FACULTY OF LAW
Lund University

Dace Winther

Extradition, Asylum and Mutual Trust in the European Union

One man's terrorist is another man's freedom fighter, yet another man's asylum seeker, yet another man's fugitive

JAMM07 Master Thesis

International Human Rights Law
30 higher education credits

Supervisor: Eleni Karageorgiou

Term: Spring 2018

Contents

Summary

The problem studied in this thesis is the impact of the principle of mutual trust on the possibility of EU nationals to claim asylum and avoiding extradition for political offences within the EU. The principle of mutual trust presumes that human rights are not violated in any EU Member State. The difficulty arises if and when human rights are actually violated. It is not clear to what extent fundamental rights can be invoked to rebut the mutual trust principle in avoiding extradition and claiming asylum. The case of the deposed Catalan leader Carles Puigdemont reveals that the questions of asylum and non-extradition of a political offender in the EU is a complicated and controversial topic. Thus, the research questions of this thesis ask how the application of the principle of mutual trust impacts the rights of the individual in cases of extradition and asylum, (and cases where extradition and asylum intersect), involving political offences.

The problematics of extradition and asylum for EU nationals in the EU are studied through analysing the EU provisions in an international law context. In addition, the CJEU jurisprudence is studied, with regard to how mutual trust is compatible with fundamental rights considerations in asylum and extradition cases. The case of Carles Puigdemont is used as the principal illustration for the problematic issues of asylum and extradition concerning EU nationals in the EU, while other cases from EU Member States are used to enforce the arguments of the thesis.

It is concluded in the thesis, that it is not fully clear what the principle of mutual trust actually entails. The Member State practice on when to rebut the presumption of mutual trust on human rights grounds, is based on random criteria and not indicative of a uniform approach. Meanwhile, the CJEU is very restrictive as to when fundamental rights grounds can be invoked in order to rebut the principle of mutual trust. It has so far been done only in cases involving potential ill-treatment. Also, national courts have mainly invoked ill-treatment, and have abstained from evaluating the right to fair trial in potential political offence cases. While national courts do occasionally refuse extradition (execution of the EAW), using fundamental rights grounds, the threshold of the Aznar Protocol for when an asylum claim by an EU national in another EU Member States would not be treated as "manifestly unfounded" is so unreasonably high, that it could be unattainable even in straight-forward cases of political persecution. Eventually the conclusions highlight that invoking the principle of mutual trust without actual respect for fundamental rights that this principle presumes, deems the principle senseless.

Abbreviations

CAT	Convention against Torture and Other Cruel, Inhuman and Degrading Treatment
CJEU	Court of Justice of the European Union
EAW	European Arrest Warrant
EAW FD	European Arrest Warrant Framework Decision
ECHR	European Convention of Human Rights
ECtHR	European Court of Human Rights
ETA	*Euskadi Ta Askatasuna* (Homeland and Liberty)– Basque separatist organization
EU	European Union
OJ	Official Journal (of the European Union)
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union

Chapter 1
Introduction

1.1.The Background

On 3 November 2017 Carles Puigdemont left Spain for Belgium. The conflict between the Spanish government and the government of the Autonomous Region of Catalonia had escalated regarding the legality of the referendum the Catalonian independence.[1] A European arrest warrant by a Spanish judge was issued on Carles Puigdemont and four other ministers of his cabinet the same day for sedition, rebellion and misuse of public funds.[2]

For over more than half a year the European media have been closely following the case of the exiled former president of the Autonomous Republic of Catalonia Carles Puigdemont: His escape to Belgium in order to avoid prosecution for organizing the independence referendum in Catalonia and announcing the independence of Catalonia from Spain, and the relentless efforts of Spain in pursuing the extradition of Puigdemont to Spain in every European country he would set his foot. Questions have been raised in the media regarding a potential asylum claim by Puigdemont in Belgium. In addition to that, law enforcement authorities in several EU countries have had to consider the possibility of apprehending and surrendering Carles Puigdemont for trial in Spain.

While the story of Puigdemont's pursuit by Spain has an entertainment value worthy of a crime series for the general public, it is just as interesting from a legal perspective. Can Puigdemont claim asylum? Can he be extradited to Spain? Even if he is wanted for a political offence? – The case of Puigdemont is a complex legal case that involves the question of extradition and asylum concerning an EU national, who is wanted for having committed a political offence. The EU principle of mutual trust has a particular impact on how such a case is to be resolved under the EU rules, and it may not necessarily be to the benefit of the individual. Based on the principle of mutual trust,[3] a situation where one EU Member State would refuse to extradite a political offender, who is an EU national, to

[1]Catalonia independence: Spain takes charge of Catalan government, *BBC News*, 28.10.2017. http://www.bbc.com/news/world-europe-41785292. Last visited 18.05.2018.

[2] Catalan arrest warrants withdrawn by Spain's Supreme Court. *BBC News*, 5 December 2017 http://www.bbc.com/news/world-europe-42237377 Last visited 18.05.2018.

[3] See CJEU, Opinion 2/13 of the Full Court of 18 December 2014 on the agreement on accession to the ECHR, ECLI:EU:C:2014:2454, para 191 reads: "That principle (mutual trust) requires, particularly with regard to the area of freedom, security and justice, each of those States, save in exceptional circumstances, to consider all the other Member States to be complying with EU law and particularly with the fundamental rights recognized by the EU law."

another Member State, ought to not be possible, because human rights are assumed to not be violated in any EU Member State. The same way asylum ought to not be necessary for an EU national in another EU Member State, because individuals are assumed not to be persecuted for a political opinion in any EU Member State. It is not clear whether the fundamental rights of the individual are sufficiently protected if these assumptions are incorrect.

1.2. The Problem

The problem analysed in this thesis is the impact of the principle of mutual trust on the possibility of individuals to invoke fundamental rights considerations in the fields of extradition and asylum, concerning political offences. Mutual trust - one of the fundamental principles in the EU - presupposes that human rights are not violated in any EU Member State. This presupposition significantly limits the possibility of EU Member States not to extradite political offenders, and for persecuted EU nationals to claim asylum in another EU Member State.

1.3. The Purpose and the Research Question

The purpose of this thesis is to expose a wider problem of the excessive limitation of fundamental rights considerations in the cases of asylum and extradition of EU nationals, based on the principle of mutual trust, analysing the topic from a political offence perspective.

In this thesis I will argue that the application of the principle of mutual trust to political offence cases has a negative impact on the protection of fundamental rights of the individual claiming asylum and avoiding extradition. This negative impact, in itself, is contrary to the human rights content that the principle of mutual trust is supposed to confirm.

The research question of this thesis is: how does the application of the principle of mutual trust in EU legislation impact the rights of the individual:

1) In cases of extradition of political offenders,
2) In cases of asylum claims on the grounds of persecution for political opinion,
3) In cases where extradition and asylum intersect concerning a political offence?

1.4. Method and Material

In this thesis I will be using the legal dogmatic method.[4] To answer the research questions, I will be analysing international law norms and EU legislation, relevant case law, scholarly books and articles, as well as factual materials. The central legislative materials I will be using for the analysis, are EU primary and secondary legislation, with a focus on the Treaty on European Union (In particular Protocol 24)[5] and European Arrest Warrant Framework Decision[6]. Concerning case law, I will be primarily analysing the cases of the Court of Justice of the European Union concerning the interaction of the principle of mutual trust with fundamental rights in cases of extradition and asylum. For this study I will be using scholarly books, articles and reports on extradition law, asylum law, as well as EU law on topics of extradition, asylum, mutual trust and fundamental rights. I will be using statistical materials and news articles for empirical data and facts of cases. To illustrate the problem, I will use real life examples of when individuals have/could have sought asylum on the grounds of political opinion and when they have/could have been extradited (or not extradited) for a political offence. A detailed focus in this thesis is on the on the most high-profile case of political offence in the EU, - that of Carles Puigdemont. The case of Carles Puigdemont is a highly illustrative starting point for exploring the legal problematics of extradition and asylum concerning EU nationals in the EU. To enforce arguments and illustrate aspects of asylum and extradition that may be outside the scope of the Puigdemont case, other examples will be analysed.

1.5. Delimitation

The scope of this thesis is to analyse the impact of mutual trust on the fundamental rights of the individual who is:

1) an EU national,
2) is seeking asylum in another EU Member State on the grounds of political opinion, and/or
3) is facing extradition from one EU Member State to another EU Member State for a political offence.

[4] For a broader study of what the complex concept of legal dogmatic method entails, see Raul Narits. Principle of Law and Legal Dogmatics as Methods Used by Constitutional Courts. *Juridica International*, Vol. 12, Int'l 15 (2007), pp. 15-23.
[5] OJ C340, 10.11.1997, p. 1-144, OJ115, 09/05/2008, p. 0305-0306.
[6] 2002/584/JHA, OJ L190/1, 18.07.2002.

The more studied question of asylum claims on the grounds of race and ethnicity, as well as asylum claims on grounds other than political opinion are outside the scope of this thesis. Asylum and extradition cases that concern third-country nationals or EU nationals that may seek asylum or flee to avoid extradition to a country outside the European Union are also outside the scope of this study.

With this thesis I intend to contribute to the existing research with an illustration of a problem, where the fundamental rights of an EU national may be violated through the application of the principle of the mutual trust which presupposes that fundamental rights in the EU are not violated. To prove this argument, I will use cases with names and faces that illustrate the problematics of mutual trust in the cases of extradition/asylum for political offenders/on the grounds of political opinion.

1.6. The Structure of the Thesis

Chapter 2 of the thesis is intended to give the necessary factual and legislative background for the reader to understand the problem and its context. This chapter contains the facts of the Puigdemont case, the background for the legal developments in applying mutual trust to extradition and asylum in the EU, description of the principle of mutual trust, and the two core documents regulating extradition and asylum, respectively, in the EU. In Chapter 3 I will analyse the principles of extradition that are relevant for political offences, and how, in contrast, the extradition of political offenders, that are EU nationals, is regulated and handled in the EU. In Chapter 4 I will describe the right to asylum with a focus on well-founded fear of persecution on the grounds of political opinion, analyse how the asylum provision regarding EU nationals in Aznar Protocol is compatible with refugee law, and what the impact of the Protocol is in practice. In Chapter 5 I will analyse how asylum and extradition interact, with a focus on cases involving a political offence, and identify the legal challenges that may arise in practice. Finally, in Chapter 6 I will present the conclusions.

Chapter 2

The Story Behind

2.1. The Catalan Referendum of Independence and Carles Puigdemont

When the Parliament of Catalonia called for a referendum on Catalan independence, it did not go down well with the Government of Spain: the Catalan pursuit of self-determination through establishing an independent republic conflicted with the interest of integrity of the state of the Kingdom of Spain and went against its constitution.[7] The Spanish Government attempted to stop the referendum. First, through the decision of the Constitutional Court of Spain.[8] Secondly, on the day of the referendum, 1 October 2017, the Spanish authorities closed down several of the polling stations and put in place police enforcement to prevent people from voting; these actions were claimed to be excessively violent, but it would be exaggerated to say that they lead to a bloodshed. When the referendum results were announced, they were ambivalent: 90% had voted for independence, while the turnout was only 42,3%.[9] By setting no minimum quorum for the referendum to be valid, and promising to declare independence within 48 hours, if the vote was yes, the Catalan Parliament did not leave options open for diplomatic negotiations with the central Government of Spain.[10]

When the Catalan Parliament voted in the favour of declaring independence, as promised, the Spanish Government exercised its power under the Spanish Constitution to take direct control over the Autonomous Region of Catalonia.[11] On 3 November a Spanish judge, on the request of a prosecutor, issued a European arrest warrant on the President of Catalonia – Carles Puigdemont, and four ministers of his Cabinet. They were accused of crimes of rebellion, sedition and misuse of public

---

[7] Xavier Vidal-Folch, It's not independence, it's a violation of the law. *El País*, 6 September 2017. Available at https://elpais.com/elpais/2017/09/06/inenglish/1504696098_919491.html. Last visited 18.05.2018.

[8] Rebeca Carranco, ÓSCAR López-Fonseca, Spain's Constitutional Court strikes down Catalan referendum law. *El País*, 17 October 2017. Available at https://elpais.com/elpais/2017/10/17/inenglish/1508250970_489373.html. Last visited 18.05.2018.

[9] Catalan referendum: Catalonia has "won right to statehood". *BBC News*, 2 October 2017. Available at www.bbc.com/news/world-europe-41463719, last visited 18.05..2018.
Sam Jones. Catalonia to hold independence vote despite anger in Madrid. *The Guardian*. 6 September 2017. https://www.theguardian.com/world/2017/sep/06/spanish-government-condemns-catalonia-over-independence-referendum. Last visited 18.05.2018.

[10] Tara John. What do we know about the Catalan Independence Referendum. *Time*, 25 September 2017, Available at time.com/4951665/catalan-referendum-2017. Last visited 18.05.2018.

[11] Catalonia independence: Spain takes charge of Catalan government, *BBC News*, 28.10.2017. http://www.bbc.com/news/world-europe-41785292. Last visited 18.05.2018.

funds,[12] with a potential prison term for up to 30 years.[13] The European arrest warrant was issued on the day Puigdemont and the ministers of his cabinet had left for Belgium. Puigdemont and the other ministers were first arrested, then released in Belgium. The arrest warrant was said to have been withdrawn by the Supreme Court on 5 December, basing it on the willingness of the Catalan leaders to return to Spain before new regional elections, that were to be held the same month.[14] However, it was actually more likely to have been withdrawn due to the awareness that, because of the difference in Belgian law from the Spanish law, the Catalan politicians were not be likely to be extradited.[15] Meanwhile, the national Spanish arrest warrant was never revoked,[16] which means, that upon return to Spain, the politicians would be arrested.

On January 25 Puigdemont was proposed as the only presidential candidate by Catalonia's newly elected parliament speaker, however, Spanish government refused to accept this candidacy.[17] While residing in Belgium, Puigdemont initiated a series of trips around Europe, to Denmark, Switzerland and Finland,[18]- promoting his political cause. When Puigdemont visited Denmark in January 2018, the Spanish Supreme Court rejected the request from the prosecutor to reactivate the European arrest warrant.[19] The possibility of Puigdemont's arrest, while in Switzerland, was examined by Spain, however the Swiss authorities were reluctant to be involved, referring to the free-movement of individuals in the Schengen area.[20] While Puigdemont was in Finland, a new European arrest warrant was issued on him on 23 March 2018. The Finnish National Bureau of Investigation stated that it did

[12] Catalan arrest warrants withdrawn by Spain's Supreme Court. *BBC News*, 5 December 2017 http://www.bbc.com/news/world-europe-42237377. Last visited 18.05.2018.
[13] Ibid.
[14] Ibid.
[15] Stephen Burgen and Daniel Boffey. Spanish Judge withdraws arrest warrant for Carles Puigdemont. *The Guardian*, 5 December 2017. https://www.theguardian.com/world/2017/dec/05/spanish-judge-withdraws-arrest-warrants-for-carles-puigdemont. Last visited 18.05.2018.
[16] Ibid.
[17] Sonya Dowsett. Spain seeks to block Puigdemont becoming leader of Catalonia. *Reuters*, 25.01.2018. https://www.reuters.com/article/us-spain-politics-catalonia/spain-seeks-to-block-puigdemont-becoming-leader-of-catalonia-idUSKBN1FE1IU. Last visited 18.05.2018.
[18] Geneva authorities distance themselves from Puigdemont visit. *Swissinfo.ch.* 18 March 2018, https://www.swissinfo.ch/eng/business/ousted-catalan-leader_geneva-authorities-distance-themselves-from-puigdemont-visit/43981428. Last visited 18.05.2018.
[19] Judith Mishcke, Spanish court rejects issuing EU arrest warrant for Puigdemont. 22 January 2018. https://www.politico.eu/article/carles-puigdemont-denmark-spanish-court-rejects-issuing-eu-arrest-warrant/. Last visited 18.05.2018.
[20] Spain examines possible Swiss arrest of Puigdemont. 15 March 2018. *Swissinfo.ch*. https://swissinfo.ch/eng/ousted-catalan-leader_spain-examines-possible-swiss-arrest-of-puigdemont/43975282. Last visited 22.05.2018.

not know about Puigdemont's whereabouts.[21] To avoid apprehension, Puigdemont chose to drive back to Belgium through Finland, Sweden, Denmark and Germany. He was arrested on the German side of the Danish-German border.[22] The German Court decided that Puigdemont could not be extradited on the rebellion charge, but the review of other charges continues.[23] Meanwhile Puigdemont has been released on bail.[24] As simplified as the European arrest warrant procedure is supposed to be, the question of returning Puigdemont to Spain cannot be simple, because it is a highly political issue. Executing the European arrest warrant blindly, without the consideration human rights issues involved, could amount to *refoulement*. At the same time, the mutual trust principle in the EU presumes that all EU Member States are safe countries of origin, to which return of an offender can be made, presuming that the fundamental rights of the individual will not be violated. This includes trusting that the fundamental rights of a political offender will not be violated upon return. Whether to rely on the principle of mutual trust or to question the potential fairness of a trial against a political offender is the legal dilemma of the Puigdemont case.

The Puigdemont case has drawn so much media attention because it is so controversial and because such a political stand-off is something that just doesn't happen in the European Union: the Catalan claims for self-determination and independence, the escalated Spanish response, the flight of Puigdemont and his pursuit by Spain. With Spain "chasing" Puigdemont through Europe with a European arrest warrant is forcing other EU Member States to reluctantly take sides in something that resembles a popularity ballot, because, legally, it appears, it is quite difficult to give "the correct answer" to a question of extradition of a political offender in the EU. Does Puigdemont have to be returned to Spain because an EU Member State will naturally respect the fundamental rights of a European politician? Or can it, instead, be anticipated, that a political offender will not receive any understanding for his political motives behind actions against the country by which he will be judged? The case of Puigdemont is not the first time Spain is seeking extradition of its separatists. Indeed, the reasons for why the tackling of the Puigdemont case is taking the particular shape it is, has a

[21] Carles Puigdemont slips out of Finland despite arrest warrant. The Guardian. 25 March 2018. Available at https://www.theguardian.com/world/2018/mar/25/carles-puigdemont-slips-out-of-finland-despite-arrest-warrant. Last visited 18.05.2018.
[22] Raphael Minder. Carles Puigdemont Is Arrested in Germany, Drawing E.U. Giant Into Catalan Fight. 25 March 2018. *The New York Times*. Available at www.nytimes.com/2018/03/25/world/europe/germany-carles-puigdemont.html. Last visited 18.05.2018.
[23] Philip Oltermann. German Court says Carles Puigdemont can be released on bail. T*he Guardian*. 05.04.2018. https://www.theguardian.com/world/2018/apr/05/german-court-says-carles-puigdemont-can-be-released-on-bail. Last visited 18.05.2018.
[24] Ibid.

history that dates a quarter of a century back. It is yet another case that involves Spain, Belgium, separatists and a political offence.

2.2. The Moreno-Garcia affair

2.2.1. The choice of Belgium by Puigdemont

Carles Puigdemont's choice of Belgium for his "voluntary exile" appears to not have been random, but based on legal considerations. Even though Puigdemont explained that he went to Belgium because it is the capital of the European Union where he would get maximum exposure for his defence of democratic values[25], and not to seek asylum, there are good reasons to believe that he most likely went to Belgium, to avoid return to Spain. Not only did the Belgian State Secretary for migration and asylum policy Theo Franken suggest that Puigdemont may file the claim and it would be reviewed.[26] Puigdemont himself hired a Belgian lawyer specializing in asylum cases,[27] with experience in assisting ETA members. And most importantly, the choice of Belgium is an obvious one, due to the special legal stance taken by Belgium regarding asylum seekers from the EU and stance shown in extradition cases regarding political offences, including, in particular, political offenders from Spain.

In fact, the Protocol on Asylum for Nationals of Member States (No. 24) to the Treaty on European Union (Amsterdam Treaty),[28] commonly called the Aznar or Spanish Protocol, bears the (nick)names for a reason. And, just as interestingly, Belgium is the only EU country that has made a separate declaration, emphasizing the conditioning of the application of the Protocol.[29] While every EU Member State may have had its individual reasons for consenting to the Aznar Protocol, the drafting of the provisions has a very particular background - the Moreno-Garcia affair. The Moreno-Garcia affair has influenced the way that the EU (as a whole), treats asylum applications from EU nationals: be it those seeking protection from racial and ethnic discrimination, or the very rare political offenders, against whom the provision was originally targeted.

---

[25] Auke Willems. *How EU law came to the fore in the Catalan independence debate – and what it means for Carles Puigdemont.* London School of Economics and Political Science. http://blogs.lse.ac.uk/europpblog/2017/11/30/carles-puigdemont-european-arrest-warrant/, last visited 18.05.2017.

[26] Sibel Top. The European Arrest Warrant against Puigdemont: A feeling of *déjà vu*? *EJIL Talk!* 3 November 2017, https://www.ejiltalk.org/the-european-arrest-warrant-against-puigdemont-a-feeling-of-deja-vu/. Last visited 18.05.2018, p. 2.

[27] Álvaro Sánchez. "Puigdemont hires Belgian lawyer who defended ETA members". *El Pais*. 31 October 2017. https://elpais.com/elpais/2017/10/31/inenglish/1509440074_788527.html, last visited 18.05.2017. (Belgian courts have traditionally exhibited mistrust about the application of the rule of law in Spain, an attitude that is uncommon among EU Member States" (p. 2).

[28] OJ C340, 10.11.1997, p. 1-144.

[29] Ibid., "Declarations the conference took note of", Declaration 5 to Protocol 24.

