10. LOST IN TRANSLATION? THE EUROPEAN ARREST WARRANT AT THE INTERSECTION OF BELGIAN AND EUROPEAN CONSTITUTIONAL LAW

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1. Introduction

Most people interested in the topic of this volume will know by now what sets the Belgian constitutional challenge to the European arrest warrant ('EAW') apart from the multiple other challenges in other jurisdictions. In its judgment in *Advocaten voor de Wereld*, the Belgian Constitutional Court had done the one thing that is as remarkable as it is common: it actually put before the European Court of Justice the question of the legality of the EU Framework Decision on the European Arrest Warrant ('EAW Framework Decision'). The fact that the Belgian Constitutional Court did this can be explained by several characteristics of Belgian Constitutional law. I will expand on these aspects of Belgian law as they may be explained by the 'open character' of the Belgian Constitution on the one hand and, on the other hand, the 'ambitious creativity' of the Belgian Constitutional Court that applies it. In this context, a remarkable type of interaction between European law and national constitutional law has become possible.

The legal challenge of the European arrest warrant before the Belgian Constitutional Court displays that interaction in all its richness, yet it also prompts new questions. Is there indeed a 'perfect fit' between Belgian and European legal safeguards regarding different aspects of the surrender of individuals following an EAW, or do crucial elements get lost in translation? What is the potential scope of the 'legal avenue', used for the first time in *Advocaten voor de Wereld,* to challenge the legal instrument of the framework decision because of its alleged 'weakening of Belgian democracy'? Before attempting to tackle these issues, it is necessary to make some general remarks on the place of EC and EU law within the Belgian constitutional system.

2. The background to *Advocaten voor de Wereld*: 'Constitutionalised European Law'

Although Belgium is not the only EU Member State with a constitution that is very accommodating to international and European law, it is the only state that combines such openness with a constitutional court that is eager to incorporate EC/EU law into its constitutional frame of reference. This phenomenon can be understood against the background of two concurrent developments in Belgium that, together, have resulted in the present 'European practice' of the Constitutional Court: federalism and European integration.

Federalism plays an important role in constitutional review in Belgium, although in the specific case of *Advocaten voor de Wereld* this aspect of Belgian law was not directly

involved. Yet, for a full understanding of the background to the case, it is important to stress that federalisation as such is the historical *raison d'être* of constitutional review in Belgium. In the 1970s and 1980s when the blueprints of present day federal Belgium were laid out (establishing three 'Communities' and three 'Regions'), it was decided that Belgian federalisation would be organised on the basis of absolute equality between the different Belgian legislators. Contrary to Germany where the *Grundgestetz* contains a clear hierarchy by stating *Bundesrecht bricht Landesrecht*,[1] the Belgian federal legislator enjoys no such privilege.[2] In such a system of 'horizontal federalisation' the necessity was evident for the introduction of an innovation in Belgian constitutional law: a Constitutional Court that could rule at least on the disputes between the several lawmaking entities of the country. Thus, in the early 1980s the Constitutional Court was established within the Belgian Constitutional system as a *fremdkörper*. In those early days, it still bore the name of 'Court of Arbitration', which reflected quite well its role at the time: an arbiter between the different equal players in the Belgian arena who were bound to have issues over their respective competences from time to time.[3] The hitherto existing constitutional principle of the 'infallible legislator'[4] (that Belgium shared with countries like the UK and The Netherlands) had to be abandoned. This newly established Constitutional Court started out with fairly modest powers and tasks. Yet, through amazing creativity the 'Court of Arbitration' gradually developed into the fully-fledged Constitutional Court that it is today. Two articles of the Belgian Constitution had greatly assisted this achievement of the Constitutional Court: Articles 10 and 11 of the Constitution. These two articles grant the Constitutional Court the power to review parliamentary legislation from all Belgian legislators with the principles of equality and non-discrimination, moreover, it can do so on the request of individuals.[5]

Originally intended as an extra tool for safeguarding the Belgian balance between the different legislators, these two constitutional provisions soon became 'portals' through which the Constitutional Court managed to bring a vast set of other norms into its constitutional frame of reference. Under these provisions, Belgians are to enjoy their 'rights and freedoms without discrimination'. Yet, it is nowhere stated that these 'rights and freedoms' are to be of a purely domestic character. Thus, the Constitutional Court has brought into its frame of reference (1) the rest of the Belgian Constitution, including the Belgian catalogue of human rights (Articles 8 to 32 of the Constitution), (2) international instruments such as the ECHR and (3) EC and EU law. Reviewing

