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International Criminal Cooperation Extradition and Surrender Procedures – Modern Trends and Problems

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Purpose:

The time when each country praised its own criminal repression and avoided cooperation with other countries has long past. Today criminal cooperation in Europe is at its peak and includes extradition and surrender procedures for criminal suspects, defendants and those accused of a criminal offence.

Although international cooperation and unification of procedural regulations is important for prosecution of international crimes, there are also dilemmas regarding the excessive uniformity of rules - especially when acts that safeguard human rights are adjusted on account of "effective and fast" cooperation.

It is the purpose of this article to explain the history, modern trends and possible problems that extradition and surrender procedures present in today's criminal law cooperation in the countries of Central and Eastern Europe.

Methods:

The article is theoretical and practical in nature. Deductive, inductive and systematic methods of research are used to define the trends and problems of extradition and surrender procedures. The Comparative method is used to determine regulation restrictions and legal practice in other European countries.

Findings:

Extradition procedures are politically based cooperation, while surrender procedures are more of a judicial cooperation. Extradition procedures are slow, complex, ineffective but offer more legal guarantees to the suspect/defendant/accused, while surrender procedures are fast, effective, based on the principle of trust and mutual recognition between countries of European Union, but offer less legal guarantees.

Research Limitations/Implications:

Findings here are important for law enforcement agents and judges. The article presents basic two approaches to criminal law cooperation regarding transfers of persons between countries. It also points out the basic dilemmas that both procedures present in today's law practice and solutions on how to avoid these problems.

Originality/Value:

Institutions responsible for extradition or surrender procedures should take our concerns into considerations when they initiate or have to respond to an extradition or surrender demand or proposal.

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Keywords: criminal cooperation, extradition, surrender, European Convention on Extradition, arrest warrant, surrender procedures, criminal procedural law

Mednarodno kazensko sodelovanje
Izročitveni postopki in postopki predaje – sodobni trendi in problemi

Namen prispevka:

Časi, ko je vsaka država poznala le svojo kazensko represijo in se izogibala sodelovanju z drugimi državami, so minili. Danes je kazensko sodelovanje v Evropi na izredno visoki ravni in vključuje izročitvene in predajne postopke osumljencev, obdolžencev in obtožencev kaznivih dejanj. Čeprav je mednarodno sodelovanje in poenotenje procesnih predpisov pomembno za pregon kaznivih dejanj, pa obstajajo tudi dileme v zvezi s čezmernim poenotenjem zakonodaje – še posebej to velja, če se zakoni, ki varujejo človekove pravice na višji ravni, prilagodijo na račun »učinkovitega in hitrega« sodelovanja. Namen prispevka je pojasniti zgodovino, sodobne trende in morebitne težave, ki jih izročitveni in predajni postopki predstavljajo za kazensko sodelovanje med državami Srednje in Vzhodne Evrope.

Metode:

Članek je teoretične in praktične narave. Za določitev trendov in težav izročitvenih in predajnih postopkov so uporabljene deduktivna, induktivna in sistematična metoda. Primerjalna metoda se uporablja za primerjanje zakonskih ureditev in pravne prakse med evropskimi državami.

Ugotovitve:

Postopki izročitve so politične narave, medtem ko so postopki predaje bolj pravna oblika sodelovanja. Postopki izročitve so počasni, zapleteni in neučinkoviti, a ponujajo več pravnih jamstev za osumljenca, obdolženca in obtoženca, medtem ko so postopki predaje hitri, učinkoviti ter temeljijo na načelu zaupanja in medsebojnega priznavanja med državami Evropske unije, a nudijo manj pravnih jamstev.

Omejitve/uporabnost raziskave:

Ugotovitve v prispevku so uporabne organom pregona in predstavnikom sodne veje oblasti. Prispevek predstavlja dva temeljna pristopa kazenskega sodelovanja med državami Srednje in Vzhodne Evrope. Prav tako opozarja na temeljne dileme, ki jih oba postopka predstavljata današnji pravni praksi in nekatere ugotovitve za njihovo razrešitev.