2.2.2. The Case of Moreno and Garcia

In 1992 a policeman was killed in Bilbao by a cell of ETA – the Basque separatist (terrorist) organization. In 1993 a Spanish judge issued an International Provisional Arrest Warrant against Spanish citizens Luis Moreno Ramajo and Raquel Garcia Arrantz, for offering lodging, transport and accommodation to the ETA cell accused of the murder[30] (offence qualified as participating in unlawful association and an illegal armed band[31]). Their names had been obtained by the Spanish police trough torture of a captured ETA member.[32] The warrant was addressed to the authorities in Belgium, to which the couple had escaped. Luis Moreno Ramajo was arrested by the Belgian police, and the Belgian court declared the International arrest warrant executable. Moreno Ramajo made an appeal, as a result of which the extradition execution decision was nullified.[33]

Following the decision, the same Court of Appeal of Brussels also issued an advisory opinion to the Belgian Government, stating that the warrant concerned political crimes, and that it therefore should not be satisfied.[34] While the Belgian Ministry of Justice decided to extradite anyway, Moreno Ramajo and Garcia Arrantz lodged an asylum application in Belgium. The application was deemed admissible for further consideration. In 1994 the asylum was denied on the grounds that, despite the fact that cases of abusive behaviours of the Spanish authorities towards the Basque secessionists existed, these were isolated cases, therefore there was no reason to believe that they would not receive a fair trial in Spain.[35] The extradition request was again accepted, but Moreno Ramajo and Garcia Arrantz appealed to the Belgian Commission for Refugee Appeal, which again denied asylum in 1996. The issue of extradition became a controversial political dispute in Belgium both because of the general political issues involving minority rights and terrorism, and also because of the questionable evidence that existed against Moreno and Garcia.[36] In 1996 the Belgian Supreme Court suspended the ministerial decision for extradition.[37] Despite Spanish political efforts on the EU level and countermeasures against Belgium, Moreno Ramajo and Garcia Arrantz were never extradited. All

[30] Emmanuel-Pierre Guittet, Identity through Security in Europe. "Because we are all democracies". A Closer View at the Protocol on Asylum between Member States of the European Union. International Studies Association 45th Annual Convention, Montreal, Conference material. March 17-20, 2004, p. 14.
[31] Sibel Top. The European Arrest Warrant against Puigdemont: A feeling of *déjà vu*? *EJIL Talk!* 3 November 2017, https://www.ejiltalk.org/the-european-arrest-warrant-against-puigdemont-a-feeling-of-deja-vu/Last visited 20.05. 2018.
[32] Ibid., p. 18.
[33] Ibid, p. 14.
[34] Ibid., p. 1.
[35] Ibid, pp. 1-2.
[36] Guittet, pp. 17-18.
[37] Ibid., p. 19.

Spain could do was to make sure the situation would not repeat itself: through enacting EU legislation on mutual recognition of arrest warrants (the provision first included in the 1996 Convention on Extradition between Member States[38], subsequently also in the 2002 European Arrest Warrant Framework Decision) and formally stipulating the assumption, based on mutual trust, that all EU Member States are safe countries of origin from which any asylum claim would be manifestly unfounded (the Aznar Protocol).The Spanish efforts concerning Moreno and Garcia, however, were in vain. In 2006 Moreno Ramajo and Garcia Arrantz were arrested again on a basis of a European arrest warrant issued by Spain[39], but the Belgian courts still refused to execute the arrest warrant.[40]

The Moreno-Garcia affair is not the only case of ETA members fleeing to Belgium and avoiding extradition. One of the most notable cases is that of Maria Natividad Jáuregui Espina, a suspected ETA terrorist who had been on the run since 1979. She was accused of being a member of the Biscay Unit of ETA that killed six Spanish officials in 1981.[41] Two European arrest warrants had been pending on her – for murder and for terrorism, with a third one having been added in 2004 – for an offence involving an attack on the authorities.[42] The Belgian court did not grant permission to extradite her, due to the risk of inhuman and degrading treatment ("incommunicado detention") in Spain, based on the reports that showed the deplorable conditions in which ETA suspects were detained.[43] It was her lawyer Paul Békaert that Carles Puigdemont hired upon arrival in Belgium.

[38] Convention of 27 September 1996 relating to extradition between Member States of the European Union, OJ C 313, 23.10.1996., p. 11-23.
[39] Detenidos en Bélgica dos presuntos colaboradores de ETA. 31.05.2006. *La Vanguardia*. Available at: www.lavanguardia.com/politica/2004316/51262789723/detenidos-en-belgica-dos-presuntos-colaboradores-de-eta.html. Last visited 24.05.2018.
[40] Anne Weyembergh, Les jurisdictions belges et le mandat d'arrêt européen. *EUCRIM, The European Criminal Law Association's Forum*. Issue 1-2/2006., p. 26.
[41] Alleged member of ETA, Natividad Jáuregui Espina, arrested in Belgium. La Moncloa, Gobierno de Espana. 8 October 2013. Available at http://www.lamoncloa.gob.es/lang/en/gobierno/news/Paginas/2013/20131008_ETA.aspx. Last visited 18.05.2018.
[42] Ibid.
[43] Jean Tomkin, Gerrit Zach, Tiphanie Crittin and Moritz Birk, *The Future of Mutual Trust and the Prevention of Ill Treatment. Judicial Cooperation and the Engagement of National Preventive Mechanisms*. Ludwig Boltzmann Institute of Human Rights, 2017. P. 43, citing Meysmann, *Belgium and the European Arrest Warrant: Is European Criminal Cooperation Under Pressure?* EUCLR European Criminal Law Review p. 186-210.
Auke Willems. *Understanding Spain's decision to revoke the European Arrest Warrant for Carles Puigdemont.* London School of Economics and Political Science. Europp – European Politics and Policy. http://blogs.lse.ac.uk/europpblog/2017/12/12/understanding-spains-decision-to-revoke-the-european-arrest-warrant-for-carles-puigdemont/. Last visited 22.05.2018.

As noted, despite Spanish political efforts on the EU level, Belgium never extradited Moreno Ramajo and Garcia Arrantz, along with other ETA separatists, and would therefore be the most likely country in the EU not to extradite Carles Puigdemont either. However, non-extradition for political offences is a particular position that Belgium is holding, grounded in both international law and a particular Belgian (Flemish) political stance. However, the EU rules developed in the aftermath of the Moreno-Garcia affair give Carles Puigdemont a much smaller chance of either getting asylum or avoiding extradition to Spain than in the pre-Moreno-Garcia era.

2.3. Changes to Extradition and Asylum Law in the EU

2.3.1. The Spanish Initiatives

Every country in the EU has its particular history. And even though coherence, harmonization and coordination is attempted, the background of each country brings in a different twist to this cooperation. Based on its own historical and political considerations, Spain has also made its proposals for EU policy and legislation. After the Moreno-Garcia affair, Spain used the leverage of mutual trust to prevent a similar scenario from happening again.

In 1996 the European Parliament adopted a resolution "On the extradition of two presumed ETA militants", that contained the determination "to redefine the legal framework which still permits a Member State to grant protection to, and refuse to extradite, persons accused of terrorist acts in another Member State". The European Parliament called on the Council to conclude a convention on extradition that would "abolish the obsolete concepts such as political offence in the Union".[44]

It is in this context that the Spanish Prime Minister of the time José María Aznar continued with legislative initiatives that would change the rule-set for all of the EU. With the Aznar Protocol and the Convention on Extradition between Member States (now replaced by an even more mutual trust-based Framework Decision on the European Arrest Warrant from 2002), the Spanish fight against terrorism became the matter of all of the EU. The Convention relating to Extradition between Member States of 27 September 1996 purposefully did not contain the option of refusing extradition of a political offender to another EU Member State[45] and the Aznar Protocol (1997) excluded the

[44] European Parliament. "Resolution on the extradition of two presumed ETA militants". Official Journal C 065, 04/03/1996, pp.160-161.
[45] Top, p. 2.

possibility that an EU national may have an asylum claim based on well-founded fear of persecution in another EU Member State.

Already the 1996 Convention on Extradition between Member States, adopted under Article K.1.7. of the Treaty on European Union, provided that no offence may be regarded by the requested Member State as a political offence.[46] It was the Spanish rapporteur at the drafting conference, who called for the mutual trust in extradition matters to be total. [47] On 1 January 2004 the Convention was, in most part, replaced by the Council Framework Decision of 13 June 2002 on the European arrest warrant, the main incentive of which was, in turn, the terror acts of 11 September 2001.[48] The mutual trust remained focal to the cooperation, and became even more enhanced.

2.3.2. The Framework Decision on the European Arrest Warrant.

The Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States,[49] pursuant to Title VI of the Treaty on European Union came into force on 1 January 2004. The secondary act of the European Union, - a decision, in accordance with Article 288 of the Treaty on the Functioning of the European Union, is binding in its entirety.

European arrest warrant (EAW) is an extradition system between EU Member States and operates pursuant to the principle of mutual recognition of criminal decisions[50]. The Member States must recognize and execute the arrest warrant originating from another Member State, as if it were originating from one of their own courts.[51]

Traditionally, the formal extradition procedure would mean that the requesting state requests the arrest and extradition, or provisional arrest to be followed by, within a certain time, a surrender request, of the accused or convicted person.[52] The requested state then starts proceedings to execute

[46] OJ C 313, 13.10.1996, p. 12; Convention on extradition between Member States Summary. Eur-lex.europa.eu/legal-context/CS/ALL?uri=uriserv:l14015b.
[47] Guittet, p. 25.
[48] Andrew Sanger, Force of Circumstance: The European Arrest Warrant and Human Rights. *Democracy and Security*, 20106:1, 17-51. p. 32.
[49] 2002/584/JHA, OJ L190/1, 1807.2002.
[50] Council Framework Decision of 13 June 2002 on the European Arrest Warrant and the surrender procedures between member states (2002/584/JHA) OJ L190, July 18, 2002, recital (2) and Article 1(2).
[51] Sanger, p. 18.
[52] Robert Cryer, Håkan Friman, Darryl Robinson, Elizabeth Wilmshurst. *An Introduction to International Criminal Law and Procedure.* Second Edition. Cambridge University Press, 2010, P 95.

the request, involving both the executive and the judiciary. The court considers the formal requirements of extradition, and the executive decides on whether to extradite.[53]

The EAW abolishes the formal extradition procedure and replaces it with a simplified judicial procedure, based on the principle of mutual recognition of criminal decisions. The EAW FD provides that an arrest warrant in one state shall be recognized and enforced (arrest and surrender) in all other Member States with minimal formalities.[54] The execution of the EAW is a simplified direct cooperation between judicial authorities.[55] The EAW does not use the term "extradition" either. Recital 5 of the EAW FD states that the extradition between Member States is abolished and replaced by a system of surrender between judicial authorities.[56] The term "execution of the EAW" is also used.

Recital 6 of the EAW FD states that the EAW is the first measure in the field of criminal law implementing the principle of mutual recognition which the European Council has referred to as the "cornerstone" of judicial cooperation. This principle of mutual recognition derives from the principle of mutual trust. Recital 10 of the EAW FD states that the mechanism of the European arrest warrant is based on a high level of confidence between Member States. Its implementation may only be suspended in the event of a serious and persistent breach by one of the Member States of the principles set out in Article 6(1) of the Treaty of the European Union, determined by the Council pursuant to Article 7(1) of the Treaty with the consequences set out in Article 7(2).

Recital 12 pledges the respect to fundamental rights and states that "Nothing in the Framework Decision may be interpreted as prohibiting refusal to surrender a person for whom a European arrest warrant has been issued when there are reasons to believe , on the basis of objective elements, that the said arrest warrant has been issued for the purpose of prosecuting or punishing a person on the grounds of his or her sex, race, religion, ethnic origin, nationality, language, political opinion or sexual orientation, or that person's position may be prejudiced for any of these reasons". In addition

[53] Cryer et al., p. 95. See Ved P. Nanda. *Extradition and mutual legal assistance: recent trends in inter-state cooperation to combat international crimes in* Research Handbook on International Criminal Law, ed. Bartram S. Brown, Edward Elgar Publishing, 2011, p.38, the example of the US – extradition is a Presidential function.
[54] Cryer, pp. 94-95
[55] Nanda, p. 38.
[56] The term "extradition" is still used in this thesis concerning the surrender under the EAW FD, for the purposes of comparability with the effects of extradition for the individual.

to that, Recital 13 states that no person should be removed, expelled or extradited to a State where there is a serious risk that he or she would be subject to death penalty, torture or other inhuman or degrading treatment or punishment. Thus, in the recital, which, however, has a non-legally binding character, there are three provisions that pledge respect for human rights in line with fundamental rights guarantees in the EU framework, refugee law and the prohibition of torture.

The main text of the EAW FD is however, much less guided by human rights principles. Article 1(3) contains the only reference to human rights in the main body of the decision, namely that the Framework Decision shall not have the effect of modifying the obligation to respect fundamental rights and legal principles enshrined in Article 6 TEU. However, human rights considerations are not among the possible grounds for refusal to execute the EAW.

The EAW lists a row of crimes that do not require double criminality, in order to execute the EAW. In these cases the requested state has to execute the EAW, even if the specific crime is not found in its national legislation. The list includes, among others, so called *relative* political offences, such as participation in a criminal organization, terrorism, crimes within the jurisdiction of the International Criminal Court. While such crimes can be perceived as political crimes, they contain also elements of serious non-political crimes and therefore are specifically excluded from being possibly classified as political crimes.[57] Beside this list, a significant element of the EAW FD is not in the wording, but in the omission: the omission of the possibility to refuse extradition based on grounds of human rights considerations or on the grounds that the offence for which the extradition is requested, is a political offence.

The grounds for refusal of execution of the EAW are listed in Articles 3 and 4. The mandatory grounds for refusal to execute the arrest warrant include situations such as: the person has already been judged for the same offence, the person has not reached the age of criminal liability in the receiving state, and amnesty laws apply. The optional grounds include: requirement of double-criminality; in matters of territorial jurisdiction, an already pending criminal jurisdiction in the receiving country, statute of limitation. As noted, the grounds for refusal to execute the EAW do not contain human rights concerns, stated in the recital. Neither does Article 5, where the guarantees to be given by the issuing Member State in particular cases are limited to trials *in absentia*. Here the

[57] Detailed description of relative political crimes in subchapter 3.1.2.

issuing judicial authority has to give assurances that a person who has been tried *in absentia* would have an opportunity to apply for a retrial in particular cases. Whether the fundamental rights considerations would be applied, thus depends on the legislation of the individual Member State: the EAW FD does not require the individual Member States to invoke them.

2.3.3. The Aznar Protocol

In the light of the outrage by Spain that the asylum claims by Moreno Ramajo and Garcia Arrantz could even be considered in Belgium,[58] Spain made a proposal for the drafting of the EU Treaty (subsequently – the Amsterdam Treaty) in 1996, that EU citizens may not have a right to claim asylum in another EU Member State. The wording of the proposal was "establish it as a clear principle that no national of a Member State of the Union may apply for asylum in another Member State, taking into account international treaties."[59] The initial Spanish proposal did not even contain any conditions under which an asylum claim by an EU national could be taken into consideration and be deemed admissible.[60] The proposal, however, ended up in Protocol 24 to the Treaty on the European Union[61] with a very narrow possibility of the claims being well founded, meeting specified exceptional conditions in line with Article 7 of the TEU and Article 15 ECHR [62](the same conditions as listed in Recital 10 of the EAW FD).

Protocol 24 provides that, given the level of protection of fundamental rights and freedoms by the Member States of the European Union, Member States shall be regarded as constituting safe countries of origin in respect to each other for all legal and practical purposes in relation to asylum matters. While the Protocol provides for a limited possibility of rebuttal of the principle of mutual trust, mainly referring to systematic breaches of fundamental rights in a Member State that have been formally recognized on the EU level, any claim is made difficult due to the outset that "the application shall be dealt with on the basis of the presumption that it is manifestly unfounded".

---

[58] Guittet, p. 26.
[59] Sarah Helm. EU blocks citizen's right to claim asylum. *The Independent.* 18 December 1996. https://www.independent.co.uk/news/world/eu-blocks-citizens-right-to-claim-asylum-1315042.html. Last visited 18.05.2018.
[60] Guittet, p. 25.
[61] OJ115, 09/05/2008, p. 0305-0306.
[62] European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14 (ECHR). 4 November 1950, ETS 5.

The compliance with fundamental rights requirements that is problematic in the legally binding main text part of the Protocol, has been noted in a non-legally binding part, - in the preamble and declarations to the Protocol. The preamble refers to compliance with both the Charter of Fundamental Rights of the European Union, European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), along with human-rights relevant references in provisions of the Treaty on European Union, as well as "respect" for the 1951 Geneva Convention (Refugee Convention).

A total of three declarations were appended to the Protocol: two declarations "adopted by the conference" (Declaration 48 and 49)[63] and one declaration "of which the conference took note" (Declaration 5). Declaration 48 states that the Protocol does not prejudice the right of each Member State to take the organizational measures it deems necessary to fulfil its obligation under the Geneva Convention of 28 July 1951 relating to the status of refugees. Declaration 49 relates to subparagraph (d) of the sole article of the protocol calling for examination and introduction of new improvements to accelerate the procedures involving the "manifestly unfounded" applications.[64] Belgium was the only country to append a separate declaration. In Declaration 5 to the Protocol Belgium explicitly commits itself to, in accordance with the provision set out in point (d) of the sole article of the Protocol, to carry out an individual examination of any asylum request made by a national of another Member State.[65]

Preambles do not have the function of laying down legal obligations, but are formulated in general wording and not intended to constitute substantive stipulations.[66] Declarations, while articulating a particular stance, are not legally binding either.[67] Declarations attached to treaties are so called "interpretative declarations" explanatory in character of how the State perceives its treaty obligation (as far as it does not change the scope of the obligation, thus becoming a "qualified interpretative reservation").[68] Thus, just as in the EAW FD, the Aznar Protocol contains ambiguity in compliance

[63] Treaty of Amsterdam, OJ C340, 10.11.1997, p. 1-144.
[64] Ibid.
[65] Ibid.
[66] Makane Moïse Mbengue. Preamble. Max Planck Encyclopaedia of Public International Law, Oxford Public International Law. September 2006. Available at opil.ouplaw.com. (log-in required).
[67] Canada: Immigration and Refugee Board of Canada, *European Union (EU) Member States*: *Application of the "Protocol on Asylum for Nationals of Member States".* 12 October 2007, ZZZ102549.E, available at refworld.org/docid/474e89551e.html.Last visited 18.05.2018.
[68] Malgosia Fitzmaurice. Treaties (6d – Interpretative Declarations). Max Planck Encyclopaedia of Public International Law, Oxford Public International Law. September 2006. Available at opil.ouplaw.com. (log-in required).

with international human rights obligations of the Member States and the Union as a whole. On one hand, reference to human rights obligations is made, but on the other – it is made in the legally non-binding part of the document. The core of the document makes an assumption that human rights are not violated in any case, in any Member State, not envisaging the possibility that they actually could be. This, of course, does not diminish the duty of each EU Member State to comply with its international obligations, but the interaction between mutual trust and fundamental rights becomes complicated. Mutual trust claims the throne as the most important principle in relations between the EU Member States in matters of asylum, overshadowing the protection of fundamental rights of an individual.

It is evident that the way Spain had envisaged to resolve problems with refusal to extradite political offenders and asylum claims based on political persecution was through emphasizing the importance of mutual trust among Member States. Mutual trust and its application in the area of freedom security and justice of the EU, of which extradition and asylum are part, is somewhat a question of a hen and an egg. Namely, it is a question of whether mutual trust shaped the EAW FD and Aznar Protocol, or if the two documents have actually shaped what is understood by mutual trust in the area of freedom, security and justice.

2.4. Mutual Trust

The principle of mutual trust in the EU is often applied but little defined. What is defined about the principle of mutual trust is that it is a principle of fundamental importance to the European Union.[69] It is a principle that allows an area without internal borders to be created and maintained.[70] It is the principle that guides not only free movement of goods and services, but also the area of freedom, security and justice, which enhances the questions of asylum and extradition. The principle of mutual trust has a significant impact on the regulation of both extradition and asylum of EU nationals. According to the CJEU, the principle of mutual trust means that Member States are required to presume that fundamental rights have been observed by the other Member States, not only by not requiring a higher level of protection, but also by not even checking (apart from exceptional cases),

[69] Opinion of the Court (Full Court) of 18 December 2014. Opinion pursuant to Article 218(11)TFEU, Case Opinion 2/13, paras 31 and 191.
[70] Ibid, para. 191.

whether the Member State has observed fundamental rights guaranteed by the EU.[71] This definition of the principle of mutual trust can be found in the CJEU Opinion 2/13 of 18 December 2014. How and when exactly mutual trust became a fundamental principle of the EU is not clear; it has been a gradual development. The Opinion 2/13 is indeed, the most comprehensive description of the principle of mutual trust so far, while the principle, without a specific definition has been applied in EU legislation and practice frequently, also in the EAW FD and the Aznar Protocol.

While "mutual trust" is a fundamental principle of the EU, defining documents like EAW FD and the Aznar Protocol, and has been referred to in over 100 decisions of the CJEU and opinions of the Advocates General for two decades,[72] it is not been stated directly in EU treaties. As Gill-Pedro and Grussot note, CJEU in Opinion 2/13 "goes far in attempting to find a historical origin of the concept of mutual trust within the very treaties",[73] and in general, there is no wider theory that would define the principle of mutual trust.[74]

The principle of mutual trust is interpreted to be enhanced in Article 2 of the Treaty on European Union which states that "The Union is founded on the values of respect for human dignity, freedom, democracy, equality and the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail".[75] Mutual trust is in the centre of assuming all EU Member States to be safe countries of origin (i.e. countries that do not produce refugees) in the Aznar Protocol,[76] and is a precondition for the mutual recognition principle[77] in the European Arrest Warrant Framework Decision. The

[71] Ibid., para 192. In para. 194 the CJEU contrasts the importance of the principle of mutual trust in the relations among Member States, contrasting it to the checking the compliance with human rights standards by the States parties to the ECHR.
[72] Thomas Wischmeyer, Generating Trust through Law. Judicial Cooperation in the European Union and the Principle of Mutual Trust, 17 *German Law Journal*, 339 (2016), p. 342.
[73] Eduardo Gill-Pedro and Xavier Groussot. The Duty of Mutual Trust in EU Law and the Duty to Secure Human Rights: Can the EU's Accession to the ECHR Ease the Tension? Nordic Journal of Human Rights, 35:3, 2017, pp. 258-274, p. 265.
[74] Wischmeyer, p. 357.
[75] TEU (consolidated), OJ C 326, 26.10.2012, p. 13-390.
[76] Treaty of Amsterdam, OJ C340, 10.11.1997, p. 1-144.
[77] This relation between mutual trust and mutual recognition is identified in CJEU Joint Cases C-187/01 and C-385/01, 11.02.2003, para. 33.

principle of mutual recognition has since been included in the primary EU legislation, - Article 82(1) of the Treaty on the Functioning of the European Union.[78]

In the EU, the principle of mutual trust has been "lingering in the air" for decades,[79] long before the EAW FD and the Aznar Protocol. It was derived from a purely economic issue of free movement of goods in the *Cassis de Dijon* case,[80] and as a legal principle mutual trust[81] has come to be extensively applied also in the area of freedom, security and justice of the EU.[82] The first CJEU case where mutual trust was actually recognized as a legal principle was *Güztok and Brügge* in 2003.[83] The core aim behind the principle of mutual trust was to further integration by bypassing complicated legal requirements for harmonization among Member States.[84] The legal concept of mutual trust has also been used as a trust-generator through legal rules,[85] that is, requiring mutual trust has been a tool to promote the trust. In a framework like the EU, a connection between trust and law was a useful tool for substituting authority where non-hierarchical modes of governance were applied.[86]

The principle of mutual trust is said to be closely related to other EU principles: loyalty, solidarity,[87] sincere cooperation.[88] However, the borders between the principles are not very clear. Thus, to be loyal to the objectives of the EU is one of the most important obligations of the EU Member States[89] and Member States must trust that other Member States will be loyal to their obligations.[90] The principle of mutual trust is explained to differ from the principle of loyal cooperation, which requires that states to take appropriate measures in national law to ensure fulfilment of their obligations under EU law,[91] with its conditionality: mutual trust can be withdrawn unilaterally without fear of sanctions

[78] OJ C326, 26/10/2012, p. 0001-390.
[79] Wischmeyer, p. 341
[80] Case 120/78 Rew-Zentral AGv Bundesmonopolverwaltung für Branntwein ECLI:EU:C:1997:42, in Eduardo Gill-Pedro and Xavier Groussot. The Duty of Mutual Trust in EU Law and the Duty to Secure Human Rights: Can the EU's Accession to the ECHR Ease the Tension? Nordic Journal of Human Rights, 35:3, 2017, p.262; Wischmayer, p. 350.
[81] Wischmeyer, p. 341.
[82] Gill-Pedro, Groussot, ibid.
[83] Wischmeyer, p. 356.
[84] Ibid., p. 351.
[85] Ibid. 350.
[86] Ibid., p. 352.
[87] *Pupino*, C-105/03 16.06.2005 (GC).,para. 41. Christine Janssens, *The Principle of Mutual Recognition in EU Law.* Oxford University Press, 2013, p. 149.
[88] *Pupino*, para. 43., Janssens, p. 149.
[89] André Klip, *European Criminal Law*. Intersentia, Antwerp, Oxford, Portland, p. 232
[90] Ibid, p. 67.
[91] Pupino, para. 42.

and must be renewed continually.[92] In line with the stance of the CJEU, though, the withdrawal must be done very cautiously. "Sincere cooperation" has been formulated as "member states shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties".[93] Principle of mutual recognition (again, not defined), it is built upon mutual trust and mutual confidence and an understanding that the rules and legal protection in all Member States are on an equal level (more or less).[94] Thus, the principles are explained as related, while clear distinction between them is difficult to make.[95]

The fundamental role of the mutual trust principle on the EAW FD and the Aznar Protocol has an impact on both extradition law and asylum law, as well as on the intersection between asylum and extradition in political offence cases like that of Carles Puigdemont. However, the application of mutual trust to asylum and extradition does not have an extensive theoretical basis. Just the contrary: The reason for the introduction of mutual trust to asylum and extradition of political offenders in the EU legislation can be narrowed down to one single case, ironically, just as the case of Carles Puigdemont, involving Spanish separatists in Belgium. The time-frame between the two cases, however, gives an amount of state practice and CJEU jurisprudence that allows for a more detailed evaluation of the content of the principle of mutual trust and its impact on EU's extradition and asylum legislation regarding EU nationals.