1 See Article 31 of the German Basic Law.

2 There are currently nine lawmakers with legislative powers in Belgium. It is beyond the scope of this chapter to fully explain the differences in origin and functioning and composition of these entities. See for a more detailed account in English, T.A.J.A. Vandamme, Prochain Arrêt, La Belgique, Explaining recent preliminary references to the Belgian Constitutional Court, *EU Const.*, 2008, p. 127.

3 Although this is not quite the case with the Brussels Capital Region: its laws (called 'Ordinances') can be reviewed by ordinary courts on their constitutionality (and with the Special Law of 12 January 1989 on Brussels Institutions) unless it regards constitutional provisions that are part of the *bloc de constitutionnalité* that the Constitutional Court can apply.

4 In the old days, a Belgian court could at best interpret a law as much as possible in accordance with the Constitution, see the old case of *Waleffe* (Cass. 20 April 1950, Pas. 1950, I, 560-572).

5 Since 1989, the Court of Arbitration has been allowed to review legislative acts in the light of Articles 10, 11 and 24 of the Belgian Constitution. In the same year, the individual *Verfassungsbeschwerde* was also introduced.

laws with these latter two categories of norms was a task originally attributed to the Belgian ordinary courts but the Constitutional Court has managed, through Articles 10 and 11 of the Constitution, to incorporate EC and EU law into its *bloc de constitutionnalité*. Because of the parallel development of the Court as an institution and the simultaneous expansion of EC/EU law, it can be said that EC/EU law has helped the Constitutional Court to establish itself firmly within the Belgian Constitutional system.

In order to bring a complaint before the Constitutional Court, one must follow the official formula that the violation of European law amounts to a violation of Articles 10 and 11 of the Constitution.[6] The result is a 'Constitutionalisation' of European law, whereby the Belgian Constitution incorporates many aspects of EC and EU law, including, as the case of *Advocaten voor de Wereld* exemplifies, the General Principles of Community Law. The only proviso is that the infringement of EC/EU law takes place in a discriminatory fashion, or at least produces discriminatory effects in Belgian law.

To a large extent, this explains why the Constitutional Court of Belgium is very willing to apply EC and EU law to a piece of parliamentary legislation, such as the Federal Act of 19 December 2003 incorporating the European arrest warrant into Belgian Law (the 'EAW Act').[7] It also explains why there was so much emphasis on equality and non-discrimination in the preliminary reference to the European Court of Justice ('ECJ'). Like all national plaintiffs keen to challenge a Belgian act by reference to the European Convention on Human Rights, Belgian norms relating to *trias politica* arrangements and European institutional law, *Advocaten voor de Wereld* had to link all these norms with non-discrimination.

Finally, it is also good to realise that since the Constitutional Court has been open for individual complaints (since 1989) the Court has interpreted the ´sufficient interest´ requirement very broadly. That explains why, contrary to the other countries where constitutional challenges were mounted against the EAW, in Belgium this case could be dealt with *in abstracto*. Unlike the cases before the *Bundesverfassungsgericht*, the Polish Constitutional Court or the Supreme Court of Cyprus, *Advocaten voor de Wereld* did not involve a concrete EAW, the plaintiff being an organisation of legal practitioners with a philanthropic interest in fighting legal injustices across the globe.

All these combined elements explain why the Constitutional Court of Belgium refers a relatively large number of preliminary questions to the ECJ under Articles 234 EC and 35 EU. Furthermore, the remarkable consequence of this incorporation of European law into Belgian constitutional law is that, by making these preliminary references on interpretation to the ECJ, the latter could in some instances be said to be the final authority on the interpretation of the Belgian Constitution.

3. Constitutionalising the Constitutional Challenge

Over the years, the Belgian Constitutional Court has built up quite an impressive amount of jurisprudence, whereby European law is interpreted and applied to national

6 There is another route for bringing European laws into Belgian Constitutional Review: through the reference to the Belgian Economic Union that is part of the set of rules relating to the distribution of competences between the different legislators. As this plays no role in *Advocaten voor de Wereld*, this topic will not be considered at this stage.

