise correctly that the Senate does not deal with § 83b (1) and (2) *IRG* with regard to the rejection of extraditions of German citizens.⁴³ This prescription allows the refusal to execute the European Arrest Warrant where the person in question is being prosecuted by a national Public Prosecutor's Office for the same act as that on which the Arrest Warrant is based and where the national judicial authorities have decided not to prosecute for this offence or to halt criminal investigations. Accordingly, in any case of the European Arrest Warrant being based on an act with a significant domestic connecting factor, the extradition of a German citizen may be rejected as long as the person in question is subject to criminal proceedings being based on the same criminal act, if the opening of such proceedings has been rejected, or if they have been suspended. This is for § 81b (1) and (2) *IRG* in conjunction with the current *Legalitätsprinzip* (principle of mandatory prosecution - § 152 (2) *StPO*). This applies the same way to such investigations which have been launched on the basis of information contained in the European Arrest Warrant.⁴⁴ As to this, the German legislature managed to implement Article 4 (2) and (3) of the Framework Decision. In the opinion of the *Rechtausschuss des Bundestages* (Law Commission of the Federal Parliament) the legislature even intended to implement Article 4 (7)(a) of the Framework Decision.⁴⁵ After all, the Senate majority was encouraged to take § 83b *IRG* into consideration in its reasoning.

However, there is no danger that German citizens will face proceedings before foreign courts as long as the offence the person in question is accused of does not have any genuine link to a foreign country. From the point of view of the European

⁴⁰ Buermeyer, *supra* note 6, at 276.

⁴¹ BVerfG (Dissenting Opinion Judge Lübbe-Wolff), *NEUE JURISTISCHE WOCHENSCHRIFT (NJW)*, 58 (2005), 2300.

⁴² BVerfG (Dissenting Opinion Judge Gerhardt), *NEUE JURISTISCHE WOCHENSCHRIFT (NJW)*, 58 (2005), 2302.

⁴³ See Vogel *supra* note 6, at 806.

⁴⁴ BTDrucks 15/1718, 21; Böse, § 83b, *supra* note 38, at margin number 5.

⁴⁵ BTDrucks 15/2677, 5.

Union it goes without saying that comparable acts are to be judged at a domestic tribunal. No other Member State will have interests in criminal acts without any own national link.⁴⁶

The principle of proportionality is based upon constitutional law.⁴⁷ Therefore it must be observed by all public measures which encroach fundamental rights, without being explicitly mentioned in the Act.⁴⁸ The *Oberlandesgerichte* having jurisdiction to authorize extraditions based on a European Arrest Warrant, are, according to that, obliged to observe this precept and to weigh the conflict of interests for avoiding an encroachment unjustified into Article 16 (2) sentence 1 of the GG in any case.

2. Challenging the Grant of Extradition

Article 19 (4) of the GG guarantees each addressee of a public measure the recourse to a court, provided that this measure infringes their rights.⁴⁹ There is no doubt that § 83b (4) IRG contains such a subjective right⁵⁰ and it is disputed, whether the same goes for § 83b (1) and (2)⁵¹. But in these cases it is already highly questionable whether the restriction of the fundamental right to freedom from extradition is proportionate. It is a matter of an arbitrary decision. This is a question that is dealt with by the *Oberlandesgerichte* assessing the permissibility of extradition.⁵² Thus, it is likely that there is no lack of protection.

⁴⁶ Hufeld, *supra* note 6, at 869.

⁴⁷ BVerfG 17, 313; BVerfG 70, 301; BVerfG (Dissenting Opinion Judge Gerhardt), NEUE JURISTISCHE WOCHENSCHRIFT (NJW), 58 (2005), 2302.

⁴⁸ See e.g., BVerfG, NEUE JURISTISCHE WOCHENSCHRIFT (NJW), 58 (2005) 1917-1920; BVerfG (Dissenting Opinion Judge Gerhardt), NEUE JURISTISCHE WOCHENSCHRIFT (NJW), 58 (2005), 2302.

⁴⁹ BVerfGE 8, 326; BVerfG 67, 58; BVerfG 96, 39; BVerfG 104, 231; Krüger, *Art. 19*, in KOMMENTAR ZUM GRUNDGESETZ, margin number 104 (Sachs ed., 2004).

⁵⁰ See Heiko Ahlbrecht & Otto Lagodny, *Einheitliche Strafverfahrensgarantien in Europa? Eine kritische Bestandsaufnahme*, STRAFVERTEIDIGER FORUM 34 (2003), 329; Böse, § 83b, *supra* note 38, at margin number 12.