2.5. Chapter Summary

In this chapter I introduced the facts of the case of Carles Puigdemont, which is the primary case used for the illustration of the impact of mutual trust on extradition and asylum of EU nationals in EU legislation. I also described the background story of why the main documents regulating extradition and asylum of EU nationals in the EU have taken the shape they have. After that I introduced the legal basis of the problems to be analysed in this thesis, namely: the European Arrest Warrant Framework Decision (extradition of EU nationals to another EU Member State), Protocol 24 to the Treaty on European Union (asylum for EU nationals) and the principle of mutual trust, which determines how extradition and asylum are regulated in the two aforementioned documents. In the

[92] Wischmayer, p. 347.
[93] Klip, p. 67, reference to Art. 4, para. 3 TEU.
[94] Klip, p. 331.
[95] Naturally, it makes sense that a principle is not fully put in a framework, as it is a principle, and not a norm, however, there are principles which have a widely defined content and those the understanding of which is more difficult to establish. The principle of mutual trust belongs to the latter.

following three chapters I will analyse how mutual trust impacts the regulation of extradition, asylum, and intersection between the two in political offence cases. Thus, chapter 3 will be dedicated to the analysis of the relevant principles of extradition law, and the particularities of extradition law regarding EU nationals in the EU. I will use the case of Puigdemont, as well as other examples, to illustrate the application of rules and their potential flaws.

Chapter 3
Extradition for Political Offences

Though the case of Puigdemont fleeing Spain is a legal and diplomatic challenge for the EU, such a situation is nothing new in world history. In fact, there could hardly be better textbook case of extradition for a political offence. And that is, perhaps, what makes the matter particularly complicated in the EU mutual trust context. This chapter will be dedicated to understanding how the EU rules differ from international law with regards to the protection of individuals that may face extradition for political offences, and how that may impact the fundamental rights protection of the individual.

3.1. Extradition Law

Extradition can be defined as the formal surrender of a person by one state to another, the person being either accused of a crime in the requesting state or unlawfully at large after conviction.[96] International extradition law dates back to the beginnings of ancient diplomacy, and continues throughout history with diplomatic agreements between states. There is no obligation of states to extradite in customary international law.[97] Extradition is based on treaty law.[98] A state has a legal obligation to extradite based on a bilateral or multilateral extradition agreement. Examples of bilateral extradition treaties are the Extradition Treaty between the Government of the Republic of Kenya and the Government of the Republic of Rwanda, dated 30 September 2009[99] and Treaty on Extradition between the Republic of Korea and Japan, dated 8 April 2008[100]. Examples of multilateral treaties, are the European Convention on Extradition of 1957,[101] and 1933 Inter-American Convention on Extradition.[102] Such agreements are inherently reciprocal.[103]

---

[96] Cryer, et al., p. 93.
[97] Sibylle Kapferer, Legal and Protection Policy Research Series. The Interface between Extradition and Asylum. UNHCR, PPLA/2003/05, November 2003, p. 3.
[98] Malcom N. Shaw, *International Law*. 6th Edition. Cambridge University Press, 2008, p. 686.
[99] Available at https://www.unodc.org/documents/terrorism/Publications/Compendium_Kenya/KENYA_COMPENDIUM_20100618_EN.pdf.
[100] Unofficial text available at http://www.oecd.org/site/adboecdanti-corruptioninitiative/39798181.pdf. Last visited 20.05.2018.
[101] 13 December 1997, ETS No. 24, 359 UNTS 273.
[102] 26 December 1933. OAS Treaty Series No. 34.
[103] Geoff Gilbert. *Aspects of Extradition Law.* International Studies in Human Rights. Martinus Nijhoff Publishers. Dodrecht, Boston, London, 1991, p. 17.

The body of bilateral and multilateral agreements between states reflects the main principles applicable to extradition. The principles that may be relevant in cases of extradition of political offenders will be described and analysed below. Such principles are the supremacy of human rights and refugee law norms[104] over the duty to extradite, principle of speciality, principle of double criminality, considerations of justice and fairness and, with the most particular relevance for the topic analysed, - political offence exception to extradition.

3.1.1. The Traditional Political Offence Exception to Extradition

The political offence exception has been the most commonly accepted grounds for refusing an extradition request in international treaties for nearly two centuries.[105] The political offence exception, however, is of a controversial nature. While some commentators state that the political offence exception is a general principle of international law[106], others suggest that the political offence question is a matter of state practice and not a general principle of international law, [107] and that there is not enough coherence to sustain the argument that the political offence exception is customary international law.[108] Nonetheless, most extradition agreements since 1834 have contained the political offence exception.[109]

The political offence exception means the notion that extradition will be refused if the requested state considers the offence for which it is sought to be of political nature.[110] The very first extradition treaty that contained a political offence exception was entered between Belgium and France in 1834.[111] In 1833 Belgium was the first country in the world to codify the political exception to extradition in its legislation.[112] Not surprisingly, the tradition of non-extradition of political offenders echoes also in

[104] Kapferer, p. vi.
[105] Mark. D. Kielsgard. The Political Offense Exception: Punishing Whistleblowers Abroad. *EJIL: Talk!* 14.11.2013. https://www.ejiltalk.org/the-political-offense-exception-punishing-whistleblowers-abroad/ Last visited 18.05.2018.
[106] Aimee J, Buckland, Offending Officials.: Former Government Actors and the Political Offence Exception to Extradition. *California Law Review.* Vol 94:423, 2006, p. 439.
[107] Gilbert, 117.
[108] Ibid.
[109] Ibid.
[110] Kapferer, para. 61, p. 20.
[111] M. Cherif Bassiouni. *International Extradition. United States Law and Practice.* Sixth edition. Oxford University Press, 2014. p. 670.
[112] Buckland, p. 440.

the actions of Belgium in the Moreno-Garcia affair, and, indirectly, also regarding Carles Puigdemont.[113]

The idea of the political offence exception originated from the French and American revolutions,[114] and was based on the thought that "political crimes affect the demanding state's most sensitive interests, and, therefore, would inspire a passionately hostile atmosphere which would make an orderly and fair trial very difficult".[115] By the end of the 19th century the political offence exception had become a generally applied principle in international extradition law. The benefit of generalizing such a refusal was thought to be that it would enable states to maintain friendly relations, while permitting not to extradite an individual for what would be deemed to be a political offence.[116] Nevertheless, the atmosphere of hostility would still be an issue in the political offence cases. For example, non-extradition of political adversaries by Belgium was declared a hostile act by president Mobutu of Zaire in 1979,[117] and hostility was even evident in the Moreno-Garcia affair described above.

Traditionally not only political, but also military offences (which are not offences under ordinary criminal law[118]) and fiscal offences have been covered by an exemption,[119] though, fiscal offences have now come to be regarded as extraditable.[120] Also non-extradition of nationals, potential death penalty, humanitarian exceptions and considerations of justice and fairness can be invoked as grounds for non-extradition.

3.1.2. The Fluctuating Border Between Extraditable and Non-Extraditable Political Offences

The most problematic aspect of the political offence exception is its diversity of background: the scope of the political crimes is very wide and unclear.[121] Narrowing down the political offence

[113] See Chapter 2.1. reference 12. Spain withdrew its arrest warrant that Belgium would not extradite Puigdemont, due to absence of double criminality.
[114] Buckland, p. 439.
[115] M. Cherif Bassiouni, *The Political Offences Exception in International Law and Practice*, in International Terrorism and Political Crimes, ed. by. M.C. Bassiouni, Charles C. Thomas Publisher, Springfield, IL, 1975, p. 444.
[116] Kapferer para. 72, p. 27.
[117] Gilbert, p. 113.
[118] Cryer et al. , p. 94.
[119] Kapferer, p. vi.
[120] Ibid, para. 62, p. 21.
[121] Gilbert, p. 131.

exception has been a constantly debated topic of international law for decades.[122] Not all offences with a political motive qualify for the political offence exception. Sometimes it can be difficult to draw the line between a political offence and a non-political offence, because both may be present in the same act. This difficulty of distinction explains, why the political offence exception was not included in the EAW FD.

Terrorism, due to its violent nature, has increasingly been declared a non-political crime,[123] also in the EAW FD. It is an example of the type of crimes that can be categorized as relative political offences, where the committed act is also a serious non-political offence, but has a political motive. The first of such political offences not covered by the exception of a political offence was the *attentat* clause: a murder or attempted murder of a head of state or a member of his or her family would not be deemed a political offence.[124] Other crimes excluded from the exemption include genocide, apartheid, crimes against humanity.[125] The grey-zone is mainly formed by the crimes where conduct of a political crime involves violence. The EAW FD lists participation in a criminal organization, terrorism, illicit trafficking of weapons, munitions and explosives, racism and xenophobia, crimes within the jurisdiction of the International Court, unlawful seizure of aircraft/ships, as such crimes. While these crimes are very likely to have a political motive, they are specifically listed as extraditable offences in the EAW FD, even without double criminality.

The abovementioned category of relative political offences is contrasted with the somewhat less controversial category of political offences: the absolute or purely political offences. Such political offences include treason, sedition, *lèse-majesté*, espionage, subversive propaganda, founding or a membership of a prohibited political party and election fraud.[126] It is this category of purely political offences that the Puigdemont's alleged offences of sedition and rebellion fall into.

The offence committed by Puigdemont of organizing, carrying out the referendum, and then declaring independence involves no violence. The Catalonian independence movement, as opposed to the Basque one, has not been violent and has not involved terrorism or other violent activity. The closest

[122] For a more detailed study, see Christine van Wijngaert, The Political Offence Exception to Extradition: Defining the Issues and Searching for a Feasible Alternative. *Revue Belge de Droit International*, 1983-2, pp. 741-754.
[123] Kapferer, p. vii.
[124] Wijngaert, p. 750
[125] Kapfefer, para. 76 , p. 28.
[126] Ibid., para. 75, p. 27 (ref. To W. Kälin and J. Künzli, ref. 142).

that the Spanish judge issuing the warrant has come to, in making the organization of the referendum a non-political crime, is the misuse of public funds, as it costs a lot of money to organize a referendum. Puigdemont's case is an example of how a fiscal offence can be intertwined with a political offence. In addition to the charges of rebellion and sedition, Puigdemont was also charged with misuse of public funds. Thus, if an EU Member State were to extradite Puigdemont only for a non-political offence, it would have to be for the misuse of public funds. It would appear difficult to try a case on the misuse of public funds without considering the context that the funds were used for organizing the referendum on the independence of Catalonia, - which, again, is a political act. Thus, even the misuse of public funds, while sounding fiscal, can still be a political offence.

Fiscal charges can be involved when a political offence in itself cannot be pursued.[127] In the case of Puigdemont the crime of corruption is not a relevant consideration. Nevertheless, it can be in other cases. Another example of political activism intertwined with fiscal crime are the trials of and by the Spanish judge Baltasar Garzón. He was the investigative judge in a corruption case involving the leading political party in Spain. While he was investigating the case, three charges were brought against him: one for abuse of power in wiretapping the lawyers of the politicians under suspicion, another for reopening investigations into crimes against humanity during the Civil War, which was prohibited under the Amnesty Act of 1977, and the third – for corruption, regarding funding he had received from the Santander bank.[128] In the cases concerned, the questions of political activism were intertwined with corruption charges in a hardly distinguishable puzzle. It was difficult to tell how much the investigation of government corruption was about the financial crime itself, and how much – about political opposition. The same way, the compilation of charges brought against Garzón left the question open whether they truly were about suspicions of corruption and misuse of power, or brought on by Garzón's political activism.[129] Perhaps the explanation is that a fiscal crime is more tangible, more comprehensible and far more justifiable, that the prosecution for a certain political opinion. It is therefore no surprise that an accusation in corruption can be either related to, or serve as a cover-up for a prosecution for a political crime. On the reverse, a political prosecution can be claimed as defence in order to rebut accusations of corruption. Notwithstanding that accusations of

[127] Hans Petter Graver. Judging without Impunity: On the Criminal Responsibility of Authoritarian Judges. *Bergen Journal of Criminal Law and Criminal Justice.* Vol. 4, Issue 1, pp. 142-143.
[128] See, for example, Joxerramon Bengoetxea. Seven Theses on Spanish Justice to understand the Prosecution of Judge Garzón". *Oñati Socio-Legal Series*, v. 1, n. 9 (2011), p. 13.
[129] Ibid. The article is dedicated to the problem of politicization of Justice in Spain.

financial offence can be made to diminish the importance of the political character of the act committed, financial crimes committed by government officials, such as corruption and financial fraud, which are not committed in the course of a political act, cannot be covered by the political offence exception.[130] Keeping in mind this intertwining nature of political and fiscal crimes is highly relevant in the case of Carles Puigdemont, especially if he is eventually extradited to Spain on the basis of the financial crime of misuse of public funds only.

3.1.3. Other Relevant Extradition Law Principles.

While the EAW FD does not permit a political offence exception, there is clearly a difference in its regulation between relative political offences and pure political offences. Namely, as opposed to the specifically listed relative political offences, for unlisted offences a Member State can invoke an optional ground for non-execution of the European arrest warrant, which is another principle of extradition law, - that of double criminality. This means that generally, the offence has to be a punishable offence both in the country that requests extradition, and the country that is requested to extradite. In line with EAW FD an EU Member State has no obligation not to extradite, if the same offence is not found in its criminal code, but it has the discretion not to extradite in such a case, if it decides so.

Another relevant principle of extradition law is the specialty principle. It means that the extradited person may only be prosecuted for the offences specified in the extradition request and may not be re-extradited to a third state, unless the requested state consents.[131] It means that if the request is made for three crimes, and the extradition request is granted for one, the extradited person may only be tried for that one crime for which he or she was extradited, and not for the other two.

The question of double criminality and specialty has been discussed with regard to the possible execution of the EAW by Belgium and in Germany in the Puigdemont case. The Belgian[132] and German[133] paragraphs on sedition and rebellion differ from the Spanish definition of the offences,

[130] Buckland, pp. 449 and 450.
[131] Kapferer, p. vi
[132] Belgian expert on legal cooperation: "There's a basis to refuse Puigdemont's extradition. *El Nacional/CAN*, Barcelona, 16 .11.2017. https://www.elnacional.cat/en/news/belgian-expert-basis-refuse-puigdemont-extradition_213282_102.html. Last visited 18.05.2018.
[133] Melissa Eddy and Raphael Minder. Puigdemont Cannot be Extradited on Rebellion Charge, German Court Rules. 05.04.2018. https://www.nytimes.com/2018/04/05/world/europe/puigdemont-extradite-germany-spain.html. Last visited 18.05.2018.

and the German judge has refused to execute the EAW regarding the crime of rebellion on the basis of double criminality.[134] The only basis for extradition under the EU rules could eventually end up to be the misuse of public funds.[135] If there is no double criminality for the crimes of sedition and rebellion, Belgium and Germany may legitimately refuse to extradite. This is in line with the EAW FD provisions that, apart from the offences that are listed as those not requiring double criminality, a state may refuse to extradite, if an offence in the EAW does not constitute an offence under the law of the executing Member State (EAW FD, Art.4(1)). Thus, in a case like that of Puigdemont, the double criminality requirement can actually serve as an alternative argument for non-extradition, instead of claiming the political offence exception.

3.1.4. Refusal Grounds Related to Notions of Justice and Fairness

The political offence exception is very closely related to the extradition refusal grounds related to notions of justice and fairness. A state may refuse to extradite a person, if there are concerns about treatment that would be contrary to notions of justice and fairness.[136] Such concerns include trials *in absentia*, by a special court, or a court that does not offer adequate guarantees of fair trial.[137] The mutual trust principle, guiding the cooperation in the EU, is intended exactly to exclude a presumption that a court may lack justice and fairness: even when a political offence against the state, which is trying the case, is in question. It would be to say that the victim would be the judge for the perpetrator. This is exactly, why the political offence exception has existed, in the first place. In political crimes one can hardly expect that those involved would be able to view the offence from a distance that wold allow for a fair, non-biased trial. The problem with relying on the justice and fairness argument, instead of invoking the political offence exception, is that the former is even more blurry than the latter.[138] Invoking the notions of justice and fairness would also require states to evaluate the judicial processes of another state,[139] which would be contrary to the principle of mutual recognition.

According to Gilbert, while states are moving away from the political offence exception, invoking human rights grounds, including the right to fair trial, gives states more discretion to refusal of

[134] Ibid.
[135] Ibid.
[136] Kapferer, para 253, p. 86.
[137] Ibid.
[138] Gilbert, 152.
[139] Ibid., 154.

extradition.[140] As to the case of Puigdemont, and cases of political offences in general (especially in cases of pure political offences), it would be possible to argue that, even though the political offence exception does not exist in EAW, extradition could, nevertheless, be against the principles of justice and fairness, and thus, - in an EU context, - would violate the right to fair trial. This, however, does not happen automatically. The mutual trust has to be rebutted and the real risk of an unfair trial has to be proven by the individual. The relation between mutual trust and the right to fair trial, and how that can impact the execution of the EAW, will be analysed below.

.

3.2. Human rights safeguards against extradition.

Apart from the specific extradition law principles, also general human rights principles apply to extradition. Thus, concerns about torture, cruel, inhuman and degrading treatment, capital punishment and unfair trial may be used to refuse extradition. These human rights principles applicable to extradition law, are, in fact borrowed from asylum law, namely - Article 33(1) of the Refugee Convention phrase "expel or return in any manner whatsoever", i.e. – the *non-refoulement* clause.[141] Similarly, the UN Convention against Torture of 1984 can be applied to refuse extradition to a State where a person would face torture. *L'Institut de Droit International*[142] has suggested that "In cases where there is a well-founded fear of the violation of the fundamental human rights in the territory of the requesting State, extradition may be refused, whosoever the individual whose extradition is requested and whatever the nature of the offence of which he is accused".[143]

The Treaty on the European Union itself contains human rights provisions. First of all, Article 6(1), paragraph 1 of the TEU states that the Union recognizes the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union, which shall have the same legal value as the Treaties. Article 6(2) also pledges to accede to the European Convention for the Protection of Human Rights and Fundamental freedoms, which still has not happened, and is complicated in the light of Opinion 2/13 of the CJEU.[144]

---

[140] Ibid.

[141] Sir Elihu Lauterpacht and D. Betlehem. *The Scope and Content of the principle of non-refoulement: Opinion.* UNHCR, 20 June 2001, paras. 71-75.

[142] International Law Institute. A private association founded in 1873 at Ghent, Belgium. The main objective of the Institute expressed in its statute is to contribute to the progress of international law. (Max Planck Encyclopaedia of International Law. For more detail see www.idi-iil.org/en/.

[143] Gilbert, p. 80, Reference to Extradition Resolution no. IV, 68-II ANN.IDI, Session de Cambridge, at pp. 304-6 (1984).

[144] CJEU, Case Opinion 2/13 of the Full Court of 18 December 2014 on the agreement on accession to the ECHR.

Article 6(3) of the TEU additionally states that fundamental rights, in line with ECHR and constitutional traditions of Member States constitute general principles of Union's law. Article 7 provides, how the EU may determine a clear risk of a serious breach by a Member State of the values referred to in Article 2. This provision, however, requires coordinated EU action and such large-scale consequences to the EU as a whole, that, even though the article is referred to both in the EAW FD and the Aznar Protocol, it is not the likely legal basis to be invoked for the protection of human rights of EU nationals. The focus should, therefore, be, instead, on what protection of fundamental rights is provided for in the Charter of Fundamental Rights and the ECHR.

The Charter of Fundamental Rights of the European Union itself provides for safeguards against extradition. Thus, Article 19(2) prohibits the removal, expulsion or extradition of a person to a State, where there is a serious risk that he or she would be subjected to death penalty, torture or other inhuman or degrading treatment or punishment. Article 21 prohibits discrimination, including, based on political opinion. Article 47 protects the right to an effective remedy and to a fair trial. Paragraph 2 of Article 47 reads: "Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented." And, in addition, Article 53 contains a safeguard concerning the level of protection provided in EU legislation. It provides that the Charter is not to be interpreted as restricting or adversely affecting human rights and fundamental freedoms by either EU law, international law or international agreements, or national constitutions: thus, human rights are to be interpreted in the most positive way. This is enforced by Article 54, which states that the Charter shall not be interpreted to deprive or excessively limit a right.

