



EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

SECOND SECTION

CASE OF ROMEO CASTAÑO v. BELGIUM

(Application no. 8351/17)

JUDGMENT

The original French version was rectified on 26 November 2019 under Rule 81 of the Rules of Court.

STRASBOURG

9 July 2019

FINAL

09/10/2019

This judgment has become final under Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Romeo Castaño v. Belgium,

The European Court of Human Rights (Second Section), sitting as a Chamber composed of:

Robert Spano, *President*,
 Paul Lemmens,
 Julia Laffranque,
 Valeriu Grițco,
 Stéphanie Mourou-Vikström,
 Ivana Jelić,
 Darian Pavli, *judges*,

and Stanley Naismith, *Section Registrar*,

Having deliberated in private on 11 June 2019,

Delivers the following judgment, which was adopted on that date:

PROCEDURE

1. The case originated in an application (no. 8351/17) against the Kingdom of Belgium lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by five Spanish nationals (“the applicants”), on 16 January 2017. The applicants’ personal details are set out in the Appendix.

2. The applicants were represented by Ms M.L. García Blanco, a lawyer practising in Madrid. The Belgian Government (“the Government”) were represented by their Agent, Ms I. Niedlispacher, of the Federal Justice Department.

3. Relying on the procedural aspect of Article 2 of the Convention, the applicants complained of the Belgian authorities’ refusal to execute the European arrest warrant issued by the Spanish authorities against N.J.E., the person suspected of involvement in the death of their father, in that it prevented a prosecution from being brought against N.J.E.

4. On 14 March 2017 the Government were given notice of the application. The applicants and the Government each filed written observations on the admissibility and merits of the case (Rule 54 § 2 of the Rules of Court). The Spanish Government exercised their right to intervene (Article 36 § 1 of the Convention and Rule 44 § 1 (a)). Third-party comments were also received from N.J.E. and from the association *Colectivo de víctimas del terrorismo* (COVITE), who had been given leave to intervene in the written procedure (Article 36 § 2 of the Convention and Rule 44 § 3 (a)).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

A. The background to the case

5. The applicants are the children of Lieutenant Colonel Ramón Romeo, who died following an attack carried out on 19 March 1981 in Bilbao (Spain) by a commando unit claiming to belong to the terrorist organisation ETA¹. An alleged member of the commando unit, N.J.E., a Spanish national of Basque origin, was suspected of shooting the applicants' father at point-blank range.

6. One of Ramón Romeo's children joined proceedings in Spain as a civil party. In May 2007 all the members of the commando unit were convicted by the Spanish courts, with the exception of N.J.E., who had reportedly fled to Mexico following the events of 1981 and later moved to Belgium.

B. Legal challenges

1. First set of surrender proceedings

7. A Spanish investigating judge of the *Audiencia Nacional* issued two European arrest warrants in respect of N.J.E. on 9 July 2004 and 1 December 2005 for the purpose of bringing criminal proceedings, respectively, on charges of attempted murder and terrorism committed in Bilbao on 14 June 1981, and participation in a criminal organisation, terrorism, intentional killing, infliction of serious bodily harm, and murder, committed in Bilbao on 19 March 1981.

8. By an order of the investigating judge of the Ghent Court of First Instance of 9 October 2013, N.J.E. was placed in detention.

9. In an order of 16 October 2013 the Committals Division (*chambre du conseil*) of the same court declared the European arrest warrants enforceable.

10. N.J.E. appealed against that order. She argued at the outset that execution of the arrest warrants should be refused, since prosecution of the offences was time-barred under Belgian law and the facts came within the extraterritorial jurisdiction of the Belgian courts (section 4(4) of the European Arrest Warrant Act of 19 December 2003, see paragraph 25 below). She also submitted that there were substantial reasons for believing

¹ The original French text was rectified on 26 November 2019. It read as follows: “*Les requérants sont les enfants du lieutenant-colonel Ramón Romeo qui fut assassiné à Bilbao (Espagne) par un commando qui revendiqua son appartenance à l'organisation terroriste ETA le 19 janvier 1981.*”

that execution of the European arrest warrants would infringe her fundamental rights under Article 6 of the Treaty on European Union (section 4(5) of the above-mentioned Act).

11. On 31 October 2013, referring to Articles 6 and 7 of the preliminary part of the Code of Criminal Procedure (see paragraph 26 below), the Indictments Division of the Ghent Court of Appeal held that N.J.E. did not come within the jurisdiction of the Belgian criminal courts, taking the view that N.J.E. did not have her main residence in Belgium. The Indictments Division further noted that N.J.E. was not being prosecuted in Belgium for any of the offences provided for in Article 6 of the preliminary part of the Code of Criminal Procedure. Lastly, it observed that there had been no “complaint from the aggrieved foreign national or his or her family”, or any “official notice given to the Belgian authority by the authority of the country in which the offence [had been] committed” within the meaning of Article 7 § 2 of the preliminary part of the Code of Criminal Procedure.

12. Nevertheless, the Indictments Division refused execution of the European arrest warrants on the basis of section 4(5) of the European Arrest Warrant Act. It held that the punishable acts needed to be viewed in the broader context of Spain’s contemporary political history and the personal background of N.J.E., who, having been active in the “Basque armed resistance movement” in her twenties, was now a 55-year-old professional woman living a normal life in Ghent. Furthermore, basing its finding in particular on a report by the European Committee for the Prevention of Torture (CPT) concerning the latter’s periodic visit to Spain from 31 May to 13 June 2011, the Indictments Division held that there were substantial reasons for believing that execution of the European arrest warrant would infringe N.J.E.’s fundamental rights under Article 6 of the Treaty on European Union. It found in particular as follows:

“... persons charged with punishable offences with an alleged terrorist motive are held in Spain under a different custodial regime, in degrading conditions possibly accompanied by torture, and with very limited contact with the outside world (family, lawyer and assistance), as borne out by evidence ... The investigating judge and the public prosecutor’s office were wrong to assert that there exists a presumption of observance of fundamental rights in Spain including with regard to former members of the Basque resistance movements, as [N.J.E.] probably was.

Firstly, there can never be a presumption of observance of human rights.

Secondly, the law itself runs counter to the existence [of such a presumption], given that the person concerned by the [European arrest warrant] has the right to demonstrate and explain convincingly that there are substantial reasons to fear a human rights violation. This additional safeguard is afforded within a strictly European legal context.

Reports from international organisations support these genuine fears.

Thirdly, the law nowhere requires it to be demonstrated that fundamental rights would be breached as a matter of absolute certainty.”

13. Lastly, the Indictments Division ordered N.J.E.'s release.

14. The Belgian Federal Prosecutor's Office lodged an appeal on points of law against this judgment. It argued that, regard being had to the principle of mutual trust between the member States of the European Union ("the EU"), any decision to refuse extradition on the grounds of a breach of the fundamental rights of the person concerned had to be supported by detailed evidence demonstrating the existence of a clear threat to his or her rights and capable of rebutting the presumption of observance of fundamental rights. The judgment of the Indictments Division had provided no specific evidence of a risk of a breach of N.J.E.'s fundamental rights, and had been drafted in such general terms that the presumption of observance of human rights in favour of the State issuing the European arrest warrant could not be rebutted.

15. In a judgment of 19 November 2013 the Court of Cassation dismissed the appeal by the Federal Prosecutor's Office. With regard to the principles applicable in the case before it, it observed the following:

"Under section 4(5) of the Act of 19 December 2003, execution of a European arrest warrant must be refused if there are substantial reasons for believing that execution would infringe the fundamental rights of the person concerned as enshrined in Article 6 of the Treaty on European Union, namely the rights guaranteed by the [Convention], which stem from the constitutional traditions common to the European Union Member States, as general principles of Community law.