Izvirnost/pomembnost prispevka:

Odgovorne institucije bi morale upoštevati naše ugotovitve, ko bodo naslednjič dobile prošnjo za izročitev ali predajo osumljenca, obdolženca ali obtoženca

kaznivega dejanja. Enako bodo morale ravnati tudi, ko bodo same naslovile tako prošnjo tuji državi.

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Ključne besede: kazensko sodelovanje, izročitev, predaja, Evropska konvencija o izročitvi, nalog za prijetje in predajo, predajni postopki, kazensko procesno pravo

1 INTRODUCTION

International cooperation is an important element of criminal prosecution for offences with international elements. The time when each country praised its criminal repression and avoided extradition, surrender and cooperation with other countries has past. In the European Union, international cooperation has acquired new dimensions. Although international coordination and unification of procedural rules of European countries is welcomed and important in the prosecution of international offences, there are concerns regarding the excessive uniformity of regulations – particularly regarding legislations that protect human rights on a high level that must be adjusted on account of those where this protection is lower.

Extremely important in international cooperation is the question of surrender and extradition of suspects, defendants and those accused of a criminal offence, which are requested by foreign law enforcement agencies. At first, countries agreed on extradition procedures by mutual or bilateral agreements. But it soon became clear that such a complex issue needed a more permanent solution in form of international rules that would determine and coordinate cooperation in this field.

The first international document in this respect was the European Convention on Extradition (hereafter Convention) adopted by the Council of Europe on 13th December 1957 in Paris. Four additional protocols to the Convention were later adopted (First in 1975, Second in 1978, Third in 2010 and Fourth in 2012). Slovenia adopted the Convention in 1994 with the Law on Ratification of the European Convention on Extradition and its Additional Protocols (Zakon o ratifikaciji Evropske konvencije o izročitvi …, 1994), and provisions of the Convention were implemented in Chapter 31 of the Slovenian Criminal Procedural Act (Zakon o kazenskem postopku [ZKP], 1994), entitled Extradition Procedure of Accused and Convicted Persons (today these provisions are used only for extradition with non-EU countries, e.g. Russia, Switzerland).

A more drastic approach to extradition was undertaken by the European Union. In 1999, the Tampere European Council meeting focused on the topic of creating a European area of freedom, security and justice, which has had significant implications for the development of criminal law. "The goal of creating an area of freedom laid out by the EU, security and justice should lead to depart from the classic form of extradition, which would be replaced by the system of surrender" (Šugman, 2004: IV). European Union established the principle of mutual recognition on the field of criminal law, according to which judicial judgment in one state should be recognized and enforced in all other EU Member States (Bantekas, 2007).

The document that replaced extradition procedures between EU members with the new system of surrender procedures was the European Council Framework Decision 2002/584/JHA of 13th June 2002 (2002) (hereafter Framework Decision) on the European arrest warrant and the surrender procedures between Member States.

The Framework Decision[1] was adopted by the European Council in accordance with its mandate from Article 34(b) of the European Union Treaty[2] and replaces all previously existing instruments governing extradition between Member States – the European Convention on Extradition from 1957 and the European Convention on the Suppression of Terrorism Act from 1977.

Members of the European Union are obligated to adopt the objectives pursued by the EU Council framework decisions; they may however choose the means and methods on how to do so. The purpose of the framework decisions is therefore harmonization of laws and not unification.

Slovenia opted for the adoption of the framework decision by a special independent act and not for the implementation of the provisions in the Criminal Procedure Act.

Thus, Slovenia has implemented the provisions of Council Framework Decision 2002/584/JHA (2002) with the new European Arrest Warrant and Surrender Procedure Act (Zakon o evropskem nalogu za prijetje in predajo [ZENPP], 2004), which was completely replaced in 2007 with the Act on Cooperation in Criminal Matters with Member States of the European Union (Zakon o sodelovanju v kazenskih zadevah z državami članicami Evropske Unije [ZSKZDČEU], 2007).