In addition to that, ECHR Article 3 that prohibits torture and Article 6 that provides the right to fair trial can also be invoked, through the provision of Article 6(2) of the TEU, for safeguarding the rights of an EU-national against extradition.

Thus, based on the circumstances of a case, there is enough of a legislative base to apply human rights safeguards to prevent extradition in the EU, even if the political offence exception, as such, cannot be invoked.

3.2.1. The Right to Fair Trial

In the context of extradition for political offences the concern about an unfair trial is of a particular interest. The protection against unfair trial overlaps with the extradition law principle of justice and fairness, thus providing a double safeguard against extradition as a principle of extradition law, and as a human rights principle. An unfair trial from a human rights perspective can be defined as "a trial in which a person is prosecuted for reasons of race, religion, nationality, ethnic or tribal origin, membership of a particular social group or political opinion or as a trial in which the position of the person risks to be prejudiced for one of these reasons.[145] In the *Soering* case the ECtHR recognized that, in principle, the denial of a fair trial can be a reason to refuse extradition.[146]

Indeed, the principle is not only included in Article 21 of the EU Fundamental Rights Charter, it is also reflected in the EAW FD – in Recital 12, that pledges respect to fundamental rights provisions in the EU, namely, Article 6 of the Treaty on European Union and Chapter VI of the Charter of Fundamental Rights of the European Union. Chapter VI of the Charter concerns justice, Article 47 stipulating the right to an effective remedy and a fair trial, and Article 48 – the presumption of innocence and the right to defence. The problematic issue, however, is that the Recitals of the framework decision are not legally binding, while, neither Article 3 or 4 of the EAWFD lists human rights considerations as grounds for refusal to extradite. Thus, when the Member States apply EAW, their practice as to the extent of fundamental rights considerations they make, varies considerably; and even the CJEU has not maintained a coherent position on the invocation of the fundamental rights, including the right to fair trial, as a ground for refusal to execute the EAW. In line with Article 53, the states may have a higher fundamental rights protection standard, but they are not obliged to do so. The practice of Member States lacks coherence and the CJEU has also been struggling to reconcile the provisions of mutual trust and fundamental rights with regard to the refusal to execute the EAW. As the *Melloni*[147] case shows, even a higher standard of protection has proven not to be unproblematic.

[145] Wijngaert, p. 753.
[146] *Case of Soering v. the United Kingdom*, ECtHR, Appl. No. 14038/88, judgement of 7 July 1989, para 113.
[147] *Stefano Melloni v Ministerio Fiscal*, C-399/11, 26.02.2013.

3.2.2. Mutual Trust and Fundamental Rights in CJEU Jurisprudence

The mutual recognition in the EU criminal justice sphere was connected to mutual trust for the first time in CJEU case law in the case *Gözütok and Brügge*,[148] with the wording "there is an implication that the Member States have mutual trust in their criminal justice systems and that each of them recognises the criminal law in force in the other Member States even when the outcome would be different if its own national law were applied."[149] This principle has been highly respected by the CJEU, as the *Melloni* case and Opinion 2/13, in particular, evidence.

The *Melloni*[150] case in 2013 was the landmark case concerning the mutual trust, on which the mutual recognition of the European arrest warrants rests. In this case the question was about the right to a fair trial, specifically – a trial *in absentia*. In this case the Court ascertained that the EAW is drafted in a way, that takes human rights into consideration,[151] that the grounds for refusal to execute the EAW under Article 4a(1) are exhaustive, and that a Member State cannot invoke another ground for refusal to execute the EAW with higher national standards, as that would undermine the effectiveness of EU law.[152] The Court concluded that Article 53 of the Fundamental Rights Charter cannot be interpreted to allow a higher level of protection recognized under the national constitution, if a ground for refusal to extradite is not included in Article 4a(1) of the EAW FD.[153] The Court states that such an interpretation would undermine the principle of primacy of EU law, and implies that the EU legal rules "are fully in compliance with the Charter".[154] And most importantly, the Court notes that by applying Article 53 the state would cast doubt on "uniformity of the standard of protection of fundamental rights as defined in that framework decision, would undermine the principles of mutual trust and mutual recognition which that decision purports to uphold and would, therefore, compromise the efficacy of that framework decision." In the *Melloni* case the Court appears to be uncompromising in its belief that the EAW FD, is, indeed, compliant with the necessary standards of fundamental rights protection, rebutting the suggestion that a higher level of protection than provided for in the EAW may be necessary.

[148] Christine Janssens, *The Principle of Mutual Recognition in EU Law.* Oxford University Press, 2013, p.141.
[149] Göztuk and Brügge, CJEU Joint Cases C-187/01 and C-385/01, para 33.
[150] CJEU, C-399/11.
[151] Para. 58.
[152] Para 60-61.
[153] Para. 55-57.
[154] Para 58.

The next landmark case regarding the mutual trust/fundamental rights conflict in the execution of EAW is the case *Aranyosi and Căldăraru*.[155] In *Aranyosi and Căldăraru* the CJEU, contrary to the protective approach to mutual trust in *Melloni*, establishes that mutual trust is not absolute.[156] In this case, the question, however is not about fair trial (as in *Melloni*), but about the prohibition of inhuman and degrading treatment and punishment. As noted above, while the violation of prohibition of ill-treatment may be a considered by the Court as a necessary human rights ground for the rebuttal of the principle of mutual trust, it may not automatically transfer to cases where the right to fair trial is concerned (proving unfairness, as well as the systematic character of the breach may constitute additional difficulties).

The Court reiterates that the principle of mutual trust and principle of mutual recognition are of fundamental importance, because they allow an area without internal borders to be created and maintained.[157] However, the Court also opens up for a possibility that there may be "exceptional circumstances" that would allow not to consider "all member states to be complying with EU law and particularly with the fundamental rights recognized by EU law.[158] In this case the Court invokes the Article 4a(1) of the EU Charter of Fundamental Rights: the Court makes note the Recital 10 commitment to fundamental rights, and points out the Article 1(3) of EAW FD as not modifying the obligation to respect fundamental rights that are enshrined in, inter alia, the Charter.[159]

The Court analyses that a rights violation may demonstrate "that deficiencies may be systemic or generalized, or which may affect certain groups of people, or which may affect certain places of detention"[160]. On the one hand, the conclusion of the Court weakens the mutual trust presumption as a whole: a presumption of the Member States' mutual trust in one another's fundamental rights standards, that in practice may not even be that strong to start with. On the other hand, self-recognition, that all human rights standards in the world cannot automatically be presumed to be complied with, simply because the EU is infallible, is also an absolute prerequisite for being able to enforce the protection of fundamental rights in the EU.

[155] *Pál Aranyosi and Robert Căldăraru* C-404/15, ECLI:EU:C:2016:198, 05.04.2016.
[156] Para. 78.
[157] Ibid.
[158] Ibid.
[159] Ibid., 83.
[160] Ibid., para. 89

In more recent cases, the Court has built on its previous cases. In *Tupikas* the Court, while also deciding on a trial *in absentia*, and concluding that the right to defence has been observed, notes, that the principle of mutual trust and mutual recognition, on which the Framework Decision is based, must in no way undermine the fundamental rights guaranteed to the person concerned.[161] In the *Ardic* case the Court reiterates the high level of mutual trust which should exist between Member States in accordance with the principle of mutual recognition.[162] This, however is done after the Court has reassured that Article 4a(1) of the Framework Decision has been applied in accordance with the requirements of Article 6 of the ECHR. Several cases (with the exception of *Aranyosi and Căldăraru*) involve the analysis of a trial *in absentia* as a potential violation of the right to fair trial. While in all *in absentia cases* the Court finds that fundamental rights (right to fair trial, more specifically right to defence) have been complied with, both under the EU law and in line with the jurisdiction of the ECtHR, there is significantly more consideration for human rights safeguards in the recent cases, in comparison to the *Melloni* case.

While in all the cases concerning a fair trial the Court has found that a high level of mutual trust is necessary, and that fundamental rights have not been violated, the category of cases, is not very comparable to the situation of a political offence, as the one Puigdemont may find himself in. In the *in absentia* cases described above the Court noted that the absence of the individual had been that of his own choice, and that the individuals had had a defence, and that the right to fair trial is not absolute. The way fairness of a fair trial is triggered in a political offence case is quite different: it is not something that an individual can have an impact on. Even more so, it is not something that the state can have an impact on either. It is the political nature of a case that taints the potential justness of the trial, and not procedural provisions. For this reason it is important to keep in mind the conclusion made by the Court in *Aranyosi and Căldăraru* case, namely, - that mutual trust is not absolute, and that in "exceptional cases" breaches are possible.

[161] CJEU, C-270/17PPU, 10.08.2017, para. 59.
[162] CJEU, C-571/17 PPU, 22.12.2017, para 90.

3.2.3. The Practice of Member States

Even though the EAW FD does not provide that extradition could be refused on the fundamental rights grounds, there is sufficient practice evidencing, that the national courts do take fundamental rights into consideration, and have used them to refuse extradition[163]. In some cases political considerations are intertwined with the concerns for fundamental rights.

Many Member States had enabled the grounds for refusing to execute an EAW on the basis of fundamental rights already before the *Aranyosi and Căldăraru*[164] case, which opened up for the potential rebuttal of the assumption of mutual trust, based on fundamental rights considerations.[165] In the Council of Bars and Law Societies in Europe survey six EU Member States reported to not be using fundamental rights grounds for refusal to execute the EAW, while five more stated they were doing so rarely.[166] The diversity in the approaches to dealing with EAW on the national level - at courts and legislatures - makes a reliable and consistent pattern of refusal to extradite on human rights grounds difficult to discern.[167] The passage below lists a few cases where execution of the EAW has been refused.

In 2006 a Belgian Court refused an extradition to Austria because it considered the presumption of innocence to have been breached.[168] In 2013 Belgium refused to extradite to Spain on the grounds that Spain uses "incommunicado detention" in relation to ETA terrorist suspects.[169] In 2014 an Austrian court refused to extradite a Latvian citizen for trial to Latvia. The court reasoned that execution of EAW was not possible due to his health condition and due to existing threats to his life in Latvia.[170] In 2016 a Greek Court refused extradition to Italy, because the rights of the individual had been violated in the previous procedural stage.[171] In another case Ireland refused to extradite a woman to Latvia, because that might potentially have inflicted harm on her two minor children.[172] It

[163] *EAW-Rights. Analysis of the implementation and operation of the European Arrest Warrant from the point of view of defence practitioners.* Council of Bars and Law Societies in Europe, Brussels, 2017, p. 42.
[164] Joint cases C-404/15 and C-659.
[165] Council of Bars and Law Societies in Europe, p. 42.
[166] Ibid.
[167] Sanger, p. 39.
[168] Tomkin, et. al., p. 43
[169] Ibid. This is the case of Jáuregui Espina, described above in subchapter 2.2.
[170] Council of Bars and Law Societies in Europe, p. 43. This case will be described in subchapter 5.4. below.
[171] Ibid, p. 42.
[172] Ibid.

is noted that most frequently the grounds of refusal not listed in the EAW FD, that involve protection of human rights, have concerned the right to private family life under Article 8 ECHR.[173]

The Council of Bars and Law Societies in Europe has recommended amending the EAW FD to mention specifically that human rights is a factor that the executing Member State must take into account before deciding whether to execute the EAW.[174] Another proposal is a harmonized standard of procedural safeguards in Member States.[175] It is noted elsewhere, that because of the simplified judicial procedure of EAW, it is important to ensure that the requested person does not become an object without personal rights.[176]

While the majority of EU Member States will make fundamental rights considerations, before executing an EAW, this is not equivalent to stating that they will refuse to execute the EAW. In many cases, where an individual claims a fundamental rights violation in the case of extradition, it is too difficult for this individual to supply the necessary evidence, in order to succeed in his or her rights violation claims.[177] The States are more likely to refuse extradition to prevent *refoulement* to a country where a person may face inhuman or degrading treatment. The issue of fair trial for a political offence, as in the case of Puigdemont, being a ground for refusal, however, is not obvious or automatic. And the additional problem with extradition for political offences will always be namely, - that they are political.

3.3. Political Considerations in Extradition for Political Offences

For a state to face the question to extradite or not to extradite a high-profile political offender means being stuck "between a rock and a hard place". On the one hand it would be quite evident that the "offence" is something that may not be perceived as a crime by the international community or the receiving state, but simply as political opposition, or even the right to self-determination, right to freedom of expression, or another legitimate right. In this case the political offence exemption would

[173] Ibid.
[174] Council of Bars and Law Societies in Europe. pp. 12 and 18.
[175] A. Sanger, p. 39.
[176] Evgenia Ralli. The Principle of Mutual Recognition Based on Mutual Trust and the Respect for Fundamental Rights: The Case of Framework Decision on the European Arrest Warrant. European Law Institute. Presentation at ELI 2017 Annual Conference and General Assembly, Vienna 6-8 September 2017. Available at http://www.europeanlawinstitute.eu/fileadmin/user_upload/p_eli/YLA_Award/yla_paper_website.pdf. Last visited 18.05.2017.
[177] Council of Bars and Law Societies in Europe, p. 42.

have a humanitarian objective to protect the individual from being judged by its political adversary.[178] This objective is accompanied by the diplomatic objective of the State – to stay neutral (neutrality principle in extradition law) to political conflicts abroad.[179] This belief in neutrality, however, is contested, because granting asylum to political offenders means effectively supporting the dissidents, which is not neutral either.[180]

On the other hand, while good diplomatic relations are not irrelevant for any two countries, in the EU they are crucial. That is, in fact, what safeguarding mutual trust is about: ensuring that the EU Member States can cooperate and benefit from the reliance on one another in this cooperation forum. Christine van den Wijngaert points out that it is paradoxical that states with similar political institutions and objectives give shelter to their respective enemies, especially, if such states are linked by political goals.[181] One could hardly think of a more paradoxical context than that of the EU.

Nevertheless, it still does not resolve the contradiction between protecting the individual's rights and good diplomatic relations, if one chooses, at the outset, to extradite as the measure of "neutrality". The EAW FD sets the blind execution of a European arrest warrant by the judiciary as the neutrality measure, contrary to the principle of international extradition law. In this case the "neutrality" means taking the side of the state.

What one can conclude is, that in the question of extradition for political offences, true neutrality is not possible: the state requested would always have to choose a side. It is not just about choosing a state or an individual. In high-profile cases like that of Puigdemont, the question is not simply about an individual as a criminal or a particular owner of rights, it is about the individual as a symbol of certain rights, certain stance, certain group, certain principles. And here, again, the situation in which the EU is in, is paradoxical. On the one hand, one can prioritize the fundamental rights of the individual, because a political opponent is not likely to face a fair trial. On the other hand, the mutual trust is derived from Article 2 of TEU, and that means, that human rights are assumed not to be violated. It is therefore a paradox, that those who fight for self-determination, democracy and human rights are to be protected from extradition under international law,[182] but in the community of "values

[178] Wijngaert, p. 752.
[179] Ibid.
[180] Ibid.
[181] Ibid., p. 754.
[182] Kapferer, para. 423, p. 84.

of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities", they do not have an equivalent protection.

Even if the EAW FD was intended to take the politics out of extradition of political offenders, it failed to do so. The case of Carles Puigdemont is a good example to that. While with EAW FD it is not the executive but the judiciary makes the decision, it does not mean that the political considerations are taken out of the equation. On the contrary, it means that the judiciary is forced to tackle the political considerations, it ought to not tackle. Through the extradition or non-extradition of Carles Puigdemont the court in the executing state, Germany, may be forced to answer not only the question of balancing fundamental rights and mutual trust in the EU, but also take a political stance on the offence. The principle of mutual trust in itself is more a political than a legal concept,[183] that the cooperation in the EU rests upon. In such case, the politically tense question of whether to extradite a political offender may put courts of Member States in an awkward position, where they are forced to make a decision not only on legal, but even political matters. Regarding the political aspect of the principle of mutual trust, one may additionally question the moral character of limiting a State's human rights obligations by a political consideration. Not that political considerations are not important in any case, but they must not be used to avoid a state's international obligations. Thus the obligation of Member States to trust that none of them are not violating fundamental rights obligations cannot overshadow the obligation for states to actually fulfil their human rights obligations.

The non-inclusion of the political offence exception in the EAW FD is not of a crucial importance. In cases where it has been applied, it has been seen as an unfriendly, even hostile act.[184] States have been avoiding the direct application of the political offence exclusion, in order to avoid problems in diplomatic relations with the requesting state, and, have instead applied other grounds for non-extradition, such as humanitarian grounds.[185] Under the EAW, as described above, it is also still possible to invoke other grounds for refusal to execute an EAW, such as double criminality, which is actually listed in Article 4, and the human rights consideration of fair trial. And so, apparently the choice is between the two.

[183] Guy Stessens, *The Principle of Mutual Confidence between Judicial Authorities in the Area of Freedom, Security and Justice*, in Gilles De Kerchove, Anne Weyembergh, "L'espace pénal européen: enjeux et perspectives (Editions de l'université de Bruxelles, 2005),p. 96.
[184] F.ex, the Zaire and Belgium case, non-extradition of Snowden to the US by Russia.
[185] Kapferer, para. 81, p. 30.

3.4. Chapter Summary

In this chapter I analysed the principles of extradition law, highlighting how they are reflected in the EU legislation. I analysed what the application of these principles means or could potentially mean for the case of Puigdemont. I then continued with an account of how the EU Member States have approached the question of fundamental rights grounds to refuse extradition. Lastly, I analysed the unavoidability of a political nature in extradition cases concerning political offenders. In the next chapter I will analyse how the specific EU regulation regarding the asylum for EU nationals in the EU impacts their rights and chances of receiving asylum.

Chapter 4

Asylum on the Grounds of Political Opinion

As it was established in the previous chapter, the European arrest warrant has somewhat limited the possibility for a fugitive political offender to avoid prosecution in their home country, compared to the rules traditionally applied in international extradition law. As the political offence exception to extradition does not exist in EU law, other grounds for non-extradition need to be sought, in order to refuse extradition of a political offender. In this chapter I will analyse the other legal question that is triggered by the Puigdemont case: the possibility for a political offender/opponent from one EU Member State to receive asylum in another EU Member State.

The principle of mutual trust has a comprehensive impact on asylum law in the European Union just as it does on judicial cooperation, which the EAW FD represents. In the regulation of asylum for EU nationals in another EU Member State, the Aznar Protocol is the core (in fact, the only) document. The Common European Asylum System (CEAS) (Dublin Regulation,[186] Qualification Directive,[187] Procedures Directive,[188] Reception Conditions Directive[189]) provides for a common regional framework for status determination, application, review and reception of asylum-seekers. In line with the provision of Article 1 of the Qualification Directive,[190] this regulation, however, applies only to asylum seekers from outside the EU. Section III of the Asylum Procedures directive provides that restrictions may be put by states on granting asylum to asylum seekers from safe countries: safe third countries and safe countries of origin.[191] The EU nationals are, however, fully excluded from the CEAS regulation by virtue of the Aznar Protocol – all EU Member States are automatically deemed

[186] Dublin III Regulation, Regulation (EU) No 604/2013 of the European Parliament and the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining the application for international protection lodged in one of the Member States by a third country national or a stateless person (recast), OJ L180/31, 29.06.2013.
[187] Directive 2011/95/EU of the European Parliament and the Council of 13 December 2011 on standards for the qualification of third-country nationals and stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted. OJ L337, 20.12.2011, pp. 9-26.
[188] Directive 2013/32/EU of the Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection. OJ L180, 29.06.2013., pp. 60-95.
[189] Directive 2013/33/EU, of the European Parliament and the Council of 26 June 2013 laying down standards for the reception of applicants for international protection, OJ L 180, 29.06.2013., pp. 96-116.
[190] Directive 2011/95/EU.
[191] Directive 2013/32/EU.

to be safe third countries.[192] The legal difficulties for EU nationals in applying for asylum in EU will be analysed in this chapter.

The analysis will involve the assessment of how the concept of a safe country of origin and the principle of mutual trust have impacted the application of asylum law towards the EU nationals seeking asylum in the EU, how this regulation relates to the Refugee Convention and other human rights documents, and whether there is room for an individual, like Puigdemont, to claim asylum on political grounds in another EU Member State.

4.1. Asylum Law

4.1.1. The Right to Seek Asylum

During the "refugee crisis" from 2015 and onwards, the EU has shown that, despite trying to "keep up the appearances" of its generous refugee policy, it has also resorted to measures that increasingly limit the refugee flow into the EU. In the centre of the tools for limiting the flow of asylum seekers is the concept of the safe countries: those of origin, as well as safe third countries, through which the asylum seekers may be transiting.

The safe country of origin concept is not new to the EU. It originated in Denmark[193] and gained increased popularity, spreading, first, to the neighbouring countries,[194] then appearing for the first time in EU context in the London Resolution of 1992.[195] *A safe country* was described as one that would normally not produce refugees, observe human rights, have democratic institutions and stability. It would be up to each EU Member State to determine which countries it considers to meet the criteria.[196] While the concept was introduced in EU legislation regarding asylum seekers from outside the EU only in 2005 (Asylum Qualification Directive[197]), it already applied to the EU

[192] Daniel S. Margolies. *Spaces in Law in American Foreign Relations: Extradition and Extraterritoriality in Borderlands and Beyond, 1877-1899*. The University of Georgia Press, 2011, p. 823.
[193] UNHCR. Background Note on the Safe Country Concept and Refugee Status. EC/SCP/68. 26.07.1991 Matthew Hunt. The Safety of Origin Concept in European Asylum Law: Past, Present and Future. *International Journal of Refugee Law*, 2014, Vol. 26, No. 4, 500-5, p. 504.
[194] Hunt, p. 504
[195] Council of the EU, Resolution. Criteria for rejecting unfounded applications for asylum. (London Resolution), 30 November 1992 (Not published in the Official Journal). Available at https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=LEGISSUM%3Al33102. Last visited 20.05.2018.
[196] Ibid.
[197] Council Directive 2004/83/EC of 29 April 24, OJ L 304/12, 30.09.2004.

nationals since 1999 by virtue of the Aznar Protocol,[198] deeming asylum applications by EU nationals in the EU "manifestly unfounded".