Recital 10 of the preamble to Council Framework Decision 2002/584/JAI of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States makes clear that the mechanism of the European arrest warrant is based on a high level of confidence between Member States. This high level of confidence entails a presumption of observance by the issuing State of the fundamental rights referred to in section 4(5) of the European Arrest Warrant Act of 19 December 2003.

In view of this principle of mutual trust between the Member States, any refusal to surrender the person concerned must be supported by detailed evidence of a clear threat to his or her fundamental rights capable of rebutting the presumption in favour of the issuing State of observance of those rights.

The judge has unfettered discretion to assess whether the detailed evidence relied on, pointing to a clear threat to the fundamental rights of the person concerned, is sufficient to rebut the aforementioned presumption. The Court [of Cassation] merely verifies that the judge has not drawn inferences from his or her findings that are unconnected to the latter or cannot be justified by them."

Turning to the circumstances of the case before it, the Court of Cassation found as follows:

"The judgment finds that there are substantial reasons for believing that the execution of the European arrest warrants would infringe the defendant's fundamental rights because 'persons charged with punishable offences with an alleged terrorist motive are held in Spain under a different custodial regime, in degrading conditions possibly accompanied by torture, and with very limited contact with the outside world (family, lawyer and assistance)'. In so finding, it refers to the 2011 reports of the

European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment of the Council of Europe.

Hence, the judgment provides legal justification for refusing extradition, as there are substantial reasons for believing that execution of the European arrest warrants would infringe the fundamental rights of the person concerned under Article 6 of the Treaty on European Union.

This ground of appeal cannot be upheld.”

16. In a letter of 27 November 2014 in reply to one of the applicants, concerning the refusal to execute the European arrest warrant in respect of N.J.E., the President of the Court of Cassation specified that the refusal to execute a European arrest warrant did not necessarily mean that the person concerned would escape punishment. He added as follows:

« [O]ther procedures exist which should be implemented by the competent authority, as appropriate, so that persons suspected of serious crimes who are no longer in the State where the crimes were allegedly committed can be put on trial. You may assess in that regard whether or not to make an application to the Federal Prosecutor’s Office.”

2. *Second set of surrender proceedings*

17. On 8 May 2015 a fresh European arrest warrant was issued against N.J.E. by an investigating judge of the *Audiencia Nacional*, concerning the acts committed in Bilbao on 19 March 1981 and classified, in particular, as “terrorist murder” in Spanish law. As to the risk of torture in Spain alleged by the Indictments Division, the investigating judge specified that the CPT’s information had been disputed by the Spanish Government in March 2012 and that, during its subsequent periodic visits in 2012 and 2014, the CPT had made no further mention of it. With regard to incommunicado detention, the judge stated that it was tightly regulated. It could be imposed only in exceptional cases concerning the investigation of armed gangs or terrorists; all persons subjected to such detention were guaranteed a forensic medical examination, and the national torture prevention mechanism included the possibility of unannounced visits by the Ombudsman; the person concerned was entitled to the assistance of a lawyer during the police and judicial proceedings; detention was always subject to judicial supervision, and the person concerned had the right to apply for a writ of habeas corpus; the communal areas were monitored by CCTV and interviews could be recorded; and the restrictions on communications with family and friends were limited to five days and had to be reviewed by a judge. Furthermore, the crime of torture under the Spanish Criminal Code encompassed any physical or psychological ill-treatment, and allegations of torture were examined by an independent judge. Lastly, the investigating judge observed that Spain had transposed the European directives strengthening existing safeguards in criminal matters.

18. Following the issuing of this arrest warrant, N.J.E. was re-arrested by the Belgian authorities on 20 June 2016 but was released on the same day.

19. In an order of 29 June 2016 the Committals Division of the Ghent Court of First Instance refused execution of the new arrest warrant.

20. On 14 July 2016, following an appeal by the Federal Prosecutor's Office, the Indictments Division of the Ghent Court of Appeal upheld the order, ruling that the new arrest warrant did not contain any information that would lead to a different conclusion than that reached in its judgment of 31 October 2013. It based its finding on, among other things, the documents submitted by N.J.E. and, in particular, the United Nations Human Rights Committee's concluding observations on the sixth periodic report of Spain (adopted at its session from 29 June to 24 July 2015), which recommended "once again" that the Spanish authorities put an end to incommunicado detention and guarantee the rights of all suspects to freely choose a lawyer whom they could consult in complete confidentiality and who could be present at interrogations.

21. On 15 July 2016 the Federal Prosecutor's Office lodged an appeal on points of law, arguing in particular that there had been a breach of section 4(5) of the European Arrest Warrant Act on the grounds that the reference to the Human Rights Committee's observations was insufficient to rebut the presumption of observance of human rights.

22. In a judgment of 27 July 2016 the Court of Cassation dismissed the appeal, finding that the ground of appeal relied on had been based on an incomplete reading of the impugned judgment.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. Framework Decision 2002/584/JAI

23. For the purposes of the present case the Court refers to its judgment in *Pirozzi v. Belgium* (no. 21055/11, §§ 24-29, 17 April 2018), which sets out the relevant provisions of Council Framework Decision 2002/584/JAI of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, together with a summary of the case-law of the Court of Justice of the European Union ("the CJEU") in that regard.

24. Mention should also be made of the CJEU judgment in the case of *Generalstaatsanwaltschaft (Conditions of detention in Hungary)* (Case C-220/18 PPU, judgment of 25 July 2018). This judgment expanded on the methodology set out in the judgment in *Aranyosi and Căldăraru* (Joined Cases C-404/15 and C-659/15, judgment of 5 April 2016) and determined the extent of the assessment which the executing member State had to undertake where it had evidence pointing to systemic or generalised deficiencies with regard to the conditions of detention in prisons in the

issuing State. The CJEU held, in substance, firstly, that the executing judicial authorities were required only to assess the actual and precise conditions of detention of the person concerned that were relevant in determining whether he or she was at real risk of being subjected to inhuman or degrading treatment. Secondly, where the issuing authority had given assurances that the person concerned would not be subjected to such treatment, the executing authority, in view of the mutual trust between the judicial authorities of the member States, had to rely on those assurances, in the absence of any specific indications that the conditions of detention were in breach of Article 4 of the Charter of Fundamental Rights of the European Union.

B. The European Arrest Warrant Act of 19 December 2003

25. In Belgium, the above-mentioned framework decision was transposed by means of the European Arrest Warrant Act of 19 December 2003, the relevant provisions of which read as follows:

Section 2

“1. The arrest and surrender of persons sought for the purposes of conducting a criminal prosecution or executing a custodial sentence or detention order between Belgium and the other Member States of the European Union shall be governed by this Act.

2. The arrest and surrender shall be carried out on the basis of a European arrest warrant.

3. The European arrest warrant is a judicial decision issued by the competent judicial authority of a European Union Member State, referred to as the issuing judicial authority, with a view to the arrest and surrender by the competent judicial authority of another Member State, referred to as the executing authority, of a person sought for the purposes of conducting a criminal prosecution or executing a custodial sentence or detention order.

...”

Section 3

“A European arrest warrant may be issued for acts punishable under the law of the issuing Member State by a custodial sentence or a detention order for a maximum period of at least 12 months or, where a sentence has been passed or a detention order has been made, for sentences of at least four months.”