2 COMPARISON OF FUNDAMENTAL SPECIFICS OF EXTRADITION AND SURRENDER PROCEDURES

It is appropriate to present the basic characteristics of extradition under the European Convention on Extradition and Surrender Procedures under the EU Council Framework Decision (2002) on the European arrest warrant and the surrender procedures between Member States.

We will present and compare only some of the major features of the two institutions, as this is not the purpose of this article, and will concentrate on the law regulation of both procedures in Slovenian Law and on their effects on criminal cooperation.

At the outset, it should be noted that the European Arrest Warrant completely replaces the provisions on extradition, which were adopted in the European Convention on Extradition. These are still in force in relation to Parties of the Convention which are not members of the European Union.

1 *Framework decisions were adopted into European Union legal system with the Treaty on European Union - Amsterdam Treaty in the year 1997.*

2 *At the time Treaty on European Union - Maastricht Treaty (1992) and Treaty of Amsterdam (1997), as Treaty of Nice (2011) has not yet entered into force.*

2.1 Normative Regulation and International Reach

The first comparative observation concerns normative regulation in our legislation. While extradition is regulated in the Criminal Procedure Act (Zakon o kazenskem postopku, 1994) in Chapter 31 entitled Procedure for Extradition of Accused and Convicted, surrender procedures are regulated by a separate Act – the European Arrest Warrant and Surrender Procedure Act (Zakon o evropskem nalogu za prijetje in predajo [ZENPP], 2004).This was completely replaced in 2007 with the Act on Cooperation in Criminal Matters with Member States of the European Union (Zakon o sodelovanju v kazenskih zadevah z državami članicami Evropske Unije [ZSKZDČEU], 2007).

When we compare the international scope of the provisions, it is clear that the European Arrest Warrant applies to the cooperation between the Member States of the European Union, while the provisions of the extradition apply to parties of the European Convention on Extradition, that are not members of the European Union - that is, to third non-EU countries (e.g. Russia, Switzerland). This means that we have two different extradition/surrender approaches – one for EU countries and on for non-EU countries. This in itself is not as problematic as the fact that the level of human rights protection in both procedures is quite different.

2.2 Definition and Purpose

Extradition is a political procedure granted for offences punishable under the laws of the requesting Party and by the requested Party, for deprivation of liberty or under a detention order. The requesting country requests extradition from the requested country in which the defendant or the accused in situated. The purpose of extradition is surrender of the accused or convicted and hence to facilitate the prosecution of criminal offenses with international elements.

The request is made through diplomatic channels and cannot be made for Slovenian citizens; Slovenia does not extradite its own citizens. This follows from Article 47 of Constitution of the Republic of Slovenia (Ustava Republike Slovenije, 1991) (hereafter Slovenian Constitution), which stipulates that a citizen of Slovenia cannot be extradited or surrendered, unless the obligation to extradite or surrender arises from an International contract, with which Slovenia has transferred part of its sovereign rights to an international organization (an exception applies only to the European Union).

Surrender on the other hand, is an execution of an arrest and surrender procedure on account of a warrant that was issued by an EU Member State.

The European Arrest Warrant is a judicial order issued by a judicial authority of the Member State with the purpose that a Member State (through its executing judicial authority) arrests and surrenders the demanded person in order to initiate criminal prosecution or execute a custodial sentence or other security measures of a criminal court (paragraph 12 and 13 of Article 7 of the Law on Cooperation in Criminal Matters with the Member States of the European Union – ZSKZDČEU, 2007). The purpose of the European Arrest Warrant is to establish a simplified system of surrender of sentenced or suspected persons between judicial authorities

of EU Member States. Surrender (a new legal term that is strictly separated from extradition) can also be related to Slovenian citizens – Slovenia is obligated to surrender its citizens – they are not under the protection of Slovenian Constitution (Ustava Republike Slovenije, 1991) as in extradition procedures.