While it is claimed that the safe country concept is compatible with the Refugee Convention through interpretation,[199] the concept has also been criticized for undermining international refugee protection.[200] The 1951 Convention Relating to the Status of Refugees[201] (the Refugee Convention) and the 1967 Protocol relating to the Status of Refugees[202] do not explicitly list the right to seek asylum, but the idea of the Convention presupposes that the person seeking asylum has a right to do so.[203] The right to seek asylum and to be granted asylum, however, is not exactly the same. The right to seek and enjoy asylum is provided for in Article 14.1 of the United Nations Declaration of Human Rights.[204] It is not, however, clearly established, what it means in terms of obligations of states towards asylum seekers. The actual right to be granted asylum is dependent on the national legislation and international (regional) documents.[205]

Article 18 of the Charter of Fundamental Rights of the EU is a special EU provision that stipulates not just a right to seek asylum, but also a right to be granted asylum. This is, however, conditioned. On one side, - with the rules of the Refugee Convention. On the other side, - by the Treaty on European Union. Here again, there is a twist: while there is a right to be granted asylum, the right in the EU is limited by the application of the concept of safe country of origin. For EU nationals Protocol 24 of the Treaty on the European Union is directly applicable, which means, that asylum claims by EU nationals are to be regarded as "manifestly unfounded" (unless a Member State has made a deliberate derogation from ECHR (Art. 15) in time of emergency, or an Article 7 TEU procedure against a breach of common values in an EU Member State has been launched. Neither one has ever taken place.

[198] Entry into force of the Amsterdam Treaty on 1 May 1999.
[199] Hunt, pp. 518-520.
[200] Cathryn Costello. *Article 31 of the 1951 Convention Relating to the Status of Refugees.* Legal and Protection Policy Research Series. UNHCR, Division of International Protection, 2017, PPLA/2017/01, p.5.
[201] UN General Assembly, Convention Relating to the Status of Refugees, 28 July 1951. 189 UNTS 150, p. 137.
[202] Protocol Relating to the Status of Refugees, 606 UNTS, 267, 31 January 1967.
[203] R. Hofmann & T Löhr. *Introduction to Chapter V*, in Zimmerman (ed.), The 1951 Convention, p. 1088.
[204] United Nations General Assembly, Universal Declaration of Human Rights, 10 December 1948, GA res 217 A(III)
[205] See African Charter of Human and People's Rights 1520 UNTS 217, 27 June 1981, Art. 12 (3), American Convention on Human Rights, OAS Treaty Series No. 36, 1144 UNTS 123, 22 November 1969 (entry into force 18 July 197), Art 22(7), EU Charter on Fundamental Rights Art. 18.

Automatically treating asylum claims by EU nationals as manifestly unfounded can be viewed as discriminating these EU nationals - asylum seekers - by nationality. Discrimination is in conflict with Article 3 of the Refugee Convention, which states that the provisions are to be applied without discrimination, including – as to the country of origin. The prohibition of discrimination, being one of the fundamental human rights principles, is included also in Article 21 of the Charter of Fundamental Rights of the European Union, Article 14 of the ECHR, and even in Article 18 of the Treaty on the Functioning of the European Union.[206]

The interpretation of how this provision can be claimed to be in compliance with the international obligations of the EU Member States is to be sought in the interpretative declarations to the Protocol,[207] i.e. the compliance depends on the statement of intention, that any claim would still have to be individually reviewed and that, in case there actually is a need for protection, it would then be granted. The safeguards available would be accelerated procedures, personal interviews and possibility to appeal.[208] Thus it could be argued that, while the right of EU nationals to seek asylum in another EU Member State is very limited, it is not fully denied, and thus – not in breach of the Refugee Convention.

Already in 1991 Background Note on the Safe Country Concept and Refugee Status[209] UNHCR took a cautious position on the "safe country" concepts (the concepts of safe third country and safe county of origin). However, with the further developments in the use of the concepts of safe countries, including the limitation of the procedural safeguards, the concept of safe country of origin has been receiving ever more negative response. Thus the Aznar Protocol has been criticized for its discriminative provision and incompatibility with Article 33 of the Refugee Convention (*non-refoulement*) not only by UNHCR,[210] but also by the EU Commission,[211] as well as non-governmental organizations, such as Human Rights Watch, Amnesty International and ECRE.[212] The latter pointed out that linking the legal right to asylum to the political and economic alliance of

[206] TFEU, OJ C 326, 26/10/2012
[207] Treaty of Amsterdam, OJ C340, 10.11.1997, p. 1-144. See Declarations to Protocol 24, described in Chapter 2.
[208] M. Hunt, pp. 518-520.
[209] EC/SCP/68, 26.07.1991.
[210] UNHCR, Position on the Proposal of the European Council Concerning the Treatment of Asylum Applications from Citizens of the European Union Member States (Appended to the letter of February 3, 1997 from Director, UNHCR Division of International Protection to Michiel Patijn, Secretary of State).
[211] Robynn Allveri, "EU Accession to the ECHR and the Stumbling Block of Asylum Protocol 24.". Ankara Law Review. Vol. 9. No.2. pp. 175-194, Reference to EU Parliamentary Session Debate (September 1997) , p. 186.
[212] Ibid., p. 187.

neighbouring countries is a bad precedent.[213] Two decades on, the question of asylum for EU nationals remains hardly touched upon. It is the mutual trust among EU Member States that dominates how asylum issues are dealt with in the EU. It is the mutual trust that warrants that all EU Member States are presumed to have an adequate human rights standard to be automatically regarded as safe countries of origin. The principle of mutual trust, so relevant for trade and economic cooperation in the EU, has also gained dominant status in the area of freedom, security and justice, which enhances asylum. Mutual trust threatens to overshadow even the human rights commitments of the Member States, including potential right to asylum for EU nationals, because it prevents the states from controlling one-another's human rights standards.

Mutual trust, though formulated as a legal principle, in the questions of granting asylum, does manifest itself also as a political commitment to be loyal to the co-Member States of the EU (another blur of the line with the loyalty principle), and not to doubt them in the name of good cooperation. The Puigdemont case is an illustration to how the political need to cooperate and maintain friendly relations among EU Member States can throw a shadow of confusion about the possibility to invoke human rights, even where there could clearly be a reason to. Granting asylum on the grounds of political opinion is the most sensitive of the potential grounds for granting asylum to a national of one EU Member State in another: Even though granting asylum is theoretically not to be deemed as a hostile act,[214] in the EU context that would actually be perceived as breaching mutual trust. It would mean stating that the Member State from which the asylum is sought does not protect the fundamental rights of its citizens and the values of freedom and democracy, even if the asylum is granted in one individual case. Such an inconvenient scenario, as the Puigdemont case evidences, is not unimaginable.

4.1.2. Political Opinion as a Ground for Seeking Asylum

Being a refugee means being a person who needs and deserves a specific form of protection and being a person who can, in practical terms, be guaranteed the substitute or surrogate protection that the

[213] Analysis of the Treaty of Amsterdam in so far as it Relates to Asylum Policy, ECRE, 10 November, 1997, p. 9.
[214] Maria-Teresa Gil-Bazo, Asylum as a General Principle of International Law. International Journal of Refugee Law, 2015, Vol. 27, No. 1, 3-28, p. 7. Rebecca Stern, At Crossroads? Reflections on the Right to Asylum for European Union Citizens, *Refugee Survey Quarterly*, Vol. 33, No 2, pp 54-83, p. 57, see Declaration on Territorial Asylum, GA res. 2312 (XXII) GAOR SUPP (NO. 16) AT 81 UN DOC. A76716, 14 December 1967, Art. 1 in particular.

Refugee Convention is designed to deliver.[215] In Ward v. Canada international refugee law has been formulated to serve as a back-up to the protection that one expects from the State of which one is a national. It was meant to come into play only when that protection of the individual's own state is unavailable, and only in certain situations.[216] These certain situations are the Convention grounds defined in Article 1(2) of the Refugee Convention. One of these grounds is well founded fear of being persecuted for reasons of political opinion.

The "political opinion" ground can be defined as "any opinion on any matter in which the machinery of state, government, and policy may be engaged".[217] While there are discussions on how broad or narrow the definition of "political opinion" should be,[218] in the case of Puigdemont it suffices with the very basic understanding of political opinion, as in – taking action for secession of the Autonomous Republic of Catalonia from the Kingdom of Spain. This is, indeed a very classical form of a political offence that may warrant asylum, and it would be unnecessary, also in line with findings of the previous chapter, to debate, whether sedition and rebellion are political crimes or not: - they are political and, additionally, high-profile.

What one does need to ask next, is whether there is a nexus between a person's political opinion and the risk of being persecuted in his or her home state.[219] It is the risk of persecution that is required, a risk of serious harm inflicted on the person due to his or her political opinion. In the case of political opinion, the risk would be more likely coming from the state, but could theoretically also be the failure of the state to protect against such harm.[220] If Puigdemont were to be returned to Spain, he would be tried for his political acts. It is not likely that there would be an attempt on his life, or that he would be tortured (as it has been claimed in the cases regarding alleged ETA terrorists[221]). Nevertheless, even the prosecution of a political opponent in itself can amount to persecution. The intersection of when asylum(persecution) meets extradition(prosecution) will be analysed in more detail in Chapter 5.

---

[215] James Hathaway and Michelle Foster, The Law of Refugee Status. Second edition. Cambridge University Press, 2014, p. 22.
[216] *Ward v. Canada* (Attorney General, (1993) 2 SCR, 689 (Can. SC, Jun. 30, 1993), at 709. See Hathaway and Foster, p. 51.
[217] Hathaway and Foster, p. 406, reference to G.S. Goodwin-Gill and McAdam, Refugee in International Law (3rd edition 2007), p. 87.
[218] Ibid., p. 407.
[219] Ibid, 362.
[220] Ibid., p. 373
[221] Specifically, in the case of Navidad Jáuregui Espina described in this thesis.

4.2. Asylum for EU Nationals in Practice.

4.2.1. CJEU Jurisprudence

Puigdemont's case is controversial in its potential legal conflict between obligations of EU Member States under the Refugee Convention and other human rights documents on one side, and the EU fundamental principle of mutual trust, on the other. It has the potential to one day become the basis for the CJEU to review the implications of the principle of mutual trust on fundamental rights in asylum cases.

As of the time of writing, the CJEU has not reviewed a single case regarding asylum seekers – EU nationals. So far, the closest-related case to the problematics of the Aznar Protocol in the jurisprudence of CJEU is the *N.S.* and *M.E. case*, [222] concerning the possibility of rebuttal of mutual trust in cases of risk of ill-treatment of asylum-seekers in the Dublin system.[223] In 2011 two similar cases were submitted to ECtHR and CJEU. The ECtHR decision in the *M.S.S. v Belgium and Greece case*[224] was a landmark. In *M.S.S.* the Court decided for the first time, that trust is not always justified.[225] This had an impact on the presumption of an EU Member State as a safe third country for asylum seekers. The essence of the decision was that the absolute presumption of trust is unlawful, when this would jeopardize the protection of the fundamental rights of the applicant.[226] In the *N.S. and M.E.* case CJEU generally followed suit by recognizing that it is not inconceivable, that asylum seekers may be treated in a manner incompatible with their fundamental rights.[227] This judgement was praised for having put an end to "blind trust" in the EU.[228] The rejoicing was, perhaps, too early, as the absoluteness of mutual trust was confirmed in the *Melloni* decision of 2013, as well as the Opinion 2/13 of CJEU,[229] which, once again, emphasized the fundamental importance of mutual trust.[230]

---

[222] Joint Cases C-411/10 and C-493/10 *N.S: v Secretary of State for the Home Department and M.E. and Others v Refugee Applications Commissioner and Minister for Justice*, Equality and Law Reform. ECLI:EU:C:2011:865, 21.12.2011.
[223] Dublin system – regulated by the Dublin Regulation – establishes the criteria and mechanisms for determining which EU Member State is responsible for examining an asylum application. (https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/background-information/docs/20160406/factsheet_-_the_dublin_system_en.pdf, last visited 16.05.2018.)
[224] ECtHR, *M.S.S. v Belgium and Greece* (GC), Appl. No. 30696/09, of 21.01.2011.
[225] Hemme Battjes and Evelien Brouwer, The Dublin Regulation and Mutual Trust: Judicial Coherence in EU Asylum Law. *Review of European Administrative Law*, Vol. 8, Nr. 2, 183-214. Paris Legal Publishers, p. 186.
[226] Battjes, p. 185.
[227] *N.S.* and *M.E.*, para. 81.
[228] See Battjes, reference 6 on page 185.
[229] Case Opinion 2/13.
[230] Ibid., para. 191.

After the *M.S.S.* (ECtHR) and *N.S. and M.E.* (CJEU) cases, the national courts started following the line the European courts had taken, not returning asylum seekers to Greece, for one.[231] The practice of states regarding asylum-seekers who are EU nationals, however is not equivalent to that concerning asylum seekers from outside the EU, and evidences a far more limited possibility of rebuttal of the presumption of a safe country and mutual trust.

4.2.2. The Practice of Member States

Even though the starting point of the Aznar Protocol is that the asylum application is "manifestly unfounded", the EU neither may (due to the Refugee Convention obligations of Member States) or does prohibit the individual Member State to assess an asylum claim. Notwithstanding that, the EU Member States are not generous in permitting asylum claims. Most Member States consider claims to be "either prima facie inadmissible, invalid or manifestly unfounded" .[232] Some countries appear not to have even foreseen the situation that an EU national may file an asylum claim.[233] In the period 2013-2015 European Council on Refugees and Exiles (ECRE) information showed that Belgium and Netherlands where the only countries that had granted asylum or subsidiary protection status to an EU national in the first instance.[234]

European Asylum Support Office[235] information indicates that in 2014, 790 applications by EU nationals were filed in all 28 EU Member States together, with the United Kingdom, Germany, Sweden and Belgium being the main recipients (195, 175, 245, 140).[236] The main source countries of asylum seekers over the past decade have been from Bulgaria, Slovakia and Romania, and, recently, - also Poland.[237] The overall number of asylum seekers – EU nationals in the EU is inconsiderable comparing to, the, for example, 5854 asylum claims Canada received from individuals

[231] See, for example, Article 3 ECHR cases in the German Courts at EDAL – Asylum Law Database, www.asylumlawdatabase.eu/en/case-law-search?f%5B0%5D=field_tcod%3A4117&f%5B1%5D=field_keywords%3A43. Last visited 20.05.2018.
[232] Canada: Immigration and Refugee Board of Canada, European Union: Application of the Protocol on Asylum for Nationals of Member States of the European Union (2013-June 2015), ZZZ105193.E, available at http://www.refworld.org/docid/55bf55094.html. Last visited 20.05.2018.
[233] Ibid.
[234] Immigration and Refugee Board of Canada, 2015, p. 5 (2015) In 2013 - 5 EU nationals were granted asylum in the Netherlands, in 2014 - 10 in Belgium.[234]
[235] EASO – an agency of the EU, see https://www.easo.europa.eu.
[236] Ibid., p. 5
[237] Ibid.

seeking protection against EU Member States in 2011(1879 of those from Hungary).[238] Most of the asylum seekers are deemed to be of Roma nationality.[239]

When it comes to EU nationals, the Member States are hardly keen on granting more protection than required by EU legislation. Most of those countries that use a list of safe countries of origin, apply it to all EU Member States.[240] To illustrate, how the asylum claims can be handled, I will describe the example of the UK Asylum Policy instruction for EU/EEA Asylum Claims of 2015.[241] It explains how the home office would assess asylum claims lodged by citizens of EU/EEA and Switzerland. From the outset, the guideline makes it clear that the asylum claims for citizens of the EU are to be considered inadmissible, whilst providing a mechanism to consider claims where exceptional circumstances are raised.[242] This is because EU Member States are deemed to be safe countries and as such asylum claims from EU nationals are presumed to be unfounded.[243] If a claim is deemed inadmissible, it will not be treated at all. As to what are exceptional circumstances, the document refers directly to those listed in the Aznar Protocol, which essentially means – none, because to find such a circumstance the Member State would have had to derogate from ECHR in line with its Article 15, or the EU would have to have taken Article 7 action against a specific Member State.[244] The UK procedure provides that the claims are to be declared inadmissible, as soon as the basic information on the applicant is collected. Instead, the individuals can make "a valid human rights claim to be decided". Such national provisions correspond to the subsidiary protection defined in the Qualification Directive.[245] In this case the applicants may make an application for leave to remain. This rule applies for family reunification, compassionate and compelling factors, victims of slavery and trafficking. Thus, there is a provision on granting discretionary leave and leave based on family and private life, or other compassionate or compelling grounds, instead of asylum.

Belgium, another example, stands out when it comes to positive decisions in asylum cases involving EU nationals. In 2014 only 10 people were granted asylum in all of the EU. These were 10 Romanian

[238] Stern, 67.
[239] Ibid., p. 68.
[240] See country profiles on AIDA – Asylum information database. www.asylumineurope.org.
[241] UK Asylum Policy instruction for EU/EEA Asylum Claims.[241] Version 3.0. Publication date 9 December 2015. Available at https://www.gov.uk/government/publications/eea-and-eu-asylum-claims-instruction. Last visited 25.04.2018.
[242] UK Asylum Policy instruction, p. 5.
[243] Ibid.
[244] Ibid., p. 13.
[245] Directive 2011/95/EU, OJ L337, 20.12.2011.

nationals seeking asylum in Belgium.[246] This is, yet, another indication that, perhaps, the suggestions that Puigdemont may have gone to Belgium in order to claim asylum, were not that far-fetched. In Belgium asylum applications by EU nationals are given priority treatment, and reviewed in an accelerated procedure.[247] Article 57/6(3) of the Aliens Act that entered into force on 22 March 2018 provides that the Commissioner General for Refugees and Stateless Persons can declare an asylum application inadmissible where the asylum seeker is a national of an EU Member State.[248] The procedure on inadmissibility, however is supposed to differ from the regular procedure only by shorter review periods. It still requires a personal interview and appeal.[249] While legal assistance is theoretically available, it is little used in practice in inadmissibility decisions and appeals procedures.[250] When it comes to the case of Puigdemont, the position of Belgium does not indicate an outright exhilaration over a potential asylum application. In fact, the Belgian government has been very uncomfortable with having been put in the middle of a Spanish-Catalonian political conflict, and, as opposed to the Flemish separatist-sympathising parties, would rather not have to face another controversial asylum case of a separatist from Spain.[251] It is nevertheless, up to the immigration authorities and, in case of appeal, judicial authorities, to decide on granting asylum. It is the Belgian courts, that, despite political inconvenience, have previously refused to extradite alleged ETA members to Spain. Whether these individuals have also been granted asylum or subsidiary protection, however, is not publically available information.

While in the Canadian report some EU Member States indicate that they will either reject the applications (Czech Republic, Ireland), classify them as manifestly ill-founded, basing it on the safe third country concept (Germany, United Kingdom), claim that there is a simplified procedure for rebuttal of the safe country designation (Bulgaria), not have a differentiated procedure for EU asylum seekers (Malta), or not have any experience with asylum claims by EU nationals (Estonia, Cyprus,

[246] Immigration and Refugee Board of Canada, 2015.
[247] EU Citizens. Office of the Commissioner General for Refugees and Stateless Persons. www.cgra.be/en/international-protection/accelerated-procedures/eu-citizens. Last visited 20.05.2018.
[248] Admissibility Procedure. Belgium. Asylum Information Database. AIDA. www.asylumineurope.org/reports/country/belgium/asylum-procedures/admissbility-procedure.
[249] Ibid.
[250] Ibid.
[251] Foo Yun Chee, Robert-Jean Bartunek, Alastair MacDonald. "Like any EU Citizen": Belgium's Catalan asylum fix. *Reuters*. 31 October 2017. https://www.reuters.com/article/us-spain-politics-catalonia...eu-citizen-belgiums-catalan-asylum-fix-idUSKBN1D02KP?il=0. Last visited 18.05.2018.

Italy, Malta) ,[252] the result is the same: a positive asylum decision granted to an EU national is a rare exception.

It is understandable that EU Member States may have an interest in not spending vast amounts of resources on reviewing asylum applications that have merely economic grounds. For that purpose the "manifestly unfounded" presumption is a practical tool. Nevertheless, while rarely, international protection may indeed be needed for EU nationals in another Member State, as the examples of Belgium and the Netherlands evidence. Seeking and being granted asylum on the grounds of political opinion is very unlikely in the EU, but, as the Puigdemont case indicates – not an impossibility. Puigdemont has become the face of a very uncomfortable problem the EU is facing in wowing mutual trust for the sake of long-term cooperation, while facing a potentially justified asylum claim. It is not just about Puigdemont, it is about the principles the EU works by, and about the EU looking itself in the mirror.

4.3. Asylum for EU Nationals is not only about Puigdemont

While Carles Puigdemont, whose potential asylum application has not even been filed, is the sole EU national with a public face and a specified name, to illustrate the norm-conflict in the Aznar Protocol, he is far from being the only individual whose rights are concerned.

Even though it is only in very rare cases that asylum is actually granted to an EU national in another EU Member State, asylum claims have indeed been filed by EU nationals both inside and outside the EU. In the past decade asylum outside the European Union has been granted to nationals from nearly every EU Member State.[253] Incomparably more positive decisions on granting asylum have been made outside the EU, comparing to inside of the EU.[254]

The largest amount of literature has been written about the Roma asylum seekers, who are mainly persecuted on grounds of race and ethnicity. They, apparently, constitute the vast majority of asylum-seekers – EU nationals.[255] Very little has been written about the right to asylum for trafficked

[252] Immigration and Refugee Board of Canada, 2015, p. 10.
[253] Hunt, p. 501.
[254] Allveri, p. 177.
[255] Stern, p. 68.

persons.[256] Asylum for an EU national in another EU Member State on political grounds does not appear to have been put up for academic discussion at all. Perhaps it is because having to seek asylum from an EU Member State is so inherently incompatible with mutual trust and the whole self-perception of the EU as the beacon of democracy and human rights. But, in reality, it is not unimaginable. To illustrate how the provisions of the Aznar Protocol are problematic, two recent examples from the EU, where the expression of political opinion resulted in persecution, will be used.

Daphne Caruana Galizia was a journalist investigating into a grand-scale corruption scheme in the Maltese political circles, when she was killed by a car-bomb.[257] A political opposition leader described it as a political murder.[258] Jan Kuciak was investigating a cover-up of Italian mafia dealings by leading Slovak politicians. It is suspected that he was killed by mafia assassins. The prime minister was forced to resign under the protests from the public that included a sequence of mass demonstrations.[259]

These two allegedly politically-motivated murders, that took place in the EU within one year, demonstrate that the EU Member States cannot be assumed to be 100% safe countries of origin when it comes to well-founded fear of persecution on the grounds of political opinion. Potentially journalists can get killed for exposing government corruption not only in Russia or Nigeria, but allegedly also in the EU. Asylum, in an EU Member State, however, would be more likely to be granted to a Russian or Nigerian journalist who has received threats to his or her life in relation to political activity, because neither Russia or Nigeria is considered a safe country of origin, while the asylum claim of the Slovak or Maltese national would have been treated as manifestly unfounded from the outset.