Section 4

“Execution of the European arrest warrant shall be refused in the following cases:

1. If the offence on which the arrest warrant is based is covered by amnesty in Belgium, where Belgium had jurisdiction to prosecute the offence under its own law.

2. If it transpires from the information available to the judge that the requested person has been the subject of a final judgment in Belgium or in another Member

State in respect of the same acts, provided that, where sentence has been passed, the sentence has been served or is currently being served or may no longer be executed under the law of the sentencing Member State, or where a final judgment has been given in respect of the requested person in Belgium or in another Member State in relation to the same acts, which prevents further proceedings.

3. If the person who is the subject of the European arrest warrant may not, owing to his or her age, be held criminally responsible for the acts on which the arrest warrant is based under Belgian law.

4. Where the criminal prosecution or punishment of the requested person is statute-barred according to Belgian law and the acts fall within the jurisdiction of the Belgian courts.

5. If there are substantial grounds for believing that execution of the European arrest warrant would infringe the fundamental rights of the person concerned under Article 6 of the Treaty on European Union.

...”

Section 11

“1. Within twenty-four hours following the actual deprivation of liberty, the person concerned shall be brought before an investigating judge, who shall inform him or her (1) of the existence and content of the European arrest warrant; (2) of the possibility of consenting to his or her surrender to the issuing judicial authority; and (3) of the right to choose a lawyer and an interpreter.

This information shall be mentioned in the record of the hearing.

...”

Section 15

“If the investigating judge deems the information provided by the issuing Member State in the European arrest warrant to be insufficient to enable a decision to be taken on the person’s surrender, he or she shall make an urgent request for the additional information required and may stipulate a time-limit for receiving it, taking account of the need to comply with the time-limit laid down in section 16(1).

...”

C. Extraterritorial jurisdiction of the Belgian courts in criminal matters

26. Article 4 of the Belgian Criminal Code provides:

“Offences committed outside the territory of the Kingdom of Belgium by Belgians or foreign nationals shall be punishable in Belgium only in those cases stipulated by law.”

27. The relevant provisions concerning the extraterritorial jurisdiction of the Belgian courts in criminal matters are contained in the preliminary part of the Code of Criminal Procedure:

Article 6

“Criminal proceedings may be brought in Belgium against any Belgian or any person whose principal residence is in the Kingdom of Belgium who, outside the country’s territory, commits one of the following:

1. a criminal offence against State security;

1 *bis*. a serious violation of international humanitarian law for the purposes of Title I *bis* of Book II of the Criminal Code;

1 *ter*. a terrorist offence under Title I *ter* of Book II of the Criminal Code.

2. A criminal offence against public confidence as laid down in Chapters I, II and III of Book II, Title III, of the Criminal Code or an offence under Articles 497 and 497 *bis*, if the offence in question concerns either the euro or other currencies which are legal tender in Belgium or objects intended for use in their manufacture, forgery, alteration or falsification, or the effects, papers, seals, stamps or marks of the Belgian State or public authorities or institutions.

3. A criminal offence against public confidence under the same provisions, if the offence in question concerns currencies which are not legal tender in Belgium or objects intended for use in their manufacture, forgery, alteration or falsification, or the effects, papers, seals, stamps or marks of another country.

In the latter case prosecution shall be possible only where the Belgian authority receives official notice from the authority of the country concerned.”

Article 7

“1. Criminal proceedings may be brought against any Belgian or any person whose principal residence is in the Kingdom of Belgium who, outside the country’s territory, commits an act classified as a criminal offence under Belgian law, if the act in question is punishable by the legislation of the country where it was committed.

2. If the offence was committed against a foreign national, a prosecution may be brought only on an application by the public prosecutor. It must also be preceded by a complaint from the aggrieved foreign national or his or her family, or by official notice given to the Belgian authority by the authority of the country in which the offence was committed.

If the offence was committed in wartime against a national of a country allied with Belgium for the purposes of the second paragraph of Article 117 of the Criminal Code, the official notice may also be given by the authority of the country of which the foreign national is or was a national.”

III. RELEVANT INTERNATIONAL INSTRUMENT

28. In its concluding observations on the sixth periodic report of Spain, adopted at its 3192nd meeting held on 20 July 2015, the United Nations Human Rights Committee addressed the issue of incommunicado detention in the following terms:

“17. The Committee reiterates its concern at the practice of court-authorized incommunicado detention. The Committee notes the initiative to reform the Code of Criminal Procedure and the information provided by the State party concerning the reduced use of incommunicado detention, but regrets that the reform does not abolish

incommunicado detention or guarantee all the rights set out in article 14 of the Covenant, including the right to legal aid (arts. 7, 9, 10 and 14).

The Committee reiterates its previous recommendations (CCPR/C/ESP/CO/5, para. 14) and recommends once again that the State party should take the necessary legislative measures to put an end to incommunicado detention and to guarantee the rights of all detainees to medical services and to freely choose a lawyer whom they can consult in complete confidentiality and who can be present at interrogations.”

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 2 OF THE CONVENTION

29. The applicants alleged a violation of Article 2 of the Convention by the Belgian authorities, arguing that the decision not to execute the European arrest warrants prevented the suspected perpetrator of their father’s murder from being prosecuted by the Spanish authorities. The applicants also raised an issue of access to a court under Article 6 of the Convention.

30. The Court reiterates that it has the power to decide on the characterisation to be given in law to the facts of a complaint by examining it under Articles or provisions that are different from those relied upon by the applicant (see *Radomilja and Others v. Croatia* [GC], nos. 37685/10 and 22768/12, § 126, 20 March 2018).

31. In the instant case, noting that the applicants’ complaints cover the same ground, it considers it appropriate to examine them under Article 2 of the Convention alone. The relevant parts of that Article provide:

“1. Everyone’s right to life shall be protected by law. ...”

A. Admissibility

1. *Whether the applicants come within Belgium’s jurisdiction*

32. Article 1 of the Convention provides:

“The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of [the] Convention.”

(a) *The parties’ submissions*

33. The Government submitted that the present case did not fall within the jurisdiction of the Belgian State within the meaning of Article 1 of the Convention. The applicants were in Spain and the proceedings concerning their father’s murder had been conducted, and continued to be conducted, in the Spanish courts. Moreover, the murder had taken place in Spain and no connection with Belgium had been invoked. Furthermore, the Belgian authorities’ refusal to execute the European arrest warrant had been based on considerations relating to the treatment of prisoners in Spain. While it

was true that N.J.E. now came *prima facie* within the jurisdiction of the Belgian courts, it could not be inferred from this that the same applied to the victims, who had no connection to that country. While acknowledging that the procedure for the execution of a European arrest warrant did not allow the applicants to intervene and that the decisions complained of had had an (indirect) impact on their interests, the Government nevertheless stressed that the applicants had never been parties to proceedings in Belgium.

34. The Government submitted that the applicants essentially came within Spain's jurisdiction and should therefore have lodged a complaint against Spain with the Court. It was primarily Spain's responsibility to conduct an investigation into their father's murder in 1981 and to prosecute the suspected perpetrators and N.J.E, in accordance with Article 2 of the Convention. The present case was to be distinguished from cases in which the Court had recognised that the State to which the suspected perpetrator had fled could have jurisdiction within the meaning of Article 1 of the Convention. Firstly, Belgium had never instituted an investigation into the murder of the applicants' father. Secondly, it could not be argued that the Belgian State had any obligation under Article 2 to obtain evidence. There had never been any question of this in the proceedings concerning the European arrest warrant, and in view of the time elapsing between the murder and the first set of proceedings in Belgium, the idea of still being able to gather evidence was somewhat illusory. Thirdly, the Government stressed that Belgium had cooperated with Spain and that it was only in the course of that cooperation that the Belgian courts, applying Article 3 of the Convention in particular, had decided not to surrender N.J.E. From that standpoint it was clear that the harm alleged by the applicants did not stem from the conduct of the Belgian authorities, but rather from the situation in Spanish prisons at the time of the refusal decision.