2.3 Statutory Conditions

Terms of extradition are provided in the Article 522 of the Slovenian Criminal Procedure Act (ZKP, 1994) with the following conditions:

1. The person whose extradition is sought is not a citizen of the Republic of Slovenia,
2. The offence for which extradition is requested has not been committed in the territory of the Republic of Slovenia, against it or its residents,
3. The offence for which extradition is sought is a criminal offence in domestic law, as under the law of the country where it was committed,
4. Penalty for the requested offence is at least one year imprisonment under domestic law and under the law of the requesting country
5. If extradition is sought for the execution of a final punishment, custodial sentence or a detention order this punishment must be at least 4 months,
6. That prosecution under domestic law is not barred due to the fall under statute of limitation,
7. That the person whose extradition is requested has not been already acquitted or convicted in the Republic of Slovenia or a foreign country, provided sentence has been served or is serving under the law of which the penalty is imposed,
8. That the person whose extradition is requested is not in a domestic criminal procedure
9. That the requesting country gives adequate assurances that the death penalty will not be imposed or enforced,
10. That, when it comes to enforcement of the sentence, which was imposed by a final judgment in the trial in absentia of the person whose extradition is sought, the requesting State shall provide appropriate evidence that the person was summoned personally or the time and place of the proceedings were informed via a representative,
11. Extradition of persons, who committed the offence under the age of 14 years, is not allowed,
12. The identity of the person whose extradition is requested must be established,
13. There must be sufficient evidence to justify a suspicion that the foreigner whose extradition is requested committed the crime.

The basic condition for surrender procedures is contained in Article 8 of the Act on Cooperation in Criminal Matters with Member States of the European Union (ZSKZDČEU, 2007), that stipulates that surrender of a person under arrest is admissible, if the arrest was ordered for a crime that is prosecuted ex officio and if the custodial sentence in the demanding country is at least one year (in the case of custodial or detention sentence, the latter must be at least four months).

2.4 Extradition and Surrender Offences

For which crimes may extradition and surrender procedure be requested? Extradition is limited by the condition of dual criminality or identity of norms. An offence for which extradition is sought must also be a criminal offence under Slovenian Law (and of course under the law of the country requesting extradition). Another condition is that the offence for which extradition is requested has not been committed in the territory of the Republic of Slovenia against it or any of its residents. The penalty for the requested offence must be at least one year imprisonment under domestic law and under the law of the requesting country.

Both procedures can be sought for the execution of a final punishment, custodial sentence or a detention order, however identity of norms (dual criminality) of surrender procedure are substantially different

Thus, regardless of double criminality, surrender procedures must be executed for the following offences, if they are punishable in the issuing Member State by a custodial sentence or a detention order for a maximum period of at least three years and as they are defined by the law of the issuing Member State: participation in a criminal organization, terrorism, trafficking in human beings, sexual exploitation of children and child pornography, illicit trafficking in narcotic drugs and psychotropic substances, illicit trafficking in weapons, munitions and explosives, corruption, fraud, including that affecting the financial interests of the European Communities, laundering of the proceeds of crime, counterfeiting currency, computer-related crime, environmental crime, including illicit trafficking in endangered animal species and in endangered plant species and varieties, facilitation of unauthorized entry and residence, murder, grievous bodily injury, illicit trade in human organs and tissue, kidnapping, illegal restraint and hostage-taking, racism and xenophobia, organized or armed robbery, illicit trafficking in cultural goods, including antiques and works of art, swindling, racketeering and extortion, counterfeiting and piracy of products, forgery of administrative documents and trafficking therein, forgery of means of payment, illicit trafficking in hormonal substances and other growth promoters, illicit trafficking in nuclear or radioactive materials, trafficking in stolen vehicles, rape, arson, crimes within the jurisdiction of the International Criminal Court, and unlawful seizure of aircraft/ships and sabotage.