In evaluating such asylum claims by EU nationals, in line with the Aznar Protocol, one would take mutual trust as a starting point for assuming that fundamental rights in the EU Member State (such

[256] Fulvia Staiano. The Protection of European Union Citizens Victims of Human Trafficking in Europe. *The Italian Yearbook of International Law Online*, Vol. 25. 2016, pp. 159-178.
[257] Will Wordley. Daphne Caruana Galizia: Top investigative reporter killed by car bomb in Malta. *The Independent.* 16 October 2017. www.independent.co.uk/news/world/europe/daphne-caruana-galizia-dead-malta-car-bomb-panama-papers-wikileaks-a8003936.html. Last visited 18.05.2018.
[258] Ibid.
[259] Nick Squires. Slovakia appoints new prime minister amid political crisis over murder of investigative journalist. www.telegraph.co.uk/news/2018/03/22/slovakia-appoints-new-prime-minister-amid-political-crisis-murder/. Last visited 18.05.2018.

as Malta or Slovakia) would not be violated. One would ascertain that the Member State has not invoked Article 15 of ECHR and that the EU has not launched an Article 7 procedure against the Member State. The applicant would be given a couple of days in an accelerated procedure to rebut the assumption that his or her country of origin is safe. Threats to life may have sufficed to invoke fundamental rights in order to rebut the principle of mutual trust, but may also not have been provable enough. All-in-all, the EU journalists would have been put in a worse position and had smaller chances of receiving protection in another EU Member State than their colleagues from outside the EU.

The question is, whether the criteria for when an asylum claim by an EU national would not be treated as manifestly unfounded can ever be attainable. - After the murder of Daphne Caruana Galizia, the European Parliament drafted a resolution expressing concerns about the rule of law in Malta, pointing, inter alia, to the possibility of the EU invoking the Article 7 procedure.[260] The European Commission has also launched an infringement procedure against Poland and subsequently has proposed to trigger the ultimate resort Article 7(1) mechanism in order to defend the rule of law and judicial independence in Poland.[261] The case of Poland is the closest the EU has ever come to invoking Article 7,[262] and it has not actually done it, as of the time of writing of this paper. Thus, in line with the direct reading of the Aznar Protocol, a case of an EU national claiming asylum in another EU Member State, without this application being treated as "manifestly unfounded" from the outset, has never happened.

CJEU in the case *N.S. and M.E.* referred to "mutual confidence" which is essentially the expression of the principle of mutual trust.[263] The mutual trust is what permits the EU Member States to make a legal assumption, that they are all safe countries of origin. Are all EU Member States considered safe countries of origin because they trust one another in principle? Or do EU Member States trust that they are safe countries of origin, because the human rights standard in all EU Member States is

[260] 2017/2935(RSP))10.11.2017.
[261] *Rule of Law: European Commission acts to defend judicial independence in Poland*. European Commission. Press release database. Brussels, 20 December 2017. Europa.eu/rapid/press-release_IP-17-5367_en.htm. Last visited 20.05.2017.
[262] Jon Stone. EU fighting war on two fronts to maintain rule of law in member states. EU institutions criticized both Poland and Malta on Wednesday. *The Independent.* 15 November 2017. www.independent.co.uk/news/world/europe/eu-rule-of-law-brexit-malta-poland-investigation-european-parliament-comission-caruana-galizia-a8056886.html. Last visited 20.05.2018.
[263] See subchapter 3.2.2. above.

actually impeccable? A problem occurs when the actual question of human rights is left out of the mutual trust – safe country of origin equation. Then mutual trust and safe country of origin concept provide reciprocal justifications to one another. It is, however, important to highlight that the principle of mutual trust in its essence rests on the reliance that the human rights will be observed. This part of evaluating an asylum claim of an EU national must therefore not be omitted.

Refoulement sounds like a dirty word in a community of shared values of democracy and human rights, where mutual trust prevails. Yet, the *non-refoulement* clause does get invoked towards EU Member States. It has been invoked in *Aranyosi and Căldăraru* in connection with returning convicts to face prison conditions that amount to ill-treatment. It has been invoked by ECHR in the *M.S.S.* case, and even by CJEU in the *N.S. and M.E.* case. It has been invoked by the authorities in USA and Canada, when granting asylum to EU nationals. It has, apparently, also been invoked by the Belgian and Dutch authorities that granted asylum to the few EU nationals. It just appears to not have been invoked in the EU for asylum claims on the grounds of political opinion. Yet it can be, and as can be seen by the above cases, it sometimes clearly ought to be invoked.

The circumstances in asylum cases must always be judged on an individual basis. Therefore the provisions of the Aznar Protocol create an unreasonably high threshold for an asylum claim by an EU national in another EU Member State. A sexually trafficked woman is equally trafficked, irrespective of whether she comes from Bangladesh, Albania, Estonia or Norway. A mafia that has ties to the government can be equally dangerous for someone who knows too much and wants to make it public in Japan, Russia, the US, Malta or Slovakia. Leading a secessionist self-determination movement against territorial integrity of the mother state one will risk prosecution not only in Serbia, Indonesia, China, or Ukraine, but also in Spain. The state cannot always be presumed to be willing and/or able to protect the individual from harm, be it caused by public or private actors. Not even in the EU. Placing a bar to exceptionality in the EU at the level of impossibility, basing it on the reliance that in an EU Member State no person could possibly have a well-founded fear of being persecuted on convention grounds is both in breach of the Refugee Convention and hypocritical. It appears rigidly arrogant to presume that a situation when an EU national may need asylum in another EU Member State cannot arise. Another question is, whether one Member State would be willing to provide protection for a national of another Member State in such a close-knit cooperation forum, as the EU, with mutual trust at its core.

All Member States are presumed to respect freedom, democracy, rule of law and human rights, based on the principle of mutual trust.[264] Sometimes even, if they do not. The EU Member States owe an allegiance to one another politically. That is why it is particularly politically inconvenient to grant asylum to a refugee from another Member State. The question of Puigdemont is, probably, as "inconvenient" as it can get. However, - political convenience is not what ought to decide on the extent of the rights of an individual. The fact that asylum claims by EU nationals comparable to the situations of Caruana, Kuciak or Puigdemont would have to be treated as "manifestly unfounded", proves that the threshold set in the Aznar Protocol is unreasonably high.

4.4. Chapter Summary

In this chapter I analysed the compatibility of the Aznar Protocol with refugee law, highlighting how the principle of mutual trust and the concept of a safe country of origin limits the possibility of EU nationals to seek asylum in another EU Member State, in particular, when asylum is sought due to well-founded fear of persecution on the grounds of political opinion. The Puigdemont case is a good illustration of how the question of extradition and asylum can derive from to the same case. When it comes to political offences, it is where extradition law and asylum law meet and overlap.[265] In the next chapter I will explain how this intersection of extradition is conceptualized, what legal challenges it creates, how the principle of mutual trust impacts this intersection, and how the asylum/extradition cases have been dealt with in practice.

[264] Opinion 2/13 – paras. 168 and 191 (including the references to the *Melloni case*, paras. 37 and 63 and *N.S. and M.E. case*, paras. 78-80.)
[265] See a general study by Sibylle Kapferer, Legal and Protection Policy Research Series. The Interface between Extradition and Asylum. UNHCR, PPLA/2003/05, November 2003.

Chapter 5
The Intersection of Asylum and Extradition

In the previous two chapters I presented how the application of the principle of mutual trust limits the rights of EU nationals in another EU Member State in cases of extradition and asylum. In this chapter I will present how extradition and asylum intersect at political offence, what legal problems emerge, in particular, when the principle of mutual trust is applied, and how some cases involving both asylum and extradition have been resolved in practice by Member States.

5.1. The Conceptual Intersection between Asylum and Extradition

Extradition and asylum are not just two separate fields of law where the principle of mutual trust applies and impacts fundamental rights of the individual. As the case of Puigdemont illustrates, one and the same case can concern asylum and extradition. When a political offence is concerned, an individual may simultaneously face extradition and have an asylum claim.

Political offence and protection from the state which the individual offended is the common origin of both non-extradition of political offenders and a right of a state to grant asylum.[266] Hugo Grotius, described the political offenders as those who "disturbed the peace of the State".[267] The later historical reason for excluding political crimes from extradition treaties was the understanding that political criminals would be returned to summary execution or at least risk being tried and punished by tribunals coloured by political passion,[268] and thus – not receive a fair trial. It is this historical type of a political offender that would have been in need of both non-extradition, and asylum. Indeed, the concept of asylum originates from the protection of the political offender from a state which, as ever democratic and law-abiding, cannot be objective in a trial against the offender. Of this the Puigdemont case is a prime example.

Asylum and extradition are neither mutually exclusive,[269] the same, or necessarily two sides of the same coin. Nevertheless, the closest extradition and asylum come to overlapping, is in the case of a political offence. The political offence exemption has a humanitarian function, and its effect may be

[266] Kapferer, para. 73, p. 27.
[267] Manuel R. Garcia-Mora. The Nature of Political Offenses: A Knotty Problem of Extradition Law. *Virginia Law Review.* Volume 48, No. 7 (Nov. 1962), 1226.
[268] Ibid.
[269] Kapferer, p. 1

comparable to the right of asylum.[270] It was also the political offence exception that triggered the need to carve out space for asylum within territorial sovereignties and within the interstate system.[271]

Bassiouni writes that there is a certain "duality" between asylum and extradition: while the concepts are related, they operate on separate tracks, but the connection is particularly close concerning the political offence exception.[272] Granting asylum does not need to include extradition requests and proceedings, but it is possible to end an extradition request (especially with political implications) through granting asylum.[273] An asylum claim and extradition request could be made in the same situation when the person, whose extradition is sought, is an asylum seeker or refugee, or when an asylum application is filed, after a wanted person has learned of the extradition request.[274] The case of Belgium granting asylum to political opponents of the Zairian government, whose extradition was requested, is such an example of the overlap between asylum and extradition in political offence cases.[275]

In dual asylum/extradition cases the two meet at *non-refoulement*. Article 33(1) of the Refugee Convention, phrase "expel or return in any manner whatsoever" includes also extradition.[276] However, asylum and non-extradition is not the same. If the review of an asylum claim and an extradition request relevant for the same case, a person may not simply be extradited, without reviewing their asylum claim. When an asylum application is filed after a request for extradition of the person in question is made, the special protection needs of this person must be taken into consideration, in order to protect them from *refoulement.*[277] This is why extradition would normally not take place if an asylum claim is filed, until the decision on whether to grant asylum would be made.

[270] Karin Landgren, "Deflecting international protection by treaty: bilateral and multilateral accords on extradition, readmission and the inadmissibility of asylum requests. UNHCR. New Issues in Refugee Research, Working Paper No. 10, June 1999, at pp. 31-42. p. 34, reference to A. Helton, "Harmonizing Political Asylum and International Extradition", p. 458.
[271] Daniel S. Margolies, *Spaces of Law in American Foreign Relations: Extradition and Extraterritoriality in the Borderlands and Beyond, 1877-1898.* University of Georgia Press, 2011, p. 283.
[272] Ibid. p. 284.
[273] Ibid.
[274] Kapferer, para. 211, p. 75.
[275] See subchapter 3.1.1.
[276] Lauterpacht and Betlehem, paras.71-75.
[277] Kapferer, p. 1.

On the question of political offence, extradition law and asylum law close in from opposite ends. In extradition law the political offence exemption creates an exception to any duty to extradite based on an extradition treaty. In refugee law the political nature of the crime keeps the offender from the scope of exclusion clause of Article 1F(b) of the 1951 Refugee Convention. The perpetrators of such political crimes qualify for refugee protection, if they meet the inclusion criteria of Article 1A (2) (definition of who qualifies as a refugee). Neither extradition law or asylum law define what amounts to "political offence".[278] Just the contrary, in both fields the question is continuously debated. The approach from "opposite ends" is what highlights the difference between asylum and non-extradition. As noted by the UK House of Lords, in *T. v. Secretary of State for the Home Department*,[279] a substantial difference between extradition and asylum is that the non-return of a fugitive due to the political nature of the offence is an exception while *non-refoulement* is the general rule applicable to an asylum seeker, unless he or she has committed a serious non-political offence.

When an extradition request is made, a claim for asylum would normally have a suspensive effect on extradition. In this way asylum can be a remedy against extradition.[280] However, if the asylum request has been denied to the fleeing person, the extradition process can be initiated by this individual's home country.[281]If the requested state is obliged by an extradition treaty to extradite, and the Convention grounds for asylum are not applicable, the *non-refoulement* principle may be the only way by which an extradition request might be rejected.[282] *Non-refoulement* as the only potential ground for granting a stay is particularly relevant in exclusion clauses.

Article 1F (b)[283] of the Refugee Convention provides that the *Convention shall not apply to any person with respect to whom there are serious reasons for considering that:*

b) He has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee.

[278] Kapferer paras 322-323, p. 105.
[279] *T v. Secretary of State for Home Department*, (1996) 2 ALL ER 865, United Kingdom, House of Lords (Judicial Committee, 22 May 1996.
[280] Emily Kendall, Sanctuary in the 21st Century: The Unique Asylum Exception to the Extradition Rule, 23 Mich. St. Int'l Rev. 153, 2014, p. 160.
[281] Ibid., p. 155.
[282] Mustafa Karakaya. The Protection of Refugees and Asylum Seekers Against Extradition under International Law. *Law and Justice Review. Vol*. V, Issue 1, 2014. P. 183. p. 210.
[283] The crimes listed in paras. a) and c) require an analysis that goes beyond the discussion of applicability of the principle of mutual trust, and are therefore outside the scope of this thesis.

This means that, even if the individual is qualified for refugee status, he or she is excluded from receiving international protection under the Refugee Convention, due to the crimes committed before. This is based on two ideas: first, that that refugee status has to be protected from abuse by prohibiting granting it to undeserving individuals and, secondly, that the guilty must not escape prosecution.[284] In such cases, an individual may not be eligible for asylum, even though he may have a well-founded fear of persecution on Convention grounds. One of the concerns addressed in this thesis is the political/non-political crime dichtomy, such as whether the misuse of public funds, that Puigdemont is accused of, is a political or non-political crime. If Puigdemont were to be eligible for refugee status, due to fear of persecution on the grounds of political opinion, but the misuse of public funds would be classified as a serious non-political crime, the exclusion clause could apply. Article 1(F)(b) has, however, been specifically worded to make sure that the prosecution of the individual is a legitimate exercise of general criminal law, and not, political abuse of criminal law against a political opponent.[285] This clause was intended as a direct reflection of the political offence exemption of extradition law in asylum law.[286]

The Refugee Convention is silent as to what this means in terms of extradition of a person who falls under the exclusion clause. Gilbert notes that this silence leaves many issues of connection between asylum and extradition unclear.[287] He notes that there have been so few cases of political offence exemption relating to Article 1(F), that hardly any meaning of this relation can be established, and that the relation is dynamic.[288] The UNHCR Guidelines on Exclusion suggest that the worse the persecution feared by the applicant, the greater the seriousness of the committed crime has to be to be in order to exclude the individual.[289] The broad understanding of what is a serious crime leaves the courts with the discretion to decide whether the crime is so serious that it would justify the exclusion from refugee status.[290] The courts should take into consideration the nature of the act, the harm inflicted, the form of procedure used to prosecute the crime and the nature of penalty.[291] The UNHCR also suggests, that a crime should be considered non-political when the motives of personal gain are predominant feature of the specific crime committed (This points to the misuse of public

[284] Geoff Gilbert, *Current Issues in the Application of the Exclusion Clauses.* UNHCR background paper, 2001, p. 2.
[285] Hathaway and Foster, p. 554.
[286] Ibid., p. 555, see reference 197.
[287] Gilbert, UNHCR background paper, p. 14.
[288] Ibid, p. 16 and 17.
[289] UNHCR, *The Exclusion Clauses: Guidelines on their application*, 1 December 1996, para 57.
[290] Gilbert, UNHCR background paper, p. 18.
[291] UNHCR Guidelines, 2003, para. 14.

funds by Puigdemont as a political crime). This interpretation, applicable in international law, however is made difficult by the principle of mutual trust, which limits the inquiry into the details of the case and the motives of the state behind the prosecution of the individual.

UNHCR notes that if the individual is excluded from refugee status and cannot receive asylum, the state can choose to grant the excluded individual stay on other grounds, unless obligations under international law require to prosecute or extradite[292] (*aut dedere aut judicare*). While the Refugee Convention contains an exclusion clause, the consequences exclusion clause on extradition are not fully clear. Therefore it is important to take note of the Convention against Torture and other Cruel Inhuman or Degrading Treatment or Punishment, which provides for *non-refoulement*, - without any exclusion. *Non-refoulement* prohibits states from returning not only a refugee or asylum seeker, but any person, to a country where he or she is likely to face torture[293] It is a mandatory bar to extradition, regardless of whether it is explicitly provided for in an extradition treaty or not. If not eligible for refugee status, a person may be granted complementary protection.[294] Some residual protection may be available where the excluded individual is at risk of torture.[295]

There are, of course, also regional documents and mechanisms stipulating *non-refoulement*. In Europe, in addition to the international documents, Article 3 of the ECHR provides for prohibition of torture, inhuman and degrading treatment. This has been interpreted in the *Soering* case[296] and *Chahal* case[297] by ECtHR to include also *non-refoulement*.

The mandatory character of *non-refoulement* is relevant in the context of the EAW FD, where no political offence exception exists. Human rights considerations are not included among the grounds of refusal to execute the EAW provision, and are interpreted by to CJEU to be applicable in a very

[292] UNHCR, Guidelines on International Protection: Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees. HCR/GIP/03/05, 4 September 2003, para. 8, also Gilbert, p. 80.
[293] UN General Assembly, Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. 10 December 1984, 1465 UNTS 85.
[294] Ruma Mandal. Protection Mechanisms Outside the 1951 Convention ("Complementary Protection"). Legal and Protection Policy Research Series. UNHCR, Department of International Protection, PPLA/2005/02, June 2005, paras 4 and 5.
[295] Ibid., para. 93. The example of "discretionary leave" in the UK. UNHCR document EC/50/SC/CRP.18, June 2000 on Complementary Form of Protection: the Nature and Relationship to the International Refugee Protection Regime, does not enhance the individuals falling under exclusion clause as eligible for complementary protection, though they, in cases, may not be returned to a country where they would face torture (see para. 5).
[296] *Soering v. The United Kingdom (Plenary)*, ECtHR, App No. 14038/88, A/161, 07.07.1989.
[297] *Chahal v. the United Kingdom (GC)*, ECtHR, Appl. No. 22414/93, 15.11.1996.

limited manner, in order not to undermine the principle of mutual trust.[298] Nevertheless, it is evident that, even though cautiously, CJEU has limited the absoluteness of mutual trust in the face of ill-treatment upon return,[299] thus highlighting the applicability of the principle of *non-refoulement* even in the EU, where the principle of mutual trust defines the presumption that no human rights are violated.

While ill-treatment as a human rights violation triggers *non-refoulement*, the question of a fair trial as a reason for non-expulsion is not as clear-cut. The cases when the ECtHR has actually set limits to the mutual trust in the EU has have involved potential ill-treatment (*M.S. and N.E, Aranyosi and Căldăraru*). In contrast, the Court has highlighted the importance of principle of mutual trust and mutual recognition in the cases of trials *in absentia*. Theoretically, though the Court has not drawn a line of distinction between prohibition of torture, and other fundamental rights, such as the right to fair trial, as justifiable human rights grounds for the rebuttal of mutual trust. What does need to be noted, though, is that the CJEU has been taking a very narrow approach as to the extent to which fundamental rights considerations may be used to limit the application of the principle of mutual trust. The only cases where the court has actually found a human rights violation to be serious enough to rebut the principle of mutual trust, have been those concerning ill-treatment. While the mandatory character of *non-refoulement* puts it aside from other potential human rights violations, that does not mean that any other human rights violation is tolerable in order to avoid erosion of the principle of mutual trust. Indeed, the right fair trial can also trigger *non-refoulement* in itself in cases where prosecution of a political offender amounts to persecution on the grounds of political opinion.

5.2. Prosecution as persecution.

Persecution may arise not only when an individual may be tortured upon return to a country but also when he may receive an unfair trial.[300] The extradition of an individual may be requested in order to obtain the surrender of a wanted person with a persecutory intent.[301] Such prosecution, - unjust, disproportionate or simply meant to get back at a political opponent, can amount to persecution that would therefore, in turn, not amount to the criteria for exclusion under Article 1F(b), even if the

[298] *Melloni*, para. 63.
[299] *N.S. and M. E., Aranyosi and Caldararu*.
[300] Kapferer, pp. 86 and 253, Kathleen Tang. Persecution v prosecution: the question of Snowden. *Berkeley Journal of International Law.* Blog. 16 November 2013. Available at http://berkeleytravaux.com/persecution-vs-prosecution-question-snowden/. Last visited 22.05.2018.
[301] UNHCR, Guidance Note on the Extradition and International Refugee Protection. UNHCR Protection Policy and Legal Advice Section, Division of International Protection Services, Geneva, April 2008, p. 29.

extradition request is formally made for a serious non-political crime.[302] The UNHCR criteria for evaluating whether the offence in question is serious or minor, political or non-political, concerning the Article 1F(b) exclusion clause,[303] are also helpful for evaluating whether the trial that the individual would face upon return would be fair. When political offences are concerned, fairness of trial becomes an important human rights consideration, because the absence of a fair trial can amount to persecution in the understanding of the Refugee Convention. If the prosecution of an individual is intended as persecution and is connected to a Convention ground (such as political opinion), the inclusion clause of Article 1A(2) of the Refugee Convention is satisfied and the person whose prosecution is sought qualifies for refugee status.

The interrelation between prosecution and persecution can be illustrated by the Puigdemont case. In the Puigdemont case, the political offence in question is not violent and consists of exercising (even if contested under international law and unconstitutional under Spanish law) the right to self-determination through a democratic process. At the same time, it can have a grave impact on the stability, prosperity and market economy of a whole country. The potential to destabilize the economy of one of the largest countries in Europe is not just a political statement, - it has a tangible price tag as well. Officials have been sentenced for the misuse of much smaller amounts of state funds. So, it is not surprising that along with charges on sedation and rebellion, Puigdemont has also been charged with misuse of public funds. This part of the charges is about a tangible financial loss to the state requesting extradition and not purely an abstract political belief. So, theoretically, it is possible to look at the case as both a case where prosecution amounts to persecution of a political opponent, and also, perhaps, from the perspective of Spain, also as a non-political offence that has caused financial losses to the state.