35. The applicants argued that although, from a criminal-law perspective, prosecution of the offence in the present case was a matter for the Spanish judicial authorities, it had not been possible to bring that prosecution to a successful conclusion as the actual perpetrator had escaped the jurisdiction of the Spanish courts. In their view, it was not for the Belgian authorities to carry out any investigative measures, as that stage had already been completed in Spain; their task was to allow N.J.E. to be tried in Spain, by executing the European arrest warrant issued in 2015. The Spanish authorities had done everything in their power to investigate the case by instituting an independent investigation and carrying out all the necessary inquiries in order to establish the facts and the persons responsible.

(b) The Court's assessment

36. The Court reiterates that "jurisdiction" under Article 1 of the Convention is a threshold criterion and is a necessary condition for a

Contracting State to be able to be held responsible for acts or omissions imputable to it which give rise to an allegation of the infringement of rights and freedoms set forth in the Convention (see *Güzelyurtlu and Others v. Cyprus and Turkey* [GC], no. 36925/07, § 178, 29 January 2019).

37. The Court further observes that, in the context of the procedural limb of Article 2 concerning deaths occurring under a different jurisdiction from that of the State in respect of which the procedural obligation is said to arise, the Grand Chamber has recently specified that, where no investigation or proceedings have been instituted in the respondent State in respect of a death which has occurred outside its jurisdiction, a jurisdictional link may nevertheless be established and a procedural obligation may arise for that State under Article 2. Although the procedural obligation under Article 2 will in principle only be triggered for the Contracting State under whose jurisdiction the deceased was to be found at the time of death, “special features” in a given case may justify departure from this approach (*ibid.*, § 190, referring to *Rantsev v. Cyprus and Russia*, no. 25965/04, §§ 243-44, ECHR 2010 (extracts)).

38. In the present case the applicants’ complaint under Article 2 of the Convention with regard to Belgium concerns the alleged failure of the Belgian authorities to cooperate with the Spanish authorities by taking the necessary steps to enable the suspected murderer of the applicants’ father, who had fled to Belgium, to be tried in Spain.

39. Hence, unlike in the cases of *Güzelyurtlu and Others* and *Rantsev*, cited above, the Article 2 complaint is not based on the assertion that the Belgian authorities failed to fulfil a procedural obligation to investigate the murder themselves.

40. That being said, the Court does not see this as a reason for distinguishing the present case for the purposes of determining whether there is a jurisdictional link with Belgium, and considers it appropriate to apply the principles set forth in that regard in *Güzelyurtlu and Others*.

41. Applying, *mutatis mutandis*, the case-law cited above (see paragraph 37), the Court notes that N.J.E., the suspected perpetrator of the killing, fled to Belgium and remains there to this day. In the context of the mutual undertakings given by the two States in the sphere of cooperation in criminal matters, in this instance under the European arrest warrant scheme (see paragraphs 23-24 above), the Belgian authorities were subsequently informed of the Spanish authorities’ intention to institute criminal proceedings against N.J.E., and were requested to arrest and surrender her.

42. These special features of the case suffice for the Court to consider that a jurisdictional link exists between the applicants and Belgium for the purposes of Article 1 of the Convention with regard to the applicants’ complaint under the procedural limb of Article 2 of the Convention (see, *mutatis mutandis*, *Güzelyurtlu and Others*, cited above, §§ 194-96).

43. The Court therefore concludes that the Government's preliminary objection of incompatibility *ratione loci* should be dismissed. In assessing the complaint on the merits, it will have to determine the scope and extent of the procedural obligation on Belgium to cooperate in the circumstances of the present case.

2. *Whether the applicants have victim status*

(a) **The parties' submissions**

44. The Government questioned the existence of a causal link between the refusal of the Belgian courts and the hypothetical failure ultimately to recognise N.J.E.'s responsibility. The option of the European arrest warrant had been chosen by the Spanish authorities. When the Belgian authorities had refused execution, the Spanish authorities could also have explored other avenues. Other procedures, such as conducting proceedings *in absentia* in Spain, should have been possible. The applicants' argument that the Spanish Constitution prohibited such proceedings, and that the Belgian authorities should therefore be more "cooperative", was problematic in that it made Belgium's obligations under Article 2 of the Convention contingent on the provisions of the Spanish Constitution; at the same time, Belgium could not be criticised for complying with its obligations under Article 3 of the Convention.

45. The applicants, relying on the Court's case-law, submitted that they had victim status as the children of the murder victim. In view of the provisions of both Spanish and Belgian law, the issuing of a European arrest warrant by the Spanish authorities was the only appropriate means of securing N.J.E.'s prosecution. In their view, the fact that no proceedings could be brought against N.J.E. was attributable solely to the conduct of the Belgian authorities. In that connection the applicants asserted that the reason why sentence could not be passed *in absentia* in Spain was in order to prevent infringements of the right to a fair trial under Article 24.1 of the Spanish Constitution. The prohibition applied to acts punishable by a custodial sentence of more than one year (Article 841 of the Code of Criminal Procedure).

(b) **Observations of the third-party interveners**

46. The Spanish Government confirmed that the refusal of the Belgian judicial authorities meant that the requested person would never be prosecuted for her involvement in the murder. If she was not surrendered she could not be tried in the Spanish courts. Furthermore, according to the Belgian courts' own findings, N.J.E. could under no circumstances be tried in the Belgian courts if she was not surrendered to Spain.

47. N.J.E. stressed that victims who lodged a civil claim could not intervene in the proceedings for execution of a European arrest warrant,

since the investigating courts did not rule on the merits of the case or on damages, but simply returned a suspect to the country where he or she was the subject of an ongoing judicial investigation. Likewise, civil parties did not fall within the jurisdiction of the aforementioned courts, as the procedure for execution of a European arrest warrant was an inter-State procedure, as was clear from the EU framework decision and the Belgian legislation on the European arrest warrant.

(c) The Court's assessment

48. The Court refers to the applicable principles regarding victim status for the purposes of Article 34 of the Convention, as set out in particular in its judgment in *Vallianatos and Others v. Greece* ([GC], nos. 29381/09 and 32684/09, § 47, ECHR 2013 (extracts)).

49. The Court observes, in particular, that it has accepted that close family members of a person whose death or disappearance is alleged to engage the responsibility of the State can themselves claim to be indirect victims of the alleged violation of Article 2 of the Convention (see, for instance, *McKerr v. the United Kingdom*, no. 28883/95, ECHR 2001-III (in relation to children), and *Van Colle v. the United Kingdom*, no. 7678/09, § 86, 13 November 2012 (in relation to parents)).

50. Regard being had to this case-law, the Court considers that the applicants in the present case have victim status for the purposes of Article 34 of the Convention.