The Slovenian Act on Cooperation in Criminal Matters with Member States of the European Union (ZSKZDČEU, 2007) takes these categories from the EU Framework Decision (2002), but does not define to which offences these categories can apply under our Criminal Code (Kazenski zakonik [KZ-1], 2008). It is clear that serious crimes are included in this listing; however, general categories (e. g. computer-related crime) can include a variety of different offences. The latter category may include a list of numerous offences of fraud, embezzlement, computer intrusion, and unauthorized entries for example. This regulation does not meet the standards of the principle of criminal precision (lex certa) and is questionable at least.[3] It would be better if the legislator would name specific criminal offences

3 *Also argued by critics such as Alegre and Leaf (2003).*

that are meant by these categories (as Hungary has done in its implementation law of the Framework Decision [Council of the European Union, 2008]). Limitation is at least provided in the fact that an offence must be punishable by a term of imprisonment of at least three years. Offences that are on the exclusion list must therefore be punishable with at least a three year imprisonment or else they cannot exclude the double criminality principle.

Extradition and surrender processes are both limited by the rule of speciality, which demands that a person who has been extradited/surrendered shall not be proceeded against, sentenced or detained with a view to the carrying out of a sentence or detention order, for any offence committed prior to his surrender other than that for which he was extradited or surrendered.

2.5 Procedure Process

The process of extradition goes through diplomatic channels. First the Ministry of Foreign Affairs of the requesting country contacts the Ministry of Foreign Affairs of the requested country. Then the Ministry of Foreign Affairs of the requested country request an extradition of a suspect/defendant through the Ministry of Justice that sends the request to the investigating judge of the court in whose territory the suspect/defendant resides or in the area he is found. After judgment is passed by the Court Senate (or the investigating judge), the process is reversed (from the court to Ministry of Justice to Ministry of Foreign Affairs of the requested country to Ministry of Foreign Affairs of the requesting country and from there to Ministry of Justice of the requesting country and finally to the requesting court). Due to the "political phase" the proceedings are long, slow and relatively ineffective in practice. Completely different processes are associated with surrender procedures – there the issuing and executing judicial authorities cooperate directly. If both authorities are state courts, then the request for surrender goes directly from the issuing court to the executing court (proceedings "from court to court" or "from judge to judge"), without any political interference. This means that if Germany requests a surrender of a certain person from Slovenia, this can be done directly through cooperation between German and Slovenian courts. Of course the police are the ones who actually surrender the person, and in practice a lot of surrender procedure requests goes through Eurojust – The European Union's Judicial Cooperation Unit (Šugman & Gorkič, 2010).

If the location of the wanted person is unknown, an International Arrest Warrant or Interpol warrant can be issued.

Surrender processes are faster, more efficient and better in practice. The problem occurs when a EU Member State does not appoint a court as its executing judicial authority. Some Member States have indeed directly or indirectly appointed the Ministry of Justice as the central authority with powers of executing judicial authority. This is contrary to the provisions of the Framework Decision (Second evaluation report on the state of transposition …, 2007).

2.6 The Process of Assessing the Foundation of a Criminal Offence - Evidentiary Basis of the Requesting State

In this respect, the two procedures differ drastically. While the extradition procedure includes strict judicial control over the extradition act, the latter is much less strict in the surrender procedure. In the extradition procedure, the court must verify if there is sufficient evidence to justify grounds for suspicion that a suspect/defendant whose extradition is requested, committed the crime, or that he has already been convicted with a final court judgment (Article 522, paragraph 13 of the Slovenian Criminal procedure act [ZKP], 1994). If reasonable suspicion is not proven, the court must refuse the extradition. The surrender procedure is completely the opposite - here the executing State, because of the principle of mutual recognition, cannot verify the grounds for suspicion that a criminal offence was committed (the Slovenian court has to accept a judgment from a Member State, although the Slovenian court could not have pronounced such a judgment). Lowering standards of proof in surrendering procedures could be more efficient in criminal cooperation, but it is also very problematic from the perspective of protecting human rights in a criminal procedure, as it clearly lowers the standards that all modern constitutions seek.