If prosecution in the country of origin may result in disproportionately severe punishment or a punishment for a law that is contrary to international human rights standards, it may fall under persecution.[304] If Puigdemont were to be returned to Spain, without applying the speciality principle to extradition, he could be tried for rebellion, sedition and misuse of funds, which could mean a prison sentence up to 30 years. If he were to be extradited only for the crime of misuse of public funds, it would be reasonable to assume that the case could not be tried without, in the essence, assessing

[302] Hathaway and Foster, pp. 554-555.
[303] UNHCR Guidelines on International Protection, 2003, see subchapter 5.1.
[304] Tang.

Puigdemont's guilt in political crimes, relating to the organization of the referendum. Puigdemont cannot simply be considered to have apolitically misused funds on a referendum, because he was elected by his electorate not least to pursue this specific agenda, and the motive for using the funds was political, and not that of personal gain.

Puigdemont could claim that he is a refugee, because of a well-founded fear of persecution on the grounds of political opinion. He could argue that his prosecution in Spain would actually be persecution through an unfair trial that would be biased about his political activity. At the same time, it is not unimaginable that Spain could claim the applicability of the exclusion clause of Article 1F (b) of the Refugee Convention: maintaining the position that the misuse of public funds is a serious non-political crime despite its motives, but due to the great financial consequences it has caused.[305] Based on the UNHCR interpretation described above, however, this claim appears to be relatively weak. As of now, it appears that Spain is still confident about claiming the extradition of Puigdemont for political crimes,[306] relying on the principle of mutual trust, which, as described in Chapter 2, had been put in place specifically to eliminate the questioning the fairness of political charges by other Member States.

The UNHCR notes that requirement for the requested state to incorporate adequate and effective safeguards against violations of fundamental rights of the individual concerned in its extradition process is increasingly reflected in the national legislations and jurisprudence.[307] Ironically, this is not the case with the EU. The courts of the Member States are expected to execute the EAW in the based on the principle mutual recognition (Article 1(2), deriving from mutual trust). It is unfortunate that the reliance on mutual trust can theoretically permit political trials, that have an inherent potential to be unfair, thus opening up the potential to use the principle of mutual trust for a purpose contrary to what it stands for. In such cases trust also needs to be placed in judicial authority of the surrendering Member State that it will consider the fundamental rights obligations and fundamental legal principles, in line with 1(3) of the EAW FD.

[305] As noted in subchapter 5.1. above, regarding exclusion cases, in deciding whether to treat the crime as political or non-political, judges have significant discretion.
[306] Peter Tefer. Germany's Puigdemont release puts Spanish court in bind. *EU Observer*. Brussels, 06.04.2018. https://euobserver.com/justice/141527. Last visited 15.05.2018.
[307] UNHCR, 2008.

Internationally, many political extradition/asylum cases where the question of whether prosecution amounts to persecution have been related to the United States. Such examples are the chess player Bobby Fischer, Julian Assange and Edward Snowden.[308] In all these cases asylum was granted and extradition request rejected. Fischer was granted asylum in Iceland, Assange is still residing at the embassy of Ecuador in London (having been granted asylum in Ecuador but not being able to depart from the UK), and Snowden has been granted temporary asylum in Russia. While prosecution/persecution political offence cases are rare (and thus even rarer in the EU), they draw public and media attention, cause a tension in the societies and the diplomatic relations involved. High-profile politically-charged cases that may seem clear-cut, actually blur the line between persecution and prosecution.[309] Whether Puigdemont will be extradited to Spain, remains to be seen. As of the time of writing, Puigdemont has not filed an asylum claim. The right to fair trial, however, is just as relevant for deciding on extradition, even if the asylum claim is not submitted. [310] The principle of *non-refoulement* would apply to either,[311] irrespective of the principle of mutual trust.

5.3. Mutual Trust and Fundamental Rights in Dual Asylum/Extradition Cases

5.3.1. CJEU Jurisprudence

When it comes to cases of CJEU regarding dual asylum/extradition cases of EU nationals, there are none. Cases regarding asylum based on political opinion, - also none. Neither are there any cases regarding asylum-seekers – EU nationals, or cases regarding extradition for political offences. Perhaps the Puigdemont case will be the push needed for the judicial authority of the EU – the CJEU - to take a look at the compliance of the Aznar Protocol with the EU human rights obligations, and to reconsider the grounds for refusal to execute the EAW in the EAW FD. There are, however, cases that are relevant for understanding the impact of mutual trust on asylum and extradition of EU nationals analysed in chapters 3 and 4, namely: cases on *non-refoulemement* of asylum-seekers to an EU Member State where they could be subject to ill-treatment (*N.S. and M.E.*) and cases of refusal to execute the European arrest warrant based on human rights considerations (*Melloni, Aranyosi and Căldăraru, Tupikas* and other cases).

[308] Ibid.
[309] Tang.
[310] UNHCR, 2008, para. 61, p. 25. The two issues would have to be dealt with in two distinct procedures under any circumstance.
[311] Ibid., para. 24, p. 12-13.

The non-defined, yet restrictive applicability of fundamental rights for the rebuttal of mutual trust indicates that the Court itself is struggling with reconciling mutual trust and fundamental rights, and is swinging back and forth even on the general principles, depending on how the facts of the case feed into the narrative. The mutual trust is claimed to be nearly absolute, yet continuously a very sensitive issue for deciding on the exact line when the fundamental rights claim is so strong, that the principle of mutual trust must be limited.

While the CJEU has analysed the composition of the right to a fair trial with regard to trials *in absentia*,[312] there has been no case before CJEU where it would been necessary to evaluate the overall fairness of the trial in the context of the execution of the European arrest warrant. In the case of Puigdemont the question that would be asked to the CJEU would not be about procedural nuances that may indicate fairness or unfairness of the trial; instead the Court would have to take a stance on whether a political trial as such can be fair, and if the principle of mutual trust can prevent the responsible court from questioning the political nature of a charge. While a case of this kind has not been adjudicated by the CJEU, the question of whether prosecution of a person for political offences may amount to persecution is a fundamental question at the intersection between extradition and asylum. Puigdemont's case is controversial in its conflict between obligations of EU Member States under the Refugee Convention and other human rights documents (including those of the EU) on one side, and the EU principle of mutual trust, on the other. One day, indeed, it may become the basis for the CJEU to review the compatibility of not only the EAW FD, but also the Aznar Protocol with human rights obligations of the EU and its Member States, perhaps even with regard to the case of Puigdemont.

5.3.2. Practice of Member States

While there are no CJEU cases that tackle the interaction between extradition and asylum that involves EU nationals in an EU Member State, there are asylum/extradition cases of EU nationals that have been resolved by courts on the national level. These cases give an indication of how EU rules may have been applied and interpreted in actual cases where asylum or non-extradition has been claimed because of fear of persecution on the grounds of political opinion.

[312] For example, the cases of *Melloni*, *Tupikas*, *Ardic*, also *Zdziaszek*, C-271/17 PPU of 10 August 2017, ECLI:EU:C:2017:629, and *Radu,* C-396/11, of 29 January 2013, ECLI:EU:C2013:39 .

The case of Puigdemont, as well as that of Moreno-Garcia, and Jáuregui Espina, are examples of when questions of asylum and extradition could come up almost simultaneously. Moreno-Garcia is a case where an individual on the run has filed an asylum claim, after the state had issued an international arrest warrant (EAW in the EU) on this person. Puigdemont is, as of the time of writing, still awaiting the decision on extradition regarding the misuse of public funds, so his next move is still to be seen. While information on specific asylum cases is not widely publicized, it is clear that the Spanish cases are not the only asylum-extradition cases in the EU involving political offences. To further illustrate the relation between extradition and asylum, two cases from Latvia, where the extraditable person has claimed his prosecution to be politically motivated, will be described.

One case is that of a participant in a demonstration against government incompetence, that escalated into a riot, leaving people injured and shops looted.[313] Subsequently a musician and eccentric Ansis Berzins, was convicted for participating in the demonstration. He received a conditional sentence,[314] but refused to report to the authorities because he considered the sentence itself to be political. Instead, he went to Czech Republic in, what he himself called "political exile".[315] Latvia issued an EAW and Berzins was arrested in the Czech Republic. He appealed the execution of the EAW and applied for asylum. The asylum claim, and it's appeal were rejected, the extradition decision was maintained.[316] In this case the offence was politically motivated (relative political offence), and was minor (judging by the length of the sentence). This EAW is one of the examples of cases when the EU Member States overuse the EAW system for minor offences, criticized by practitioners and scholars.[317] On the other hand, the political persecution claim was, apparently, not considered to be proven by the courts, neither in the extradition, nor the asylum case.

[313] Cehija aizturets 13. janvara grautinu lieta apsudzetais Ansis Berzins. 08.04.2017. http:www.tvnet.lv/zinas/latvija/655457-cehija_aizturets_13janvara_grautinu_lieta_apsudzetais_ansis_berzins. Last visited 14.05.2018.
[314] News Agency LETA, Ansis Ataols Berzins atgriezas Latvija, Neatkariga Rita Avize, 22.03.2018. nra.lv/latvija/240346-ansis-ataols-berzins-atgriezas-latvija.htm. Last visited 14.05.2018.
[315] Ibid.
[316] Ibid.
www.alamy.com/stock-photo-liberec-czech -republic-03rd-july-2017-regional-court-in-liberac-deals-147525920.html.
[317] Thomas Hammerberg. *Overuse of the European Arrest Warrant – a threat to human rights*. Council of Europe, Strasbourg, https:///www.coe.int/et/web/commissioner/-/overuse-of-the-european-arrest-warrant-a-threat-to-human-righ-1- Last visited 14.05.2018.

The other case from Latvia is that of a customs official Vladimirs Vaskevics, who was notorious for being corrupt and involved in organized crime, as well as misusing his official position.[318] Similarly, his wife was involved in corruption, for which she was sentenced to an insignificant fine.[319] The events surrounding the trials of Vashkevics and Vilkaste have involved episodes worthy of mafia series: alleged kidnapping of their daughter, the disappearance of their lawyer, a car-bombing, where Vashkevics received leg injuries, extortion, bribery and threatening witnesses.

While on bail, Vaskevics left Latvia for Austria. His wife established a human rights foundation for the support of her family, published a book and financed a documentary film about the political prosecution of her husband, and filed a case with the ECHR.[320] She claims that the attacks on her family were organized by the Latvian state secret services and have been politically motivated.[321] When Latvia finally issued an EAW on Vaskevics, it was refused by Austria on humanitarian grounds: namely, a doctor had certified that Vaskevics had become incurably ill, as well as due to the possible risk to his life (essentially, - *non-refoulement*). The Austrian authorities did not reflect on the political persecution claim. It must be noted that humanitarian reasons are not a ground for refusal to extradite in EAW FD Article 4a(1). The grounds for refusal to extradite invoked in this case are actually closely related to the subsidiary protection provided for third country nationals under the Qualification Directive, available if the individual does not meet the criteria to qualify as a refugee, but may be subject to ill-treatment in his country of origin, thus providing another example of a link between asylum and non-extradition. It is not known if Vaskevics has claimed political asylum. The Austrian authorities have apparently established that there is a risk of ill-treatment upon return. If the

[318]Prokuratūrā Vaškevičam uzrādīta sākotnējā apsūdzība, 20.11.2008. http://www.tvnet.lv/zinas/kriminalzinas/289931-prokuratura_vaskevicam_uzradita_sakotneja_apsudziba. Last visited 22.05.2018.

[319] Spriiedums: RD kukulosanas lieta Vilkasti no bargaka soda pasarga nesamerigi ilgs kriminalprocess. 02.05.2011. http://www.delfi.lv/news/national/criminal/spriedums-rd-kukulosanas-lieta-vilkasti-no-bargaka-soda-pasarga-nesamerigi-ilgs-kriminalprocess.d?id=38286845
Inga Springe. Kas noticis? (What has happened?). Diena. 26.05.2007. https://diena.lv/raksts/pasaule/krievija/kas-noticis-13144743. Last visited 02.05.2018. One of those was selling real estate she had acquired for 170 000 euros for 45million euros to a company owned by – then – mayor of Riga, where her husband's former employer – the State Revenue Service - is now renting their headquarters for almost 9 million euros a year. This payment was decreased by 1,5 million euros a year when the State Real Esate Agency bought the building for, essentially, 71 million euros. www.delfi.lv/news/national/politics/no-vilkastes-superdarijuma-lidz-valsts-makam-vid-ekas-miklas.d?id=46925241. Last visited 02.05.2018.

[320] Austrijas tiesa atska Vaškevica izdošanu Latvijai. 06.10.2014. https://lsm.l/raksts/zinas/latvija/austrijas-tiesa-atsaka-vaskevicaizdosanu-latvijai.a1013637. Last visited 14.05.2018.

[321] Committee Justice for Inara (Vilkaste). Violations of Human Rights in Europe: The Case of inara Vilkaste Presented in Strasbourg, France. http://prnewswire.co.u/news-releases/violations-of-human-rights-in-europe-the-case-of-inara-vilkaste-presented-in-strasbourg-france-148862145.html. Last visited on 02.05.2018.

Austrian authorities were to receive an asylum application from Vaskevics, such asylum claim, based on the Aznar Protocol, would be treated as "manifestly unfounded" at the outset. However, the Court's finding of risk to his life in the extradition case should be sufficient evidence to rebut the assumption of mutual trust. As the next step, however, the authorities would be faced with the question of whether asylum should be granted on a Convention ground, or whether it should be rejected, based on the exclusion clause of Article 1(F)(b).

The comparison of the two cases, as well as, naturally, the case of Puigdemont, evidences that the dichotomy of political/non-political offences can be a practical challenge. Some common trends can be observed. First, the courts appear to avoid the political arguments in the cases. Berzins' political persecution claims were rejected. In Vaskevics' case possible ill-treatment, without the political argument was invoked by the court as grounds for refusal to extradite. The same was done in the Moreno-Garcia and the Espina-Jáuregui case: while the risk of ill-treatment was invoked, the political persecution aspect was left aside. Evaluating the likeliness of political persecution in another Member State appears to contradict the principle of mutual trust too much, for the courts to choose this avenue. Other possible arguments appear to be a sought instead in every potentially politically-tainted case. Secondly, non-extradition is more common in political offence cases than granting asylum. The Courts in the Member States appear to consider the fundamental rights arguments to counter the mutual trust in extradition cases. Of all the extradition request cases described in this thesis, where the question of political offence features, the EAW has actually been executed in only one: the most minor offence of all, indeed, the only minor offence among all the cases described. Non-extradition, judging on the examples available, is more a rule than an exception. In cases like that of Natividad Jáuregui Espina or Vladimirs Vaskevics the non-extradition is based on the principle *non-refoulement*, which is only possible in on the grounds of ill-treatment. When it comes to asylum, - the situation is different. Asylum is not known to have been granted in any political offender case.

Daphne Galizia Caruana and Jan Kuciak probably did not even contemplate the possibility of asylum, before they were killed. Garcia and Moreno were not extradited to Spain, but simultaneously their asylum claim in Belgium was rejected. Also Natividad Jáuregui Espina was not extradited to Spain, but she had already lived in Belgium for many years, without formal asylum. Vladimirs Vaskevics was not extradited to Latvia, but was granted a stay on humanitarian grounds due to his health and threats to his life (essentially resembling subsidiary protection). Ansis Berzins was extradited and his

asylum claim was rejected. And last, but not the least, Carles Puigdemont, while exploring his legal options, has until now not applied for asylum.

Of all the cases listed above only Moreno-Garcia and Ansis Berzins have been known to have filed an asylum claim. Indeed, with the overall statistics of asylum granted to EU nationals in the EU, the chances are slim. In the Moreno-Garcia and Berzins case the asylum claim was filed only when the individuals were apprehended in order to be extradited. Applying for asylum before apprehension may actually speed-up the extradition, as the person in hiding has to reveal him or herself. With the very slim chances that the Aznar Protocol leaves to EU nationals for receiving asylum, it may not be worth the risk to even attempt.

As to Puigdemont, the decision of the court in Germany, (the case being heard at the time of writing) will reveal, if the ground of non-extradition due to lack of double criminality will suffice for Puigdemont to continue his political activism outside Spain, whether he will be extradited to Spain on the grounds of misuse of public funds, whether he will be forced to file an asylum claim in the face of a pending extradition, and if so, if it will be granted. The analysis above evidences that claiming asylum against political persecution in the EU is not a step easily taken, at least not by EU nationals. The existing definition on mutual trust and fundamental rights limits to it is not clear enough to give a definite, clearly predictable answer of how the case will be resolved. Instead, cases, like that of Puigdemont, are what continues to shape the development of how the balance between mutual trust and fundamental rights is established in cases of asylum and/or extradition for EU nationals in the EU.

5.4. Chapter Summary

In this chapter the fields of extradition and asylum were analysed together at their intersection: the political offence. The question of relation of extradition and asylum was analysed in the light of *non-refoulement*, and prosecution as persecution. The last part of the chapter illustrated how the described intersection extradition/asylum cases concerning EU nationals can look in practice.

Chapter 6
Conclusions

The case of Carles Puigdemont has brought to the fore the question of asylum and extradition of EU nationals in the EU, giving a problematic issue a face and a name. The application of the principle of mutual trust in the EU to the regulation of asylum and extradition of EU nationals, limits the fundamental rights protection available such individuals. This is particularly relevant in political offence cases, that involve the considerations of both asylum and extradition.

The regulation of asylum and extradition in the EU, that has determined many non-political claims in the EU over the years, was actually created due to circumstances of a case very similar to that of Carles Puigdemont, namely the case of Luis Moreno Ramajo and Raquel Garcia Arrantz. Being displeased with the way the two political offenders were not extradited and had been able to file an asylum claim, was an incentive for Spain to propose two important legislative initiatives to the EU. First, an extradition agreement that would soon be transformed into EAW FD which would not include a political offence exception and would allow for unquestioned extradition by a judicial authority, without the involvement of diplomatic channels of the requesting and receiving state. Secondly, a Protocol to the Amsterdam Treaty regarding asylum for EU nationals, deeming such asylum claims "manifestly unfounded". Both of these initiatives were based on the principle of mutual trust. Neither at the time, nor in the present has there been a clear and elaborate definition of what the principle of mutual trust actually entails, and as to what extent fundamental rights considerations can be used to rebut the mutual trust assumption. The most detailed description of what mutual trust means can be found in a couple of paragraphs of Opinion 2/13, where mutual trust of not questioning the compliance with fundamental rights standards of other EU Member States is essentially put in contrast to the mutual control of compliance with human rights standards for parties of the ECHR, which would not be optimal in the EU. The Member State practice is based on random criteria and not indicative of a uniform approach, while the CJEU in its practice has continuously emphasized the importance of not undermining the principle of mutual trust, save in very exceptional cases. So far, such exceptional cases in the CJEU have only concerned the risk of ill-treatment, while the Member States have applied both a broader and narrower approach to rebuttal of mutual trust in extradition and asylum cases. The national courts also do appear to be more comfortable with invoking the principle of *non-refoulement* to rebut the mutual trust principle, by not extraditing the individuals, where they could face ill-treatment. Any indication that the prosecution of the wanted

individual may be politically tainted, and that this could be a fundamental rights concern has, nevertheless, been avoided by the courts in all cases analysed.

Mutual trust as a legal principle can be used as a tool for gaining and promoting trust, which is why CJEU is so protective of its integrity. In matters that concern human rights, such as extradition and asylum, however, as indicated in this study, mutual trust has a potential to become a pretext for avoiding the human rights obligations by the Member State responsible. At the same time, an individual's claim to asylum or non-extradition can, and often is, sacrificed in the name of good diplomatic relations. While neither non-extradition, nor asylum is to be seen as a hostile act in international law, in practice it does have a negative effect on the diplomatic relations between states, - even in the EU. The principle of mutual trust, with its assumption of compliance with human rights standards, legitimizes the diplomatic choice of good relations among states, and reduces the possibility for the individual to claim the protection of their fundamental rights.

The impact of mutual trust on the EAW FD is such, that the political offence exception to extradition does not exist as a ground for refusal to extradite. Neither are human rights grounds specifically listed as a reason to refuse extradition. It is possible to refuse an extradition request, based on the human rights principles binding on EU and its Member States individually. However, the CJEU has set the benchmark in the *Melloni* case, that the margin of invoking fundamental rights to rebut mutual trust ought to be limited as much as possible, not to undermine and erode the principle of mutual trust. When it comes to extradition of political offenders, however, one can invoke an optional ground for refusal to extradite. As in the Puigdemont case, the principle of double criminality can be invoked, if the law of the extraditing state does not have the same paragraph in its criminal code. In such cases it is up to the requested state to decide whether to extradite or not. In principle, the right to fair trial also ought to be an applicable ground to refuse an extradition request, as political trials by their inherent nature are not likely, or at least – not guaranteed to be fair. This clause, however, has not been invoked by national courts in the EU in similar political cases. Instead the courts have opted for the more "heavyweight" fundamental rights ground of risk of ill-treatment, thus indicating a high threshold.

While refusal to extradite appears to be relatively frequent in practice, the Aznar Protocol, in contrast, does appear to put up a considerable bar to asylum for EU nationals in the EU. The assumption of the asylum claim being "manifestly unfounded" is difficult to rebut both in theory and practice. The limits

of when an asylum claim could be recognized as based on well-founded fear of persecution by definition, set an unrealistically high threshold. The rebuttal of the assumption in the accelerated asylum procedure used for EU nationals seeking asylum is a great practical challenge. The cases where asylum has been granted are very exceptional, not just in theory, but also based of empirical data. There are no known cases where asylum would have been granted to an EU national in the EU on the grounds of political opinion. Nevertheless, the cases analysed do evidence that, just like anywhere else in the world, also in the EU the need for asylum based on political opinion is absolutely not a theoretical and practical impossibility.

While the German court in Schleswig is still investigating the matter of whether to extradite Puigdemont on the grounds of misuse of public funds, it has refused to extradite him on the grounds of rebellion, based on the absence of double criminality. The mutual trust that the Spanish politicians promoted in the EU cooperation in the fields of extradition and asylum (area of freedom, security and justice) goes both ways. Not only is a simple judicial procedure sufficient to extradite a political offender to another EU Member State. Mutual trust implies also that a simple judicial procedure is sufficient to refuse extradition. The complaints of Spanish authorities that a German court "equivalent to provincial court" was in charge of the decision not to extradite Puigdemont for the political offences,[322] is, indeed, a direct result of Spain's own legislative initiatives in the area of freedom, security and justice. The political character of the case, however, is just as tricky as 25 years ago, and in a not very distant future the CJEU may be asked to formulate its opinion on the complicated matter of extradition of political offenders.[323]

On a final note, it is important to highlight and remember that the principle of mutual trust is based on the Article 2 TEU wording that "The Union is founded on values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities". Without actual respect for these values the principle of mutual trust is senseless and self-cancelling.