7 *Moniteur Belge* of 22 December 2003, p. 60075.

acts. It is surprising that it was not until 2005 that, in this legal environment so open to EC/EU law, the first cases were brought that dealt with the *validity* of European acts. Instead of constitutionalising a European norm, the Constitutional Court must now constitutionalise a conflict of European norms. When a European act is challenged before the Constitutional Court of Belgium, it 'translates' the invoked grounds, be they of national or international origin, into EC/EU law. The next step is to combine these grounds with the provisions on equality and non-discrimination, which is necessary to make them justiciable before the Constitutional Court. The result is that challenges to EC or EU acts before the Constitutional Court are 'levelled' with a European challenge. In its 2005 judgment, amounting to the preliminary reference to the ECJ, the Constitutional Court indeed put it very sympathetically, stating that:

> 'Differences in view between the judicial authorities about the validity of Community actions and the validity of on internal legislation implementing such actions would jeopardise the unity of the European legal order and undermine the general principle of legal certainty'.[8]

In fact, the Belgian Constitutional Court holds the record in this regard. It is the first constitutional court in the EU ever to have made preliminary references to Luxembourg dealing with the validity of EC law (as it did in the *Money Laundering Directive* Case)[9] and EU law (as it did in *Advocaten voor de Wereld*).

As the Constitutional Court has manoeuvred itself into a position in which constitutional challenges to EC/EU acts can be levelled with European law by 'translating' or 'constitutionalising' the invoked grounds, it can easily avoid a constitutional conflict in which the issue of supremacy of EC and EU law over domestic constitutional law becomes the heart of the matter. Yet, it seems too optimistic to conclude from this 'European practice' of the Constitutional Court that no insoluble conflicts could ever arise between Belgian law and EC/EU law. It will be remembered that the grounds invoked before the Belgian Constitutional Court were of a different nature than those put forward by the plaintiffs in Cyprus,[10] Germany[11] and Poland.[12] In these countries, the national constitutional rule pertaining to the non-extradition of nationals was said to be violated by legislation implementing the EAW and its mandatory extradition of

8 See par. B.10 of Case 124/2005 of 13 July 2005.

9 See Case C-305/05 *Ordre des Barreaux Francophones et Germanophones and others v. Conseil des Ministres*, ECR [2007] I-5305.

10 Related rules of the Constitution were also applied before the Cyprus Constitutional Court, but it was evident that the rule on the non-extradition of Cyprus nationals was the dominant issue (evidenced by the fact that it was that constitutional provision (Article 11 (2) (f) of the Cyprus Constitution) that was amended following the ruling of the Cyprus Supreme Court. For a detailed description, see A. Tsadiras, Cyprus Supreme Court Judgment of 7 November 2005, *CML Rev* 2007, p. 1515-1528.

11 See Article 16 (2) *Grundgesetz* and the interpretation given thereto by the *Bundesverfassungsgericht* in its judgment of 18 July 2005, BverfG 2 BvR 2236/04.

12 See Article 55 (1) of the Polish Constitution: no extradition of Polish Citizens. The legal trick of differentiating between 'surrender' (based on a EAW) and 'extradition' did not stand before the Constitutional Court of Poland. For an analysis, see K. Bem, The European Arrest Warrant and the Polish Constitutional Court Decision of 27 April 2005, in: E. Guild (Ed.), *Constitutional Challenges to the European Arrest Warrant*, Nijmegen: Wolf Legal Publishers 2006, at p. 137.

nationals.[13] No such rule was invoked before the Belgian Constitutional Court, for the simple reason that it does not exist in the Belgian Constitution. The rule that Belgian nationals are not to be extradited was laid down in an ordinary federal law and, therefore, did not have any constitutional status that could shield it from subsequent legislation implementing the EAW into Belgian law.[14] That sets the 'case of Belgium' apart from the litigation before the other constitutional courts. Even the Belgian Constitutional Court would have found it hard to 'translate' a national 'non-extradition' clause into a norm of European constitutional law as the latter's principle of mutual recognition stands diametrically opposed to such a national norm.