3. Exhaustion of domestic remedies

(a) The parties' submissions

51. The Government submitted that the applicants had not exhausted domestic remedies. While one of the applicants had joined the criminal proceedings in the Spanish courts as a civil party, this was irrelevant in so far as their application was only against Belgium. Although the application was directed solely against the Belgian State, the applicants had not taken any procedural steps in Belgium apart from the "informal courtesy correspondence" between one of the applicants and the President of the Court of Cassation. The Government conceded that the applicants could not be criticised for not intervening in the proceedings for execution of the European arrest warrant as victims of the alleged offence, since those proceedings mainly concerned the public prosecutor's office and the arrested person whose surrender was requested. However, it was clear from the letter of 27 November 2014 from the President of the Court of Cassation (see paragraph 16 above) that the door had been open to dialogue in order to explore with the federal prosecuting authorities possible means of overcoming the refusal to execute the European arrest warrant. In their additional observations the Government also referred to the option available

to the applicants of making an application under the urgent procedure or bringing an action for damages.

52. For their part, the applicants argued that they had exhausted domestic remedies in Spain, as one of the applicants had participated as a civil party in the criminal proceedings in the Spanish courts concerning their father's murder. As to Belgium, they contended that domestic remedies had been exhausted by means of the appeals lodged by the Federal Prosecutor's Office, given the latter's task of representing victims, and that they could not lodge any other appeal or take other procedural steps. In their view, the letter they had received from the President of the Court of Cassation was to be regarded purely as a courteous and informal reply to the victims.

(b) The Court's assessment

53. The Court reiterates that the rule on the exhaustion of domestic remedies must be applied with some degree of flexibility and without excessive formalism, given the context of protecting human rights. The Court has also accepted that this rule is neither absolute nor capable of being applied automatically; for the purposes of reviewing whether it has been observed, it is essential to have regard to the circumstances of the individual case (see *Vučković and Others v. Serbia* (preliminary objection) [GC], nos. 17153/11 and 29 others, §§ 69-77, 25 March 2014, and *Gherghina v. Romania* [GC] (dec.), no. 42219/07, §§ 83-84, 9 July 2015, with further references).

54. As regards the burden of proof, it is incumbent on the respondent Government to satisfy the Court that the remedy was an effective one, available in theory and in practice at the relevant time. Once this burden has been satisfied, it falls to the applicant to establish that the remedy advanced by the Government was in fact exhausted, or was for some reason inadequate and ineffective in the particular circumstances of the case, or that there existed special circumstances absolving him or her from this requirement (see *Vučković and Others*, cited above, § 77, and *Gherghina*, cited above, §§ 88-89, with further references).

55. Turning to the particular circumstances of the present case, the Court notes that the Spanish authorities instituted a criminal investigation into the case and that one of the applicants joined the criminal proceedings against N.J.E. in Spain as a civil party. However, the present case concerns the proceedings for execution of the European arrest warrant in the Belgian courts, which are the direct source of the current inability to prosecute N.J.E.; there is no provision, either under the framework decision or under Belgian law, for the applicants to take part or intervene in those proceedings.

56. As to the Government's argument concerning the letter from the President of the Court of Cassation and their contention that the applicants could have contacted the Belgian Federal Prosecutor's Office with a view to

finding a means of overcoming the refusal to execute the European arrest warrant, the Court considers that this option is vague and speculative and cannot be regarded as capable of remedying directly the impugned state of affairs or offering reasonable prospects of success (see, in particular, paragraphs 11 and 26 above).

57. As regards an urgent application or an action for damages, the Court notes that the Government did not produce any evidence in support of their claim apt to demonstrate that these remedies would be effective in the present case.

58. Hence, while it is true that the applicants did not make use of the remedies suggested by the Government, the Court considers that the Government, with whom the burden of proof lies in this regard (see paragraph 54 above), have not demonstrated that the use of the remedies to which they referred would be capable of affording redress in respect of the applicants' complaint under Article 2 of the Convention.

59. In view of the foregoing, the Court considers that the application should not be dismissed for failure to exhaust domestic remedies.

4. The six-month time-limit

(a) The parties' submissions

60. Lastly, the Government raised an objection of failure to comply with the six-month time-limit. They argued that the harm alleged by the applicants did not stem from the refusal to execute the 2015 European arrest warrant, but rather from the decision of the Indictments Division of 31 October 2013, upheld by the Court of Cassation on 19 November 2013, refusing to execute the European arrest warrants issued in 2004 and 2005. They therefore criticised the applicants for not challenging this first refusal decision before the Court. Moreover, the Indictments Division had held on 14 July 2016 that the 2015 arrest warrant did not contain any new information compared with the warrants issued in 2004 and 2005.

61. The applicants argued that the information concerning the follow-up by the CPT, referred to in the European arrest warrant issued on 8 May 2015, had clarified the situation in Spanish prisons and the conditions of the detention regime applicable to suspected terrorists, prompting the Spanish judicial authorities to issue this new arrest warrant, the refusal to execute which had triggered the start of a new six-month period. They therefore submitted that this period had started running on 27 July 2016, the date of the final Court of Cassation judgment terminating the domestic proceedings.

(b) The Court's assessment

62. In the present case the Court notes that, although the first set of surrender proceedings indeed ended with a Court of Cassation judgment of 19 November 2013, the Government did not adduce any evidence

demonstrating that the applicants, who had not been parties to the proceedings in question, had been informed of this development at that time. Only as of the time when the applicants wrote to the President of the Court of Cassation, on 17 November 2014 (see paragraph 16 above), can it be said with certainty that they were aware of the Belgian authorities' refusal. On 8 May 2015, that is, within six months of that contact, a fresh European arrest warrant based on new information was issued by the Spanish courts (see paragraph 17 above). There followed a new set of proceedings for execution of the arrest warrant, which terminated with a Court of Cassation judgment of 27 July 2016.

63. Reiterating that Article 35 § 1 of the Convention cannot require an applicant to lodge his or her complaint with the Court before his or her position in connection with the matter has been finally settled at the domestic level, the Court considers that the six-month period in the present case began running on 27 July 2016.

64. In the light of the foregoing, the Court concludes that the Government's objection that the application was lodged out of time should be dismissed.

5. Conclusion as to admissibility

65. The Court notes that the application is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. Nor is it inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. The parties' submissions

(a) The applicants

66. The applicants contended that the Belgian State's refusal to execute the European arrest warrants issued by the Spanish authorities in respect of the suspected perpetrator of their father's murder was unjustified and manifestly unreasonable, and was therefore in breach of the procedural aspect of Article 2 of the Convention. Taking as its basis an arbitrary assessment of one of the exceptions allowed to the execution of a European arrest warrant, it made it effectively impossible for the suspected perpetrator of their father's murder to be tried.

67. In the applicants' view, even if the Belgian courts had noted a risk of a breach of N.J.E.'s fundamental rights, they should not have refused to surrender her on that ground alone. The Belgian courts had had a duty to specify the alleged risk in the individual case by examining the specific and practical impact which the surrender was liable to have on N.J.E. In order to do that, they should have requested more information from the Spanish authorities concerning the conditions of detention to which N.J.E. would

have been subjected. This would have enabled Spain, as the State issuing the European arrest warrant, to provide assurances that N.J.E. would not be subjected to inhuman or degrading treatment.

68. As to the reasons given by the Belgian courts, the applicants contended that these were political rather than legal and that they were inaccurate. During the second set of surrender proceedings the Belgian courts had merely echoed the arguments advanced by the Indictments Division of the Ghent Court of Appeal in its order of 31 October 2013, thereby reproducing a “false, mistaken and inappropriate” portrayal of Spain.