⁵¹ Böse, *id.* at margin number 12; Tom Van der Beken & Gert Vermeulen & Otto Lagodny, *Kriterien für die jeweils "beste" Strafgewalt in Europa - Zur Lösung von Strafgewaltskonflikten jenseits eines transnationalen Nebis-in-idem*, 22 NEUE ZEITSCHRIFT FÜR STRAFRECHT 624, 625 (2002).

⁵² Joachim Vogel, § 1, in INTERNATIONALE RECHTSHILFE IN STRAFSACHEN, margin number 28 (Grützner & Pötz eds., 06/2005); Vogel *supra* note 6, at 807.

Furthermore the German legislature disrespects the Framework Decision's binding objectives by maintaining the granting procedure.⁵³ Articles 3, 4 (3), 6 and 15 of the Framework Decision imply that the concept of surrender is meant to be realized only by judicial authorities. By distinguishing between granting and judicial authorities the German legislature ignored the procedural changes intended by the Framework Decision and one of the most important objects of the scheme of the European Arrest Warrant.⁵⁴ If it had respected the abolition of the granting procedure, the question of an alleged violation of Article 19 (4) of the GG by the EAWA would have been superfluous.

II. The Second Surrender for Execution of a Sentence

Judge *Lübbe-Wolff*⁵⁵ is right in criticising the Senate's majority in not dealing with one of the major problems concerning the resurrender of German citizens for execution of a sentence. § 80 IRG permits the extradition of German citizens on the condition that the issuing member state guarantees that the requested person who, after being heard, will be returned to the executing member state in order to serve there the sentence passed against him within the issuing member state. This complies with Article 5 (3) of the Framework Decision. The surrender might, however, be a problem as soon as the European Arrest Warrant is based on an act which is not punishable in Germany.⁵⁶ This because the IRG does not encompass provisions for the case that the act in question is not punishable in both legal systems and thus does not provide the option of domestic execution of foreign judgements (see § 43 (1) sentence 3 IRG).

The resurrender of German citizens directly effects the principle of proportionality, emphasized by the *Bundesverfassungsgericht*. In its reasoning the Senate ascertains that the possibility of returning the requested person in their native land in order to serve the sentence passed against them must be included into the weighing of the pros and cons of the encroachment's vindication.⁵⁷ It results from the fact that the execution of a sentence in Germany leads to a reduction of the interference in

⁵³ Böse, § 83b, *supra* note 38, at margin number 1; Otto Lagodny, *Extradition without a granting procedure: The concept of surrender*, in HANDBOOK ON THE EUROPEAN ARREST WARRANT 39, 44 (Blekxtoon & van Ballegooij eds., 2004).

⁵⁴ Böse, § 83b, *supra* note 38, at margin number 1; ECKHART VON BUBNOFF, DER EUROPÄISCHE HAFTBEFEHL 63 (2005); Ahlbrecht & Lagodny, *supra* note 50, at 333; Lagodny *supra* note 6, at 515.

⁵⁵ BVerfG, NEUE JURISTISCHE WOCHENSCHRIFT (NJW), 58 (2005), 2300; See Vogel, *supra* note 6, at 806.

⁵⁶ Böse, § 80, *supra* note 38, at margin number 7.

⁵⁷ See BVerfG, NEUE JURISTISCHE WOCHENSCHRIFT (NJW), 58 (2005), 2294.

Article 16 (2) sentence 1 of the GG, violated because of the extradition.⁵⁸ Moreover, the resurrender complies with the principle of rehabilitation.⁵⁹ In this respect, the possibility of resurrender must be a necessary prerequisite of such an extradition of citizens.⁶⁰ Even the “*Regierungsentwurf*”’s (Draft Act of the Federal Government) reasoning refers to the fact that a resurrender of execution of a sentence is impossible if it does not deal with a case of double criminality. It offends the rules of international cooperation in criminal matters as well as against German legal principles.⁶¹