4. The Challenges to the EAW: *Un Mélange à la Belge*

The national plaintiff managed to put forward five pleas regarding the unconstitutionality of the Belgian EAW Act where we see a typical Belgian *mélange* of provisions of the Belgian Constitution and the ECHR, all made justifiable by linking them with the Constitutional provisions on equality and non-discrimination (Articles 10 and 11 of the Constitution). These were:

1) violation of one's democratic rights under the Belgian Constitution in conjunction with Articles 10 and 11 of the Constitution;
2) violation of legal rights of detainees ex Articles 12 of the Belgian Constitution, 5(2), 5(4) and 6(2) ECHR, all in conjunction with Articles 10 and 11 of the Constitution;
3) violation of the rights of defence after a conviction *in absentia* (Articles 13 of the Constitution and 6 ECHR, all in conjunction with Articles 10 and 11 of the Constitution);
4) violation of equal treatment in its own right (by relaxing the double incrimination requirement for certain offences and maintaining it for other offences); and
5) the principle of legality in criminal matters (Article 14 of the Constitution and Article 7 ECHR), all in conjunction with Articles 10 and 11 of the Constitution.

The first, fourth and fifth pleas induced the Constitutional Court to refer questions on the validity of the EAW Framework Decision to the ECJ. After the ECJ rendered its preliminary ruling in case C-303/05 *Advocaten voor de Wereld*, the case was decided by the Constitutional Court on 10 October 2007.[15] These challenges will be discussed in paragraphs 4.2 and 4.3 below.

13 See on the position of a Member State's own nationals Articles 4(6), 4(7) and 5(3) of the EAW Framework Decision.

14 As a '*lex generalis*' this is laid down in the Law of 15 March 1874, modified by the Law of 31 July 1985. Yet, many bi- and multilateral treaties already diverged from this rule. Some scholars derive some constitutional status of this '*lex generalis*' from Article 13 of the Constitution: 'no one can be withheld, unwillingly, from recourse to the judge the law has assigned to him'.

15 Case 128/2007 of 10 October 2007.

4.1 The Rights of Detainees and Trials *In Absentia*: Who to trust?

It is interesting to take a closer look at the challenges that were resolved by the Constitutional Court without addressing the ECJ as, here too, fundamental issues were decided. The answers to the pleas relating to the rights of detainees and to safeguards concerning convictions *in absentia* both relate to a concept of trust. What is interesting, though, is that the Constitutional Court elaborates on trust in two different ways.

When *Advocaten voor de Wereld* challenged the EAW Act with the human rights issues mentioned above, it pointed to the fact that the Belgian law of 20 July 1990 (Law on Provisional Detention) provides detainees with certain guarantees from which there is a diversion in case a European arrest warrant is issued. The EAW Act (and its parent EU act) thereby introduces a new differentiation into Belgian law between detainees covered by the EAW and those outside the scope of the EAW that still enjoy the guarantees provided by ordinary criminal procedure. The Constitutional Court, seeing no need to refer a question on the subject to the ECJ, emphasised how different the role of Belgian Courts is when they decide to detain someone in order to pursue an EAW, in comparison with a situation entirely governed by national law. Hence, the difference is objectively justified. It could have ended here, since equal treatment was not an issue, the question of the adequate protection of rights of detainees could have been left for what it was. Nevertheless, the Constitutional Court also relied on a second, more fundamental, argument. It reiterated the principle of mutual recognition and, since there was a competent court somewhere in the EU that issued a valid EAW, the 'guarantees could be trusted to be to a high degree equivalent to those offered by Belgian law'.[16]

Advocaten voor de Wereld also attacked the EAW Act in as far as it provides for the surrender of persons convicted *in absentia*. Traditionally, trials *in absentia* are a ground for non-extradition in the classical extradition instruments, yet the EAW abandons that principle. The plaintiff argued that this leads to discrimination in Belgian law since the legal guarantees in the different Member States as regards a conviction *in absentia* are too different. For instance, a Belgian detainee surrendered to Denmark where he or she was convicted *in absentia* might be in a better position than a Belgian surrendered to Bulgaria. At this point, treating all issuing EU Member States as equivalent results in discrimination. In response, the Constitutional Court acknowledged that Belgian courts would have to make an appraisal of the guarantees offered in the issuing state to persons convicted *in absentia*. In particular, the EAW Act (in line with the EAW Framework Decision) required them to assess the available legal remedies in the issuing state that must guarantee the surrendered person a full review of his or her case.[17] Yet, instead of putting trust in the legal systems of the other Member States, the Constitutional Court stressed the trust people must have in the Belgian legal system. As Belgian courts could be trusted to scrutinise sufficiently the guarantees given in states issuing an EAW for someone convicted *in absentia*, there would be uniform protection for all persons in Belgium against whom an EAW was issued.[18]

16 See par. B.5.4 and B.5.6. It attaches great value at this point to the possibility to ask for more data if these seem insufficient (provided by Article 15 of the EAW Framework Decision).