69. In contrast to the case of *M.S.S. v. Belgium and Greece* ([GC], no. 30696/09, ECHR 2011), the international reports in the present case were not sufficient to rebut the presumption of observance of human rights. The shortcomings that had been highlighted related solely to the conditions of incommunicado detention, which did not apply in the case of a surrender requested for the purposes of a criminal prosecution, as in the present case. In view of the time that had elapsed since the events in issue and the fact that “the legal criteria for application” were not met (see paragraph 78 below), and given that the other members of the commando unit had already been convicted, the regime of incommunicado detention in police custody would in no circumstances be applied in N.J.E.’s case, and she would be brought directly before the judicial authorities. The applicants criticised the Belgian authorities for not obtaining this information from their Spanish counterparts.

70. Lastly, relying on a report from the State Secretariat for Security of the Spanish Interior Ministry, the applicants asserted that between 2011 and 2017 European arrest warrants issued by the Spanish judicial authorities, concerning 70 individuals linked to the terrorist organisation ETA, had been executed and that the countries executing the warrants (including France, the United Kingdom and Italy) had not identified any risk of a violation of the fundamental rights of the persons to be surrendered. Moreover, it emerged from the report that Belgium itself had executed four European arrest warrants issued by the *Audiencia Nacional* in respect of suspected members of ETA (in 2005, 2010 and 2011).

(b) The Belgian Government

71. The Belgian Government stressed that the obligations arising under the procedural limb of Article 2 lay first and foremost with the Spanish State. While it was true that the Court had found that, where several States were involved, the other States could also have obligations under Article 2 of the Convention, the Court should find in the present case that Belgium had fulfilled its obligation to cooperate. The Belgian judicial authorities had arrested N.J.E. Only later, during the proceedings before the investigating courts, had it become clear that N.J.E. could not be surrendered owing to the

real risk that she would be subjected to ill-treatment in Spanish prisons. Hence, although the Belgian authorities had wished to cooperate with Spain, their obligations under Article 3 of the Convention had prevented this cooperation from resulting in N.J.E.'s surrender.

72. The Government emphasised the very awkward situation facing the Belgian authorities in that regard. Whatever option they chose they were in danger of breaching the Convention. That situation was especially regrettable given that Belgium was not responsible either for the criminal investigation in Spain or for the situation in Spanish prisons and that no investigation was being conducted in Belgium.

73. In such a situation the Court's role was to ascertain whether the national authorities had struck a fair balance between the competing rights and had taken all the relevant factors into account. In that connection, given the absolute nature of Article 3, it should be regarded as normal for the Belgian judicial authorities to give precedence to the protection of this absolute right over their duty to cooperate in the context of the procedural limb of Article 2.

74. The Government further stressed that the Belgian courts had based their decisions on reports by the CPT and the United Nations Human Rights Committee. Consequently, they could not be said to have taken those decisions lightly, in arbitrary fashion or without credible supporting information.

75. Lastly, the Government argued that the presumption of protection of human rights which underpinned the system of mutual trust between EU member States, of which the European arrest warrant formed a part, was not an "irrebuttable presumption". Referring to recitals 12 and 13 of the Framework Decision on the European arrest warrant and to section 4(5) of the Belgian European Arrest Warrant Act, they argued that the principle of mutual trust could not displace the obligation of States Parties to the Convention to satisfy themselves that a person's removal was not liable to result in an infringement of his or her fundamental rights in the requesting State.

76. Pointing out that in the present case nobody questioned the fact that N.J.E. was of Basque origin and was suspected of involvement in ETA's activities, the Government submitted that the two criteria laid down by the Court with regard to Article 3 of the Convention – namely, the availability of reliable international reports demonstrating the existence of the risks in question and the ability of the applicant to demonstrate that he or she belonged to a group targeted by the measures allegedly contrary to that provision – had been met in the present case.

77. The Government concluded that in view of the information available to the Belgian courts at the time they took their decisions, and of the obligations flowing from Article 3 of the Convention, those courts had acted

in full compliance with Belgium's obligations under the Convention and could not be said to have infringed Article 2 of the Convention.

(c) Observations of the third-party interveners

78. The Spanish Government contended that the Belgian authorities' refusal to execute the European arrest warrant had been based on general, erroneous considerations rather than on any actual circumstance applicable to the requested person. They argued in particular, citing the report on the Spanish legislation concerning incommunicado detention in police custody referred to in the European arrest warrant, that the legislation in question was not applicable in N.J.E.'s case, as the legal regime in question applied only for the first five days following the initial detention of a suspected terrorist, in order to prevent evidence being lost or the damage caused to the victims being aggravated, and to prevent further attacks. Moreover, Spain was a democracy of almost forty years' standing, with one of the most advanced constitutions with regard to human rights protection, and was the country with the fewest cases before the Court in relative terms. Relying on the Court's case-law, the Spanish Government concluded that there was no real or substantial risk that N.J.E. would be subjected to any violation of Article 3 if she were tried before the Spanish courts.

2. The Court's assessment

79. Having already concluded that the applicants come within Belgian jurisdiction, the Court must now determine the extent and scope of Belgium's procedural obligation to cooperate in the circumstances of the present case (see paragraphs 42-43 above). It will then have to ascertain to what extent Belgium complied with that obligation.

80. The Court observes that the applicants' complaint under Article 2 of the Convention stemmed from the refusal of the Belgian courts to execute the European arrest warrants issued by the Spanish authorities in respect of N.J.E. They complained that the Belgian authorities' refusal to execute the European arrest warrants deprived them of the enjoyment of their right to an effective official investigation by Spain. As the Court has already stressed, it is therefore not called upon to determine whether Belgium is responsible for any acts or procedural omissions in the context of an investigation into the case, which falls exclusively within the jurisdiction of the Spanish authorities.

81. That being said, the Court observes that in its judgment in *Güzelyurtlu and Others* (cited above, §§ 232-35), it found as follows in this regard:

"232. The Court has previously held that in interpreting the Convention regard must be had to its special character as a treaty for the collective enforcement of human rights and fundamental freedoms ... This collective character may, in some specific circumstances, imply a duty for Contracting States to act jointly and to cooperate in

order to protect the rights and freedoms they have undertaken to secure within their jurisdiction ... In cases where an effective investigation into an unlawful killing which occurred within the jurisdiction of one Contracting State requires the involvement of more than one Contracting State, the Court finds that the Convention's special character as a collective enforcement treaty entails in principle an obligation on the part of the States concerned to cooperate effectively with each other in order to elucidate the circumstances of the killing and to bring the perpetrators to justice.

233. The Court accordingly takes the view that Article 2 may require from both States a two-way obligation to cooperate with each other, implying at the same time an obligation to seek assistance and an obligation to afford assistance. The nature and scope of these obligations will inevitably depend on the circumstances of each particular case, for instance whether the main items of evidence are located on the territory of the Contracting State concerned or whether the suspects have fled there.

234. Such a duty is in keeping with the effective protection of the right to life as guaranteed by Article 2. Indeed, to find otherwise would sit ill with the State's obligation under Article 2 to protect the right to life, read in conjunction with the State's general duty under Article 1 to 'secure to everyone within [its] jurisdiction the rights and freedoms defined in [the] Convention', since it would hamper investigations into unlawful killings and necessarily lead to impunity for those responsible. Such a result could frustrate the purpose of the protection under Article 2 and render illusory the guarantees in respect of an individual's right to life. The object and purpose of the Convention as an instrument for the protection of individual human beings require that its provisions be interpreted and applied so as to make its safeguards practical and effective ...