Nevertheless, in order to prevent the injury of fundamental rights, different solutions are suggested. On the one hand, the Federal Parliament’s Law Commission is of the opinion that extraditions based on a European Arrest Warrant could be avoided by taking legal actions against the person in question.⁶² Due to the principle of mandatory prosecution (§ 152 (2) *StPO*) and the applicability of German criminal law for crimes committed by German citizens abroad (§ 7 (2)(1) *StGB*), the national Public Prosecutor’s office would be obliged to make a preliminary investigation. If the allegation of the issuing member state were not punishable in accordance with German national criminal law, an order to stay proceedings in accordance with § 172 (2) *StPO* would take place. Thus, the extradition could be rejected in accordance with § 83b (2) *IRG* and any dealing with the resurrenders’ admissibility would be superfluous. Scholars rather favour carrying out the verification of the double criminality in connexion with the permissibility of the extradition.⁶³

An argument against the latter point of view is Article 2 (2) of the Framework Decision. Due to this provision, the aspect of double criminality is no longer needed to be verified in the cases specified as it concerns the aim of facilitating the procedure of extradition among European Member States.⁶⁴ The judicial authorities

⁵⁸ See BVerfG (Dissenting Opinion Judge Lübke-Wolff), *NEUE JURISTISCHE WOCHENSCHRIFT* (NJW), 58 (2005), 2300.

⁵⁹ See Böse, § 80, *supra* note 38, at margin number 4.

⁶⁰ See BVerfG (Dissenting Opinion Judge Lübke-Wolff), *NEUE JURISTISCHE WOCHENSCHRIFT* (NJW), 58 (2005), 2300.

⁶¹ BTDrucks 15/1718, 16.

⁶² BTDrucks 15/2677, 5.

⁶³ Nico Keijzer, *The double criminality requirement*, in *HANDBOOK ON THE EUROPEAN ARREST WARRANT* 137, 162 (Blekxtoon & van Ballegooij eds., 2004); VON BUBNOFF, *supra* note 54, at 75.

⁶⁴ See Böse, § 78, *supra* note 38, at margin number 8.

need to even look at the question of whether the facts are punishable under their own domestic law.

The legal committee's reasoning cannot be followed. The Public Prosecutors' offices are only entitled to start prosecution based on sufficient grounds concerning a criminal offence (§ 152 (2) *StPO*).⁶⁵ This requires a so-called "*Anfangsverdacht*" (initial suspicion), that suggests that a criminal offence actually has been committed.⁶⁶ Consequently, investigations are inadmissible if no facts constituting an offence correspond to the behaviour accused. Beyond that the public prosecutor investigating such a case runs the risk of committing an offence himself because of the prosecution of innocent citizens due to § 344 *StGB*⁶⁷, especially as § 344 *StGB* applies to any official activity carried out with regard to the criminal procedure.⁶⁸

Therefore it remains questionable whether the *IRG* could be amended in such a way, that it is possible to surrender German citizens condemned abroad, even though it concerns an act that is not a criminal offence in Germany. In view of the fact that the possibility to resurrender is an indispensable condition to justify the infringement of Article 16 (2) sentence 1 *GG*, a decision with regard to this question by the *Bundesverfassungsgericht* would be preferable.

III. Declaration of Nullity

Finally, I agree with the Judges *Lübbe-Wolff's* and *Gerhardt's* opinion concerning the dictum of the legal consequences. Because of the declaration of total nullity of the EAWA, extraditions based on a European Arrest Warrant must be refused also in cases which do not concern German citizens and which pose no constitutional problems.⁶⁹ Furthermore, Germany's duty to respect European Union law required an interim regulation.⁷⁰ The *Federal Republic* thus compels the obligation to implement the Framework Decision by 31 December 2004 (Article 34 (3) of the Framework Decision). This is a situation, which could have been avoided.

⁶⁵ Edda Weßlau, § 152, in *SYSTEMATISCHER KOMMENTAR ZUR STRAFPROZESSORDNUNG (SK-StPO)*, margin number 21 (Rudolphi/Wolter eds., delivery complement 08/2005).

⁶⁶ Lutz Meyer-Goßner, § 152, in *STRAFPROZESSORDNUNG*, margin number 4 (48th ed., 2005).

⁶⁷ Böse, § 80, *supra* note 38, at margin number 7.

⁶⁸ Karl Lackner and Kristian Kühl, § 344, in *STRAFGESETZBUCH*, margin number 4 (25th ed., 2004).

⁶⁹ See BVerfG (Dissenting Opinion Judge Lübbe-Wolff), *NEUE JURISTISCHE WOCHENSCHRIFT (NJW)*, 58 (2005), 2300; BVerfG (Dissenting Opinion Judge Gerhardt), *NEUE JURISTISCHE WOCHENSCHRIFT (NJW)*, 58 (2005), 2303.

⁷⁰ Vogel, *supra* note 6, at 804.