[322] Peter Tefer. Germany's Puigdemont release puts Spanish court in bind. EU Observer. Brussels, 06.04.2018. https://euobserver.com/justice/141527. Last visited 15.05.2018.
[323] Spain mulls appealing Germany's Puigdemont extradition ruling to EU Court. The Local – Spain. 07.04. 2018. https://www.thelocal.es/20180407/sapin-mulls-appealing-puigdemont-extradition-ruling-to-eu-court. Last visited 15.05.2018.

Bibliography

Books

Robert Cryer, Håkan Friman, Darryl Robinson, Elizabeth Wilmshurst. *An Introduction to International Criminal Law and Procedure*. Second Edition. Cambridge University Press, 2010.

James Hathaway and Michelle Foster, *The Law of Refugee Status.* Second edition. Cambridge University Press, 2014.

Geoff Gilbert. *Aspects of Extradition Law.* International Studies in Human Rights. Martinus Nijhoff Publishers. Dodrecht, Boston, London, 1991.

Christine Janssens, *The Principle of Mutual Recognition in EU Law.* Oxford University Press, 2013.

André Klip, *European Criminal Law*. Intersentia, Antwerp, Oxford, Portland, 2009.

Daniel S. Margolies. *Spaces in Law in American Foreign Relations: Extradition and Extraterritoriality in Borderlands and beyond, 1877-1899,* University of Georgia Press, 2011.

Malcom N. Shaw, *International Law.* 6th Edition. Cambridge University Press, 2008.

Chapters in Books

M. Cherif Bassiouni, The Political Offences Exception in International Law and Practice, in *International Terrorism and Political Crimes*, ed. by. M.C. Bassiouni, Charles C. Thomas Publisher, Springfield, IL, 1975,

Ved P. Nanda. Extradition and mutual legal assistance: recent trends in inter-state cooperation to combat international crimes in *Research Handbook on International Criminal Law*, ed. Bartram S. Brown, Edward Elgar Publishing, 2011.

Guy Stessens, The Principle of Mutual Confidence between Judicial Authorities in the Area of Freedom, Security and Justice, in Gilles De Kerchove, Anne Weyembergh, *L'espace pénal européen: enjeux et perspectives*, Editions de l'université de Bruxelles, 2005.

Encyclopaedia Entries

Malgosia Fitzmaurice. Treaties (6d – Interpretative Declarations). *Max Planck Encyclopaedia of Public International Law,* Oxford Public International Law. September 2006. Available at opil.ouplaw.com. (log-in required).

Makane Moïse Mbengue. *Preamble. Max Planck Encycopedia of Public International Law,* Oxford Public International Law. September 2006. Available at opil.ouplaw.com. (log-in required).

Rainer Hofmann and Tillman Löhr, Introduction to Chapter V in A. Zimmermann (ed) *The 1951 Convention Relating to the Status of the Refugees and its 1967 Protocol: A Commentary*, Oxford, OUP, 2011, pp. 1087-1128.

Articles

Robynn Allveri, ”EU Accession to the ECHR and the Stumbling Block of Asylum Protocol 24.”. *Ankara Law Review.* Vol. 9. No.2, pp. 175-194.

Hemme Battjes and Evelien Brouwer, The Dublin Regulation and Mutual Trust: Judicial Coherence in EU Asylum Law. *Review of European Administrative Law*, Vol. 8, Nr. 2, pp. 183-214.

Joxerramon Bengoetxea. Seven Theses on Spanish Justice to understand the Prosecution of Judge Garzón”. *Oñati Socio-Legal Series*, v. 1, n. 9 (2011).

Aimee J, Buckland, Offending Officials.: Former Government Actors and the Political Offence Exception to Extradition. *California Law Review*. Vol 94:423, 2006.

Manuel R. Garcia-Mora. The Nature of Political Offenses: A Knotty Problem of Extradition Law. *Virginia Law Review.* Volume 48, No. 7 (Nov. 1962), (pp. 1226-1257).

Eduardo Gill-Pedro and Xavier Groussot. The Duty of Mutual Trust in EU Law and the Duty to Secure Human Rights: Can the EU's Accession to the ECHR Ease the Tension? *Nordic Journal of Human Rights*, 35:3, 2017, pp. 258-274.

Hans Petter Graver. Judging without Impunity: On the Criminal Responsibility of Authoritarian Judges. Bergen Journal of Criminal Law and Criminal Justice. Vol. 4, Issue 1

Emmanuel-Pierre Guittet, Identity through Security in Europe. ”Because we are all democracies”. A Closer View at the Protocol on Asylum between Member States of the European Union. International Studies Association 45th Annual Convention, Montreal, Conference material. March 17-20, 2004, p. 14.

Thomas Hammerberg. *Overuse of the European Arrest Warrant – a threat to human rights*. Council of Europe, Strasbourg, https:///www.coe.int/et/web/commissioner/-/overuse-of-the-european-arrest-warrant-a-threat-to-human-righ-1- Last visited 14.05.2018.

Mustafa Karakaya. The Protection of Refugees and Asylum Seekers Against Extradition under International Law. aw and Justice Review. Vol. V, Issue 1, 2014.

Emily Kendall, Sanctuary in the 21st Century: The Unique Asylum Exception to the Extradition Rule, 23 Mich. St. Int'l Rev. 153, 2014

Matthew Hunt. The Safety of Origin Concept in European Asylum Law: Past, Present and Future. *International Journal of Refugee Law*, 2014, Vol. 26, No. 4, 500-5,

Raul Narits. Principle of Law and Legal Dogmatics as Methods Used by Constitutional Courts. *Juridica International*, Vol. 12, Int'l 15 (2007), pp. 15-23.

Evgenia Ralli. The Principle of Mutual Recognition Based on Mutual Trust and the Respect for Fundamental Rights: The Case of Framework Decision on the European Arrest Warrant. European Law Institute. Presentation at ELI 2017 Annual Conference and General Assembly, Vienna 6-8 September 2017. Available at http://www.europeanlawinstitute.eu/fileadmin/user_upload/p_eli/YLA_Award/yla_paper_website.pdf. Last visited 18.05.2017.

Andrew Sanger, Force of Circumstance: The European Arrest Warrant and Human Rights. *Democracy and Security*, 20106:1, pp. 17-51.

Fulvia Staiano. The Protection of European Union Citizens Victims of Human Trafficking in Europe. *The Italian Yearbook of International Law Online*, Vol. 25. 2016, pp. 159-178.

Anne Weyembergh, Les jurisdictions belges et le mandat d'arrêt européen. EUCRIM, *The Euopean Criminal Law Association's Forum*. Issue 1-2/2006.

Reports

UNHCR Reports

Geoff Gilbert, *Current Issues in the Application of the Exclusion Clauses.* UNHCR background paper, 2001.

Sibylle Kapferer, Legal and Protection Policy Research Series. The Interface between Extradition and Asylum. UNHCR, PPLA/2003/05, November 2003.

Karin Landgren, *Deflecting international protection by treaty: bilateral and multilateral accords on extradition, readmission and the inadmissibility of asylum requests*. UNHCR. New Issues in Refugee Research, Working Paper No. 10, June 1999.

Sir Elihu Lauterpacht and D. Betlehem. *The Scope and Content of the principle of non-refoulement: Opinion.* UNHCR, 20 June 2001.

Ruma Mandal. *Protection Mechanisms Outside the 1951 Convention ("Complementary Protection")*. Legal and Protection Policy Research Series. UNHCR, Department of International Protection, PPLA/2005/02, June 2005.

Other Reports

Jean Tomkin, Gerrit Zach, Tiphanie Crittin and Moritz Birk, *The Future of Mutual Trust and the Prevention of Ill-treatment.* Ludwig Boltzmann Institute of Human Rights, 2017.

ECRE, Analysis of the Treaty of Amsterdam in so far as it Relates to Asylum Policy, 10 November, 1997

Canada: Immigration and Refugee Board of Canada, *Eurpean Union (EU) Member States*: *Application of the "Protocol on Asylum for Nationals of Member States".* 12 October 2007, ZZZ102549.E, available at refworld.org/docid/474e89551e.html.Last visited 18.05.2018.

Canada: Immigration and Refugee Board of Canada, European Union: Application of the Protocol on Asylum for Nationals of Member States of the European Union (2013-June 2015), ZZZ105193.E, available at http://www.refworld .org/docid/55bf55094.html. Last visited 22.05.2018.

EAW-Rights. Analysis of the implementation and operation of the European Arrest Warrant from the point of view of defence practitioners. Council of Bars and Law Societies in Europé, Brussels, 2017.

Academic blogs

Mark. D. Kielsgard. The Political Offense Exception: Punishing Whistleblowers Abroad. *EJIL: Talk!* 14.11.2013. https://www.ejiltalk.org/the-political-offense-exception-punishing-whistleblowers-abroad/. Last visited 22.05.2018.

Sibel Top. The European Arrest Warrant against Puigdemont: A deeling of *déjà vu*? *EJIL Talk!* 3 November 2017, https://www.ejiltalk.org/the-european-arrest-warrant-against-puigdemont-a-feeling-of-deja-vu/. Last visited 22.05. 2018

Auke Willems. How EU law came to the fore in the Catalan independence debate – and what it means for Carles Puigdemont. London School of Economics and Political Science. http://blogs.lse.ac.uk/europpblog/2017/11/30/carles-puigdemont-european-arrest-warrant/, last visited 22.05.2017.

Auke Willems. *Understanding Spain's decision to revoke the European Arrest Warrant for Carles Puigdemont.* London School of Economics and Political Science. Europp – European Politics and Policy. http://blogs.lse.ac.uk/europpblog/2017/12/12/understanding-spains-decision-to-revoke-the-european-arrest-warrant-for-carles-puigdemont/. Last visited 22.05.2018.

Newspaper Articles

Stephen Burgen and Daniel Boffey. Spanish Judge withdraws arrest warrant for Carles Puigdemont. *The Guardian*, 5 December 2017. Available at https://www.theguardian.com/world/2017/dec/05/spanish-judge-withdraws-arrest-warrants-for-carles-puigdemont. Last visited 22.05.2018.

Rebeca Carranco, ÓSCAR López-Fonseca, Spain's Constitutional Court strikes down Catalan referendum law. *El País*, 17 October 2017. Available at https://elpais.com/elpais/2017/10/17/inenglish/1508250970_489373.html. Last visited 18.05.2018.

Sonya Dowsett. Spain seeks to block Puigdemont becoming leader of Catalonia. *Reuters,* 25 January 2018. https://www.reuters.com/article/us-spain-politics-catalonia/spain-seeks-to-block-puigdemont-becoming-leader-of-catalonia-idUSKBN1FE1IU. Last visited 18.05.2018.

Melissa Eddy and Raphael Minder. Puigdemont Cannot be Extradited on Rebellion Charge, German Court Rules. 5 April 2018. https://www.nytimes.com/2018/04/05/world/europe/puigdemont-extradite-germany-spain.html. Last visited 18.05.2018.

Sarah Helm. EU blocks citizen's right to claim asylum. *The Independent.* 18 December 1996. https://www.independent.co.uk/news/world/eu-blocks-citizens-right-to-claim-asylum-1315042.html. Last visited18.05.2018.

Tara John. What do we know about the Catalan Independence Referendum. *Time*, 25 September 2017, Available at time.com/4951665/catalan-referendum-2017. Last visited 18.05.2018.

Sam Jones. Catalonia to hold independence vote despite anger in Madrid. *The Guardian*, 6 September 2017. https://www.theguardian.com/world/2017/sep/06/spanish-government-condemns-catalonia-over-independence-referendum. Last visited 18.05.2018.

Raphael Minder. Carles Puigdemont Is Arrested in Germany, Drawing E.U. Giant Into Catalan Fight. *The New York Times*, 25 March 2018. Available at www.nytimes.com/2018/03/25/world/europe/germany-carles-puigdemont.html. Last visited 18.05.2018.

Judith Mishcke, Spanish court rejects issuing EU arrest warrant for Puigdemont. 22 January 2018. https://www.politico.eu/article/carles-puigdemont-denmark-spanish-court-rejects-issuing-eu-arrest-warrant/. Last visited 18.05.2018.

Philip Oltermann. German Court says Carles Puigdemont can be released on bail. *The Guardian*, 5 April 2018. https://www.theguardian.com/world/2018/apr/05/german-court-says-carles-puigdemont-can-be-released-on-bail. Last visited 18.05.2018.

Álvaro Sánchez. "Puigdemont hires Belgian lawyer who defended ETA members". *El Pais*, 31 October 2017. https://elpais.com/elpais/2017/10/31/inenglish/1509440074_788527.html, last visited 18.05.2017.

Nick Squires. Slovakia appoints new prime minister amid political crisis over murder of investigative journalist. *The Telegraph*, 22 March 2018. www.telegraph.co.uk/news/2018/03/22/slovakia-appoints-new-prime-minister-amid-political-crisis-murder/. Last visited 18.05.2018.

Jon Stone. EU fighting war on two fronts to maintain rule of law in member states. EU institutions criticized both Poland and Malta on Wednesday. *The Independent*, 15 November 2017. www.independent.co.uk/news/world/europe/eu-rule-of-law-brexit-malta-poland-investigation-european-parliament-comission-caruana-galizia-a8056886.html. Last visited 20.05.2018.

Peter Tefer. Germany's Puigdemont release puts Spanish court in bind. *EU Observer*. Brussels, 6 April 2018. https://euobserver.com/justice/141527. Last visited 15.05.2018.

Xavier Vidal-Folch, It's not independence, it's a violation of the law. *El País*, 6 September 2017. Available at https://elpais.com/elpais/2017/09/06/inenglish/1504696098_919491.html. Last visited 18.05.2018.

Foo Yun Chee, Robert-Jean Bartunek, Alastair MacDonald. "Like any EU Citizen": Belgium's Catalan asylum fix. *Reuters*, 31 October 2017. https://www.reuters.com/article/us-spain-politics-catalonia...eu-citizen-belgiums-catalan-asylum-fix-idUSKBN1D02KP?il=0. Last visited 18.05.2018.

Will Wordley. Daphne Caruana Galizia: Top investigative reporter killed by car bomb in Malta. *The Independent*, 16 October 2017. www.independent.co.uk/news/world/europe/daphne-caruana-galizia-dead-malta-car-bomb-panama-papers-wikileaks-a8003936.html. Last visited 18.05.2018.

Carles Puigdemont slips out of Finland despite arrest warrant. *The Guardian*, 25 March 2018. Available at https://www.theguardian.com/world/2018/mar/25/carles-puigdemont-slips-out-of-finland-despite-arrest-warrant. Last visited 18.05.2018.

Catalan arrest warrants withdrawn by Spain's Supreme Court. *BBC News*, 5 December 2017. www.bbc.com/news/world-europe42237377.

Catalan referendum: Catalonia has "won right to statehood". *BBC News*, 2 October 2017. Available at www.bbc.com/news/world-europe-41463719. Last visited 18.05..2018.

Geneva authorities distance themselves from Puigdemont visit. Swissinfo.ch, 18 March 2018, https://www.swissinfo.ch/eng/business/ousted-catalan-leader_geneva-authorities-distance-themselves-from-puigdemont-visit/43981428.

Cehija aizturets 13. janvara grautinu lieta apsudzetais Ansis Berzins. 08.04.2017. http:www.tvnet.lv/zinas/latvija/655457-cehija_aizturets_13janvara_grautinu_lieta_apsudzetais_ansis_berzins. Last visited 14.05.2018.

News Agency LETA, Ansis Ataols Berzins atgriezas Latvija. Neatkariga Rita Avize, 22.03.2018., nra.lv/latvija/240346-ansis-ataols-berzins-atgriezas-latvija.htm. Last visited 14.05.2018.

Prokuratura.: Vaskevics ir neglabjami slims uz muzu. 01.11.2017. htts://www.diena.lv.raksts/latvija/zinas/prokuratura-vaskevics-ir-neglabjami-slims-uz-muzu-14184004. Last visited 14.05.2018.

Detenidos en Bélgica dos presuntos colaboradores de ETA. *La Vanguardia*, 31.05.2006. Available at: www.lavanguardia.com/politica/2004316/51262789723/detenidos-en-belgica-dos-presuntos-colaboradores-de-eta.html. Last visited 24.05.2018.

List of Documents

Legal documents

EU

Council Act of 27 September 1996 drawing up a Convention relating to extradition between Member States of the European Union, OJ C 313, 23.10.1996.

Treaty of Amsterdam amending the Treaty on the European Union, the Treaties establishing the European Communities and certain related acts. OJ C340, 10.11.1997.

Consolidated version of the Treaty on European Union, OJ C 326, 26.10.2012.

Charter on Fundamental Rights of the European Union, OJ C 326, 26.10.2012.

Council Framework Decision of 13 June 2002 on the European Arrest Warrant and the surrender procedures between member states (2002/584/JHA), OJ L190, July 18, 2002

Council Directive 2004/83/EC of 29 April 24 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees and as persons who otherwise need international protection and content of the protection granted, OJ L 304/12, 30.09.2004

Dublin III Regulation, Regulation (EU) No 604/2013 of the European Parliament and the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining the application for international protection lodged in one of the Member States by a third country national or a stateless person (recast), OJ L180/31, 29.06.2013.

Directive 2011/95/EU of the European Parliament and the Council of 13 December 2011 on standards for the qualification of third-country nationals and stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted. OJ L337, 20.12.2011.

Directive 2013/32/EU of the Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection. OJ L180, 29.06.2013.

Directive 2013/33/EU of the European Parliament and the Council of 26 June 2013 laying down standards for the reception of applicants for international protection, OJ L 180, 29.06.2013.

UN

UN General Assembly, Convention Relating to the Status of Refugees, 28 July 1951. 189 UNTS 150, p. 137.

UN General Assembly, Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. 10 December 1984, 1465 UNTS 85.

Regional

Convention on Political Asylum, Montevideo, 26 December 1933, OAS Treaty Series No. 34.

American Convention on Human Rights, 22 November 1969. OAS Treaty Series No. 36, 1144 UNTS 123.

African Charter of Human and People's Rights, 27 June 19811520 UNTS 217.

European Convention on Extradition, 13 December 1997, ETS No. 24, 359 UNTS 273.

European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14 (ECHR). 4 November 1950, ETS No. 5.

Bilateral Agreements

Extradition Treaty between the Government of the Republic of Kenya and the Government of the Republic of Rwanda, 30 September 2009.
https://www.unodc.org/documents/terrorism/Publications/Compendium_Kenya/KENYA_COMPENDIUM_20100618_EN.pdf.

Treaty on Extradition between the Republic of Korea and Japan, 8 April 2008, Unofficial text available at http://www.oecd.org/site/adboecdanti-corruptioninitiative/39798181.pdf.

Guidelines

UNHCR. Background Note on the Safe Country Concept and Refugee Status. EC/SCP/68. 26.07.1991.

UNHCR, *The Exclusion Clauses: Guidelines on their application*, 1 December 1996.

UNHCR, Guidelines on International Protection: Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees. HCR/GIP/03/05, 4 September 2003.

UNHCR, *Guidance Note on the Extradition and International Refugee Protection.* UNHCR Protection Policy and Legal Advice Section, Division of International Protection Services, Geneva, April 2008.

UK Asylum Policy instruction for EU/EEA Asylum Claims. Version 3.0. Publication date 9 December 2015. Available at https://www.gov.uk/government/publications/eea-and-eu-asylum-claims-instruction. Last visited 25.04.2018.

Political documents

EU

Council of the EU, Resolution. Criteria for rejecting unfounded applications for asylum. (London Resolution), 30 November 1992 (Not published in the Official Journal). Available at https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=LEGISSUM%3Al33102. Last visited 24.05.2018.

European Parliament. "Resolution on the extradition of two presumed ETA militants". Official Journal C 065, 04/03/1996.

European Parliament resolution on the rule of law in Malta. 2017/2935(RSP))10.11.2017.

UN

United Nations General Assembly, Universal Declaration of Human Rights, 10 December 1948, GA res 217 A(III).

UNHCR, Position on the Proposal of the European Council Concerning the Treatment of Asylum Applications from Citizens of the European Union Member States (Appended to the letter of February 3, 1997 from Director, UNHCR Division of International Protection to Michiel Patijn, Secretary of State).

List of Cases

CJEU

Judgement of the Court of 20 February. 1979 Rewe-Zentral AGv Bundesmonopolverwaltung für Branntwein, Case 120/78, ECLI:EU:C:1997:42.

Judgement of the Court of 11 February 2003. Criminal proceedings against Hüseyin Göztuk and Klaus Brügge. Joint Cases C-187/01 and C-385/01, ECLI:EU:C:2003:87.

Judgement of the Court (Grand Chamber) of 16 June 2005. Criminal Proceedings against Maria Pupino, Case C-105/03, ECLI:EU:C:2005:386.

Judgement of the Court (Grand Chamber) of 21 December 2011. *N.S: v Secretary of State for the Home Department and M.E. and Others v Refugee Applications Commissioner and Minister for Justice, Equality and Law Reform.* Joint Cases C-411/10 and C-493/10, ECLI:EU:C:2011:865.

Judgement of the Court (Grand Chamber), 29 January 2013. *Ciprian Vasile Radu,* case C-396/11, ECLI:EU:C2013:39.

Judgement of the Court (Grand Chamber) of 26 February 2013. *Stefano Melloni v Ministerio Fiscal*, C-399/11, ECLI:EU:C:2013:107.

Opinion of the Court (Full Court) of 18 December 2014. Opinion pursuant to Article 218(11)TFEU, Case Opinion 2/13, ECLI:EU:C:2014:2454.

Judgement of the Court (Grand Chamber) of 5 April 2016. Pál Aranyosi and Robert *Căldăraru* v Generalstaatsanwaltschaft Bremen. Joined cases C-404/15 and C-659/15 PPU, ECLI:EU:C:2016:198.

Judgement of the Court (Fifth Chamber) of 10 August 2017, *Openbaar Ministerie v Tadas Tupikas,* case C-270/17PPU, EU:C:2017:628.

Judgement of the Court (Fifth Chamber) of 10 August 2017. *Openbaar Ministerie v Slavomir Anrzej Zdziaszek*, Case C-271/17 PPU of 10 August 2017, ECLI:EU:C:2017:629.

Judgement of the Court (Fifth Chamber) of 22 December 2017. *Samet Ardic*. Case 571/17 PPU, ECLI:EU:C:2017:1026.

ECtHR

M.S.S. v Belgium and Greece (GC), Appl. No. 30696/09, Judgement of 21 January 2011.

Soering v The United Kingdom (plenary) , Appl. No 14038/88, Judgement of 7 July 1989.

Chahal v The United Kingdom (GC), Appl. No. 22414/93, Judgement of 15 November 1996.

Other

T v. Secretary of State for Home Department, (1996) 2 ALL ER 865, United Kingdom, House of Lords (Judicial Committee, 22 May 1996.

Ward v. Canada (Attorney General, (1993) 2 SCR, 689 (Can. SC, Jun. 30, 1993).