17 Under Belgian law an appeal is considered a sufficient guarantee to that effect, see Article 7, second paragraph of the Belgian EAW Act of 19 December 2003.

18 See pars. B.8.5. and B.8.6. of the Court's ruling in Case 128/2007.

4.2 The Preservation of the Belgian Parliament's Powers: Is the Best yet to Come?

Traditionally, the subject of the EAW was dealt with by classical intergovernmental treaties. Yet, it is well known that the 'Third Pillar Convention' that could have introduced the EAW has not been a very successful instrument, mainly due to a lack of parliamentary ratification.[19] Of all the conventions adopted since 1993, most have not entered into force for this reason and the Council has virtually stopped using them since 2000.[20] Nevertheless, it was this traditional role of the Belgian Federal Parliament that *Advocaten voor de Wereld* tried to defend before the Constitutional Court.

The national plaintiff argued a violation of the Belgian *trias politica* constellation resulting from the wrong legal form chosen for the EAW. This should, allegedly, not have been a framework decision but a Third Pillar convention requiring national parliamentary ratification. *Advocaten voor de Wereld* managed to 'constitutionalise' this European institutional defect by linking it to Articles 36, 167 and 168 of the Belgian Constitution. These provisions relate to the position of the two Chambers of the Federal Parliament (Chamber of Representatives and the Senate) and the Federal Government ('The King') in Belgian federal treaty making practice.[21] Pivotal is Article 167 of the Constitution that states that 'The Federal Government ('The King') concludes treaties that shall not have effect in Belgium unless approved by the Federal Parliament'. As the EAW was laid down in a framework decision (for understandable reasons), the plaintiff claimed a violation of the democratic guarantees it would normally enjoy under Belgian law in the field of surrender/extradition.

Yet, in order to be able to challenge the EAW on these grounds, the national plaintiff would have to argue a form of 'discrimination' that is entailed by this violation of the Belgian *trias politica* rules. This required some creativity, even for Belgian standards. The line of reasoning of *Advocaten voor de Wereld,* apparently, was that an unjustified difference of treatment would arise between those who were subject to a request for extradition that was still based upon a classical international agreement (duly ratified by the Belgian Federal Parliament) and those who were surrendered following an EAW.[22]

Some doubt as to the soundness of this argumentation seems justified. First of all, the EAW obviously also relates to non-Belgian nationals who would not have the vote in Belgium and whose democratic rights could not be said to have been violated. Furthermore, the 'difference' in democratic guarantees (ignoring the democratic safeguards surrounding the EAW Framework Decision, both from national parliaments and the European Parliament) comes across as somewhat formalistic, perhaps even resonating cases like *Brunner.*[23] Yet, the most dubious issue is the question of infringement of the

19 See Article 34 (2) (d) EU.

20 See C. Ladenburger, Police and Criminal Law in the Treaty of Lisbon, *EU Const.,* 2008, p. 20-40 at p. 22.

21 The other federated entities also have treaty making powers. As the topic of surrender/extradition is exclusively federal, those powers were not at stake in the case of *Advocaten voor de Wereld*.

22 See also L. Walleyn, The Supremacy of International Law and Judicial Cooperation with International Jurisdictions, in: E. Guild (Ed.), *Constitutional Challenges to the European Arrest Warrant*, Nijmegen: Wolf Legal Publishers 2006, at p. 137.