Extradition may be refused if it involves enforcement of a sentence, which was imposed by a judgment in a trial *in absentia* of the person whose extradition is sought. The requesting State must provide appropriate evidence that the person was summoned personally or that the time and place of the proceedings were informed via a representative, authorized in accordance with the law of the country which issued the judgment (of the Slovenian Criminal Procedure Act [ZKP], 1994: Article 522, paragraph 10). On the other hand, in the surrender procedure the home court can only require certain guarantees from the issuing judicial authority (e. g. require that a person who has been convicted in absentia, but was not personally invited, or otherwise informed of the location and date of the hearing, has the right to request a retrial or a new trial in the country ordering the warrant and be present at the judgment; Article 11 of the Slovenian Act on Cooperation in Criminal Matters with Member States of the European Union [ZSKZDČEU], 2007).

2.7 Decision-Making Process and Reasons for Refusal

Both procedures contain procedural and substantive grounds for refusal. The Slovenian Criminal Procedural Act (ZKP, 1994) stipulates that if an extradition demand is incomplete, it may be sent back to the requesting country to redress it. If the extradition demand is procedurally complete, than a substantive judgment must be given. Proceedings are conducted by the investigating judge of a District court, however judgment is given by a Judge Panel of the District court, who either accepts or refuses the request for extradition. The decision is sent to the Ministry of Justice, then on to the Ministry of Foreign Affairs, who informs the requesting country.

Arrest and surrender procedure is led by an investigating judge of a District Court. After a procedural form check of the warrant the investigating judge issues an order for arrest and arranges a hearing of the demanded person. The latter may consent to surrender (the final decision is then given by the investigating judge) or object to surrender procedure – the decision is then given by the District Court Senate.

The Council Framework Decision of 13 June 2002 on the European Arrest Warrant and the surrender procedures between Member States (2202) provides grounds for mandatory non-execution of the European Arrest Warrant in Article 3 and grounds for optional non-execution of the European Arrest Warrant in Article 4 (both are implemented in the Slovenian Act on Cooperation in Criminal Matters with Member States of the European Union [ZSKZDČEU], 2007).

Grounds for mandatory non-execution are the following. This means that the Member State of execution shall refuse to execute the European arrest warrant if:

a) the offence is covered by amnesty in the executing Member State,
b) the requested person has been judged by a Member State, or that the sentence for the offence has already been served or is being served or may no longer be executed under the law of the sentencing Member State (*Non bis in idem*),
c) the subject of the European Arrest Warrant is a minor (in Slovenia under 14 years of age).

Grounds for optional non-execution are the following, which means that the Member State of execution may refuse to execute the European Arrest Warrant if:

a) the act on which the European Arrest Warrant is based does not constitute an offence under the law of the executing Member State,
b) the person who is the subject of the European Arrest Warrant is being prosecuted in the executing Member State for the same act as that on which the European arrest warrant is based,
c) the judicial authorities of the executing Member State have decided either not to prosecute for the offence on which the European Arrest Warrant is based or to halt proceedings,
d) criminal prosecution or punishment of the requested person is statute-barred according to the law of the executing Member State,
e) the executing judicial authority is informed that the requested person has been finally judged by a third State for the same offence provided that, where there has been sentence, the sentence has been served or is currently being served or may no longer be executed under the law of the sentencing country,
f) Slovenia undertakes to execute the issued sentence or detention order in accordance with its domestic law, and
g) the European Arrest Warrant relates to offences which were committed in the territory of the executing Member State or if the offence was committed outside the territory of the issuing Member State and the law of the executing Member State does not allow prosecution for the same offences when committed outside its territory.