235. The Court notes, however, that the obligation to cooperate, which is incumbent on States under the procedural limb of Article 2, can only be an obligation of means, not one of result, in line with what the Court has established in respect of the obligation to investigate ... This means that the States concerned must take whatever reasonable steps they can to cooperate with each other, exhausting in good faith the possibilities available to them under the applicable international instruments on mutual legal assistance and cooperation in criminal matters. In this connection, the Court is aware that Contracting States cannot cooperate with each other in a legal vacuum; specific formalised modalities of cooperation between States have developed in international criminal law. This approach is consistent with the previous transnational cases under the procedural limb of Articles 2, 3 and 4, in which the Court has generally referred to existing extradition and other mutual assistance instruments binding on the States concerned ...

236. ... In this context, the procedural obligation to cooperate will only be breached in respect of a State required to seek cooperation if it has failed to trigger the proper mechanisms for cooperation under the relevant international treaties; and in respect of the requested State, if it has failed to respond properly or has not been able to invoke a legitimate ground for refusing the cooperation requested under those instruments."

82. In the present case the mechanism under which Spain sought Belgium's cooperation was the system put in place within the EU by the Framework Decision on the European arrest warrant (see paragraphs 23-24 above). Applying the principles set out above, the Court must therefore first examine whether, in this context, the Belgian authorities responded properly to the request for cooperation. It must then verify whether the refusal to cooperate was based on legitimate grounds.

83. As regards the first question, the Court observes that the Belgian authorities provided their Spanish counterparts with a properly reasoned response. As the Belgian Court of Cassation pointed out in its judgment of 19 November 2013, the mechanism in question is based on a high degree of trust between member States which entails a presumption of observance of fundamental rights by the issuing State. In view of this principle, any refusal to surrender an individual must be supported by detailed evidence of a clear threat to his or her fundamental rights capable of rebutting the presumption in question. In the present case the Court of Cassation found that the Indictments Division of the Ghent Court of Appeal, in its judgment of 31 October 2013, had provided legal justification, on the basis of section 4(5) of the Belgian European Arrest Warrant Act, for its decision to refuse execution of the European arrest warrants issued by the Spanish investigating judge, on account of the risk of an infringement of N.J.E.'s fundamental rights in the event of her surrender to Spain, and in particular the risk that she would be detained there in conditions contrary to Article 3 of the Convention (see paragraph 12 above). In its judgment of 14 July 2016 the Indictments Division essentially referred to its previous judgment, taking the view that the fresh information referred to in the new European arrest warrant did not call for a different assessment and that the previous assessment was in fact confirmed by the observations made by the Human Rights Committee in 2015 (see paragraph 20 above).

84. The Court notes that the approach taken by the Belgian courts is compatible with the principles it has set out in its case-law (see *Pirozzi*, cited above, §§ 57-64, which echoes the methodology advocated in *Avotiņš v. Latvia* [GC], no. 17502/07, §§ 105-27, 23 May 2016). According to that case-law, in the context of execution of a European arrest warrant by an EU member State, the mutual recognition mechanism should not be applied automatically and mechanically to the detriment of fundamental rights.

85. As to the second question the Court emphasises that, from the standpoint of the Convention, a risk to the person whose surrender is sought of being subjected to inhuman and degrading treatment on account of the conditions of detention in Spain may constitute a legitimate ground for refusing execution of the European arrest warrant and thus for refusing cooperation with Spain. Nevertheless, given the presence of third-party rights, the finding that such a risk exists must have a sufficient factual basis.

86. In this connection the Court notes that the Indictments Division based its decision mainly on international reports and on the context of "Spain's contemporary political history" (see paragraph 12 above). In its judgment of 31 October 2013 it referred in particular to the report drawn up following the CPT's periodic visit to Spain a few years previously, in 2011. Despite the information provided in support of the European arrest warrant issued on 8 May 2015, particularly regarding the fact that the CPT's subsequent reports made no mention of the issue and regarding the

characteristics of incommunicado detention in Spain (see paragraph 17 above), the Indictments Division, in its judgment of 14 July 2016, found that the information in question did not enable it to depart from the assessment it had made in 2013 (see paragraph 20 above). It is true that the Indictments Division referred to observations published in 2015 by the Human Rights Committee concerning the existence of incommunicado detention (see paragraph 28 above), but it did not conduct a detailed, updated examination of the situation prevailing in 2016 and did not seek to identify a real and individualised risk of a violation of N.J.E.'s Convention rights or any structural shortcomings with regard to conditions of detention in Spain.

87. The Court also notes that, according to the Spanish Government's observations concerning the legislative framework governing incommunicado detention, that regime would not be applicable in a situation such as that in the present case. As this issue was not discussed before the Belgian courts, the Court does not consider it necessary to determine it.

88. The Court further takes note of the applicants' argument, not disputed by the Government, to the effect that numerous European arrest warrants had been issued and executed in respect of suspected members of ETA without the executing States identifying any risk of a violation of the fundamental rights of the persons being surrendered, and that Belgium had been among the executing States (see paragraph 70 above).

89. Lastly, the Court is of the view that the circumstances of the case and the interests at stake should have prompted the Belgian authorities, making use of the possibility afforded by Belgian law (section 15 of the European Arrest Warrant Act, see paragraph 25 above), to request additional information concerning the application of the detention regime in N.J.E.'s case, and in particular concerning the place and conditions of detention, in order to ascertain whether there was a real and concrete risk of a violation of the Convention in the event of her surrender.

90. In view of the foregoing, the Court considers that the examination conducted by the Belgian courts during the surrender proceedings was not sufficiently thorough for it to find that the ground they relied on in refusing to surrender N.J.E., to the detriment of the applicants' rights, had a sufficient factual basis.

91. The Court therefore concludes that Belgium failed in its obligation to cooperate arising under the procedural limb of Article 2 of the Convention, and that there has been a violation of that provision.

92. The Court would emphasise that this finding of a violation of Article 2 of the Convention does not necessarily entail a requirement for Belgium to surrender N.J.E. to the Spanish authorities. The reason which has prompted the Court to find a violation of Article 2 is the lack of sufficient factual basis for the refusal to surrender her. This in no way releases the

Belgian authorities from their obligation to ensure that in the event of her surrender to the Spanish authorities N.J.E. would not run a risk of treatment contrary to Article 3 of the Convention. More generally, this judgment cannot be construed as lessening the obligation for States not to extradite a person to a requesting country where there are serious grounds to believe that if the person is extradited to that country he or she will run a real risk of being subjected to treatment contrary to Article 3 (see, in particular, *Soering v. the United Kingdom*, 7 July 1989, § 88, Series A no. 161; *Mamatkulov and Askarov v. Turkey* [GC], nos. 46827/99 and 46951/99, § 67, ECHR 2005-I; and *Trabelsi v. Belgium*, no. 140/10, § 116, ECHR 2014 (extracts)), and hence to verify that no such risk exists.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

93. Article 41 of the Convention provides:

“If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party.”

A. Damage

94. The applicants claimed an overall amount of 150,000 euros (EUR) in respect of the non-pecuniary damage they had allegedly sustained on account of the violation of the procedural limb of Article 2 of the Convention.

95. The Government contended that the amount claimed by the applicants did not correspond to the Court’s practice in cases of this kind, and that the award should in any event not exceed EUR 5,000.

96. The Court observes that the Belgian State is not responsible for the death of the applicants’ father or the resulting suffering. Nevertheless, it considers that the Belgian authorities’ failure to cooperate, which made it impossible to prosecute the suspected murderer of the applicants’ father, must have caused the applicants considerable distress and frustration. Ruling on an equitable basis as required by Article 41, it awards the applicants EUR 5,000 each under this head.

B. Costs and expenses

97. Submitting documentary evidence, the applicants claimed EUR 7,260 for the costs and expenses incurred in the proceedings before the Court.