23 See BVerfG, judgment of the *Bundesverfassungsgericht* of 12 October 1993, 2 BvR 2159/92.

Belgian non-discrimination provisions. From the start of this case, the Federal Government had contended that it failed to see how a violation of the powers of the Federal Parliament would result in discrimination against citizens in Belgium. It stated that: 'as the complaint regards the legislative procedure rather than the content of the act, the Constitutional Court is not competent to rule on this matter'.[24] Unfortunately, the Constitutional Court has at no point (either in its judgment of 2005 or in its final judgment of 2007) explicitly acknowledged that this reliance on non-discrimination in relation to *trias politica* is sound. In its ruling of October 2007, it stated that 'if the powers of the Federal Parliament could be said to have been violated and since this is a legal safeguard attributed to all who are subject to Belgian law, this *would allegedly result* in a violation of Articles 10 and 11 of the Constitution'.[25] Thus, the Court seems to neither deny nor accept this reasoning as such but discards the plea as the ECJ ruled that, under the EU Treaty, the EU legislator did enjoy the liberty to choose the form of the framework decision for the introduction of the EAW.[26] Yet, two further questions remain.

First of all, it is questionable whether the issue of the violation of the Belgian provisions on non-discrimination (Articles 10 and 11 of the Constitution) can be discarded simply because the ECJ had stated that the institutional provisions of the EU Treaty were not violated by the chosen form of a framework decision. The answer of the ECJ as such, although perhaps not very surprising from an EU perspective, has an interesting impact upon Belgian law. After all, the fact that the ECJ has accepted the form of the EAW does not change the *alleged* difference in treatment of one's democratic rights (depending on whether one is surrendered under an EAW or still extradited under a classical treaty instrument). Such discrimination would then be allowed for the simple reason that EU law had introduced it into Belgian law. This is another way of 'constitutionalising' EU law: EU law itself provides an 'objective justification' for doing something that would otherwise violate the Constitution's provision on equal treatment. It may very well be that this line of argumentation is indeed what the Constitutional Court had in mind, but it failed to state so explicitly.

The second question that remains after this reliance on non-discrimination in connection with the Belgian ground rules on *trias politica* is that of the future potential of this Belgian Constitutional argument vis-à-vis other EC and EU acts. If indeed, this was a valid way of challenging the EAW, the avenue thus created can be used to challenge other EC and EU acts, both as regards their form (as in *Advocaten voor de Wereld*) but also as regards their legal basis chosen (unanimity versus qualified majority vote). An EC regulation generally grants fewer powers to the federal or federated Parliaments (no implementation) than an EC directive and a unanimity requirement obviously gives the (several) parliaments of Belgium more power as well. If, for instance, someone wanted to challenge the Data Retention Directive, as Ireland has done recently (though unsuccessfully), by claiming that it should have been a Third Pillar framework decision instead of a First Pillar directive,[27] the 'Belgian Constitutional Route' used in *Advocaten*

24 See Case 124/2005 of 13 July 2005, par. A.3.4.

25 See Case 128/2007 of 10 October 2007, paragraph B.2.3. Please note, however, that the translations into English are by the author and are, therefore, unofficial.

26 See C-303/05 *Advocaten voor de Wereld*, par. 28 to 42.

27 See C-301/06 *Ireland v. European Parliament and Council*, judgment of the Court of 10 February 2009, n.y.r.

voor de Wereld would seem to be open as well. The reasoning would then be that a Third Pillar framework decision would guarantee a Belgian veto, which Parliament could have sanctioned politically. In short: any kind of institutional defect of a European act could be said to result in a Belgian Constitutional defect, which would necessitate a preliminary reference to the ECJ. Considering the wide accessibility of the Belgian Constitutional Court to private individuals (of which the case of *Advocaten voor de Wereld* is a fine example), this might become an attractive legal remedy to pursue for the challenge of EC/EU acts.

The possible entry into force of the Lisbon Treaty would not alter that conclusion, although the present case of *Advocaten voor de Wereld* would take a different course under the new treaty. 'Lisbon' would abandon the present Third Pillar convention as a possible instrument in favour of the new harmonised nomenclature of 'regulations', 'directives' or 'decisions'.[28] Moreover, the new Article 82 (1) (a) of the Treaty on the Functioning of the European Union grants the European Legislature, in very clear terms, a discretion as to the choice of instrument on topics such as the EAW.[29] Yet, also under the Lisbon Treaty, procedures and instruments may still differ greatly with possibly a correspondingly different position for the Belgian Parliament(s).[30] The interaction between Belgian Constitutional law (on *trias politica*) and EU law as elaborated specifically in *Advocaten voor de Wereld* would, therefore, remain highly relevant. For these reasons it would be wise for the Belgian Constitutional Court to clarify more explicitly whether this 'route' is indeed as open as it now seems to be.

4.3 The Requirement of Double Incrimination

The EAW Act was challenged before the Constitutional Court for its relaxation of the classical double incrimination requirement for 32 categories of offences for which the EAW Act faithfully followed the EAW Framework Decision. Again, the Constitutional Court identifies a Belgian constitutional issue with a European constitutional issue by translating the invoked provisions from the Belgian and the ECHR into the General Principles of Community Law.

4.3.1 Full Identification of the Belgian and European Principle of Equality?

The first challenge to the relaxation of the requirement of double incrimination is based on the Constitutional principles of equality and non-discrimination. Here, these principles do not serve as mere 'portals' to bring other norms into the frame of reference. The relaxation brought about by the EAW Act was said to have introduced a discrimination into Belgian law as this classical requirement for traditional extradition instruments is maintained for other offences not listed in the EAW Act. The Constitutional Court, identifying the national provisions on equality and non-discrimination with the

28 See Art. 288 of the Treaty on the Functioning of the European Union.

29 The new provision speaks of 'measures' thus indicating that the choice of 'regulations', 'directives' or 'decisions' is open.

30 Some legal bases will contain restrictions as to the use of the instrument (e.g. only a directive) and obviously not all legal bases will, in procedural terms, entail a veto for individual Member States (the 'special legislative procedure' versus the 'ordinary legislative procedure').

General Principles of Community Law, put the validity question to the ECJ as if it were a question purely of EU law

Yet, it is interesting to see how the ECJ proceeded to review the EAW Framework Decision in the light of these principles. Although the ECJ was now officially applying General Principles of Community Law, one can read between the lines that the ECJ was really applying Articles 10 and 11 of the Belgian Constitution. It did so not without difficulty, for 'Belgian non-discrimination' still seems to be a concept quite distinct from its European counterpart. Whereas the national claimant stated that abandoning the double incrimination requirement for the types of offences enumerated in the EAW Framework Decision and maintaining it for other sorts of offences violated Articles 10 and 11 of the Belgian Constitution, the ECJ had to investigate how such a differentiation could be justified by objective reasons under the European principle of non-discrimination. In the process of European lawmaking, harmonisation is always gradual depending on the political possibilities and insights of the moment. The differentiation resulting therefrom is sometimes arbitrary but not necessarily contrary to the European principle of non-discrimination. The case of the EAW is possibly such a case. The 32 categories of criminal acts could very well in the future be extended to other offences as politics and necessity dictate.[31] Yet, the ECJ struggled to give the present differentiation an objective justification. It referred to the serious way in which these offences jeopardised the public order justifying the abandonment of the double incrimination requirement. Yet, it then proceeded to acknowledge that:

> 'even if one were to assume that the situation of persons suspected of having committed offences featuring on the list set out in Article 2(2) of the Framework Decision (…) is comparable to the situation of persons suspected of having committed (…) offences other than those listed in that provision, the distinction is, in any event, objectively justified'.[32]

Here at least one could say the ECJ's reasoning does not follow a straight line and the explanation seems to be the fact that the juxtaposition of Belgian with European non-discrimination put the ECJ in an awkward position. Thus, the process of 'constitutionalising' European law may defuse any potential supremacy issues as we have witnessed in other Member States, but it is no guarantee that European law and national law will always make a 'perfect fit'.

4.3.2 The Principle of Legality in Criminal Matters

When the national plaintiff invoked the principle of legality in criminal matters (Article 14 of the Belgian Constitution and Article 7 ECHR), he drew further upon the challenge of, specifically, the relaxation of the double incrimination requirement. As the EAW Framework Decision (and its implementing act) did not prescribe a specific set of criminal offences but, rather, enumerated 'vaguely described generic categories of undesirable behaviour', the EAW conflicted with the principle of legality.[33] The discrimi-

31 In fact, the EAW Framework Decision already envisages that possibility in Article 2 (3).
32 See par. 58 of C-303/05 *Advocaten voor de Wereld* ECR [2007] I-3633.
33 See par. A.8.1. of Case 128/2007 of 10 October 2007.