98. The Government left the matter to the Court’s discretion.

99. According to the Court’s case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown

that these were actually and necessarily incurred and are reasonable as to quantum. In the present case, in view of the documents in its possession, the Court considers the amount claimed for the proceedings before it to be reasonable and awards it to the applicants.

C. Default interest

100. The Court considers it appropriate that the default interest rate should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Declares* the application admissible;
2. *Holds* that there has been a violation of Article 2 of the Convention (procedural aspect);
3. *Holds*
 - (a) that the respondent State is to pay the applicants, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the following amounts:
 - (i) EUR 5,000 (five thousand euros) to each of the applicants, plus any tax that may be chargeable, in respect of non-pecuniary damage;
 - (ii) EUR 7,260 (seven thousand two hundred and sixty euros) to the applicants jointly, plus any tax that may be chargeable to them, in respect of costs and expenses;
 - (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;
4. *Dismisses* the remainder of the applicants' claim for just satisfaction.

Done in French, and notified in writing on 9 July 2019, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Stanley Naismith
Registrar

Robert Spano
President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the separate opinion of Judge Spano joined by Judge Pavli is annexed to this judgment.

R.S.
S.H.N.

CONCURRING OPINION OF JUDGE SPANO JOINED BY JUDGE PAVLI

I.

The European Convention on Human Rights does not live in isolation within its regional context of application. Of the forty-seven member States of the Council of Europe, twenty-eight States are currently also Member States of the European Union (EU). This creates challenges in reconciling the minimum human rights guarantees secured by the Convention with the requirements of uniformity and harmonisation of norms within EU law that must also conform to the EU Charter of Fundamental Rights, the substance of which must take account of developments in this Court when the Charter’s rights correspond to the Convention (see Article 52 (3)). This “challenge of symmetry” is manifested, in particular, within the EU mechanisms of mutual recognition which are based on the principle of mutual trust, as was examined most recently by this Court in its Grand Chamber judgment in *Avotiņš v. Latvia* ([GC], no. 17502/07, 23 May 2016), and subsequently applied in the framework of the European Arrest Warrant (EAW) in *Pirozzi v. Belgium* (no. 21055/11, 17 April 2018, § 60). The tensions that can often arise in this context are particularly salient in this case.

The present case brings before the Court, for the first time, the following set of facts: The national courts of a Member State of the EU (Belgium) have refused, twice, to execute an EAW, issued by another Member State of the EU (Spain), on the basis of a risk assessment under Article 3 of the Convention. However, this Court holds today, correctly in my view, that viewing this refusal to execute the EAW through the lens of Belgium’s duty to cooperate under the procedural limb of Article 2 of the Convention, it must be concluded that the respondent Government have violated this provision of the Convention owing to the inadequate factual basis upon which the refusal was based.

I write separately to highlight the following three elements, which I consider important for a correct reading of today’s important judgment, in particular taking account of its EU law context.

II.

First, in the Court’s judgment, the *duty to cooperate* under the procedural limb of Article 2 of the Convention, as developed most recently in the Grand Chamber judgment in *Güzelyurtlu and Others v. Turkey and Cyprus* ([GC], no. 36925/07, 29 January 2019, §§ 222-38), is applied for the first time in a case implicating the EAW framework. The “duty to cooperate” is, in other words, context-specific in relation to the normative framework of transnational cooperation applicable in a particular case, as transpires from § 235 of the judgment in *Güzelyurtlu*, as referenced in paragraph 81 of

today's judgment. When Member States of the European Union trigger their mutual obligations under the EAW Framework Decision No. 2002/584/JAI of 2002, as transposed into their respective national laws, the Convention-based "duty to cooperate" under Article 2 may, at the same time, come into play, the supervision of which is finally for this Court. However, in assessing whether the duty to cooperate has been fulfilled in an EAW context, the Court must be careful to articulate its assessment in a manner which, on the one hand, enforces already settled principles in its case-law under Articles 2 and 3 of the Convention, but, on the other, retains, as far as possible, the required "symmetry" between Convention and EU law, so as not to undermine the delicate balance of duties and obligations embedded in the EAW framework of cooperation.

Secondly, according to § 236 of the Court's judgment in *Güzelyurtlu*, a State requested to cooperate in an ongoing investigation into a suspected murder in the requesting State must base a refusal to cooperate on a "legitimate ground". This concept has, in my view, two elements which are assessed on a *prima facie* basis by this Court. On the one hand, the refusal must in substance be in conformity with the norms applicable under the transnational framework of cooperation and, on the other, be sufficiently supported by the facts adduced by the authorities of the requested State when reasoning their refusal, also taking account of the Convention rights of third parties. It is this second element which was lacking in the present case (see paragraphs 86-90 of the judgment) and constitutes the core of the Court's finding of a violation. However, as is made clear in paragraph 92 of the judgment, this finding in no way entails an obligation at this point for the Belgian Government to execute the EAW warrant issued by the Spanish authorities. It only means that the Belgian Government has not convinced the Court that it had a sufficiently strong basis in the facts, as relied upon by the domestic courts, to conclude that the warrant's execution would rise to the concrete and individual level of a real risk of ill-treatment of the accused in Spain, as is required under the Court's Article 3 case-law, also taking account of the context in which it takes place in the present case (see, most recently, *A.M. v. France*, no. 12148/18, 29 April 2019, §§ 117 and 119).

Thirdly, as emphasised in § 234 of *Güzelyurtlu*, the *duty to cooperate* of member States of the Council of Europe is "in keeping with the effective protection of the right to life as guaranteed by Article 2. Indeed, to find otherwise would sit ill with the State's obligation under Article 2 to protect the right to life, read in conjunction with the State's general duty under Article 1 to 'secure to everyone within [its] jurisdiction the rights and freedoms defined in [the] Convention', since it would hamper investigations into unlawful killings and necessarily lead to impunity for those responsible. Such a result could frustrate the purpose of the protection under Article 2 and render illusory the guarantees in respect of an individual's right to life".

As is clear from the Court’s settled case-law, the prohibition under Article 3 of the Convention is absolute. Nothing in this judgment should be construed as suggesting otherwise (see paragraph 92 of the judgment). However, the duty to effectively protect the right to life under Article 2, and thus effectively to investigate unlawful killings, requires that in the examination of whether there exists a concrete and individualised risk of ill-treatment, negating the requested State’s ability to deport or extradite a person suspected of murder to the State where the death occurred and where an investigation is ongoing, the requested State must rely on a solid factual basis to support a finding that the required threshold of risk is met. Seen in this light, Article 53 of the Convention, which permits States to provide a higher level of human rights protections than flow from the minimum guarantees of the Convention, has limited, if any, direct application in this context.

III.

In conclusion, the “challenge of symmetry” between Convention law and European Union law is an ongoing enterprise which requires carefully crafted interpretative solutions so as to retain, as far as possible, the principled character and integrity of the former without upsetting the delicate institutional balance and fundamental elements inherent in the latter. I concur in today’s judgment, as it succeeds, in my view, in achieving just that.

APPENDIX

List of applicants

1. Jose ROMEO CASTAÑO, born in 1964, resident in Madrid;
2. María de la Paz ROMEO CASTAÑO, born in 1959, resident in Madrid;
3. María del Carmen ROMEO CASTAÑO, born in 1960, resident in Madrid;
4. Monserrat ROMEO CASTAÑO, born in 1961, resident in Madrid;
5. Ramón ROMEO CASTAÑO, born in 1963, resident in Santoña.