nation (necessary for enabling the plaintiff to bring the ECHR into the frame of reference) would follow from the vagueness of the EAW Act (and Framework Decision), as the wording of these categories of 'undesirable behaviour' was prone to lead to a different application by the different Belgian courts.[34] The Federal Government refuted this plea by stressing that the principle of legality was upheld, since the double incrimination check was relaxed only in cases when the crime was committed on the territory of the state in which the EAW was issued.[35]

When the ECJ had the opportunity to review the EAW Framework Decision on the principle of legality, it took the view that the Framework Decision did not harmonise these substantive elements of criminal law relating the 32 'offences' (the term coined by the Framework itself).[36] In itself that is hardly surprising as the ECJ had stated in the same judgment that framework decisions indeed need not harmonise substantive criminal law in the sense of Article 31 (1) (e) EU (see *supra*). Yet what makes the European answer sit uneasily with the Belgian question is the fact that the ECJ then argued from the perspective of the issuing state: the 'offence' as such would be duly circumscribed in the legal system of that state and, consequently, there was no violation of the principle of legality. Thus, the principles of legality and territoriality became inextricably intertwined.

Again, the answer of the ECJ seems to sit uneasily with the national constitutional question. The national plaintiff argued before the Constitutional Court from the perspective of the executing state (Belgium): is legality guaranteed when amongst the judges of the executing state there may be a different application of the double criminality requirement due to the fuzzy categorisation of the 'offences' for which this requirement is no longer to be examined? This indeed seems a point quite distinct from what the ECJ had addressed. It is interesting to note in this regard that Belgian law itself actually emphasises the potential difference in dealing with these 32 categories. In the EAW Act, it is stipulated that for the purposes of surrender under an EAW the terms 'murder or grievous bodily injury' ('offence Nr 14' on the list of crimes for which double criminality need not be checked) does *not* cover abortion or euthanasia.[37] It is difficult to see that abortion and euthanasia would be the only offences that necessitated 'an internal harmonisation of Belgian law' for the purpose of clarification of the 32 offences listed in the EAW Framework Decision.

5. Concluding Remarks

There is no doubt that, on the whole, the EAW came out of its Belgian test case stronger than before. Thanks to the Constitutional Court of Belgium, the ECJ was given the chance to affirm strongly the validity of this 'flagship of judicial cooperation'[38] despite the weakening effects of some of the constitutional courts of other Member

34 See par. B.12.2. of Case 128/2007 of 10 October 2007.
35 See par. A.8.2. of Case 128/2007 of 10 October 2007.
36 See Article 2(3) of the EAW Framework Decision.
37 See Article 5 (4) of the Belgian EAW Act.
38 A term used by Geyer, see F. Geyer, Case note on the Judgment of 3 May 2007, *Advocaten voor de Wereld*, *EU Const.*, 2008, p. 149.

States. The unique context of Belgian Constitutional law and the equally unique position of the Constitutional Court accounted largely for this opportunity.

Furthermore, in terms of providing an 'easy forum' for testing EC/EU acts, *Advocaten voor de Wereld* might have actually opened a new route for challenging many more EC/EU acts. By allowing (or at least not rejecting) the formula of combining Belgian Constitutional provision on non-discrimination with national *trias politica* and an alleged institutional defect of the EAW Framework Decision, the Constitutional Court may have opened somewhat of a Pandora's Box.

Be that as it may, the unique context of Belgian law cannot be completely isolated from the way the ECJ proceeds in answering preliminary questions, such as those that were the subject of *Advocaten voor de Wereld*. The practice of the Belgian Constitutional Court of 'Constitutionalising' European law, in particular the General Principles of Community Law, sympathetic as it may seem, does not always result in the 'unity of the European legal order' that the Constitutional Court advocates. In the process things may get 'lost in translation', which is certainly conceivable when the principles of equality and non-discrimination are the subject of a question from the Constitutional Court of Belgium. As these principles play a pivotal role in Belgian Constitutional litigation (for they serve as portals to widen the frame of reference of the Court to, *inter alia,* the ECHR) and are thus interpreted extremely broadly, it seems difficult to maintain that they are identical to the equivalent General Principles of Community Law. The fundamental question that the EAW brings to the fore is then: is European law 'constitutionalised' or is the Constitution 'Europeanised'. There seems to be room for both points of view.