There are very similar grounds for refusing extradition in the European Convention on Extradition.[4]

It is unfortunate that Slovenian legislation does not include potential violation of human rights as an optional non-execution ground based on the European Convention on Human Rights. On the other hand, Netherland's implementation law of the Framework Decision clearly defines this ground in Article 11 of the EU Council Report on Netherland (Council of the European Union, 2009). German criminal law theory also advocates that every arrest warrant should be tested for hidden motives – e.g. criminal prosecution of political crimes (Hecker, 2005).

3 MODERN PROBLEMS OF EXTRADITION AND SURRENDER PROCEDURES

With the emergence of new criminal laws, new legal dilemmas associated with them will appear. This is even more apparent when dealing with an international criminal law (e. g. European Arrest Warrant), that aims to unify legal rules about surrendering suspects and defendants of criminal offences. Problems may occur in such simple tasks as in the translation of Conventions and European regulations. Fišer (1995: 22) comments that Slovenian translations of the European Convention on Extradition are "devastating and in some places completely misleading, so that the use of translation can lead to errors of law."

Translations of European Union regulations (e. g. Framework decision on European Arrest Warrant) are on a much higher level, so there should be no poor translations that do not follow the criminal law doctrine.

There are some concerns regarding the authors of the regulations. The European Convention on Extradition was formed by governments (or their representatives) with the idea to improve international cooperation. After examining the Convention, it is obvious that legal experts were the ones drafting it. On the other hand, the European Council Framework Decision on the European Arrest Warrant and the surrender procedures between Member States (2002) was drafted by the Council of the European Union, which consists of State Ministers for a particular area - in this case, the Ministers of the Interior. As part of law enforcement, the latter will often follow the goal of effectiveness over the rights and freedoms of individuals. The Framework Decisions (2002) are also formulated without cooperation of the legislation branch (Parliament of European Union) and judicial branch (European Court) and must be implemented into the legislation of the EU Member States – again without cooperation or approval of each state's Legislator (Framework Decisions have to be implemented in the EU Member State's legislations without

4 *However, there are some additions in the Convention. One is lapse of time - extradition shall not be granted when the person claimed has, according to the law of either the requesting or the requested Party, become immune by reason of lapse of time from prosecution or punishment. Second is capital punishment – no extradition will be given if the offence for which extradition is requested is punishable by death under the law of the requesting Party. And the third is an exclusion of extradition for political offences.*

exceptions[5]). Therefore, the issue with European Arrest Warrant is that the executive branch has removed the guarantees that were achieved through hard negotiations of the legislative branch resulting in the international Convention on Extradition (Šugman & Gorkič, 2010).

After 11th September 2001, legislative acts of the European Union were emotionally characterized as a result of extreme events. It could be said that European Council used the terrorist attacks for implementing legislation that would otherwise never be approved by all the EU Member States (Šugman & Gorkič, 2010). Until 11th September 2001, there was no progress in criminal law cooperation between EU Member States. However, after the terrorist attacks regulations on this field became numerous. Douglas-Scott (2004) writes that European critics that criticize USA and their presidential orders should take a look at the measures that are being adopted in the European Union.

These facts convey a feeling of incompleteness of legal regulations, which can also be shown in certain Council's decisions. Alegre and Leaf (2003) argue that European Arrest Warrant is unclear, incomplete, very differently implemented in the legislation of the EU Member States and that it removes safety guarantees established with the Convention on Extradition.

There has been a lot of concern about abolition of the double criminality standard. Article 2 of the European Arrest Warrant Framework Decision 2002/584/JHA (European Council Framework Decision …, 2002) lists exceptions to the double criminality standard – however, these exceptions are defined very generally and do not present specific criminal offences (e.g. racism and xenophobia, computer-related crime). "The vagueness just described is perceived as a problem which stems from a general unawareness of other Member States' legal systems" (Eisele, 2006: 203). Member State of execution will have to surrender a person based only on the fact that the demanding Member State qualified certain act as one of the vaguely prescribed offences according to its own legislation. Such regulation does not meet the standards of the principle of criminal precision (lex certa) and is questionable at least (Alegre & Leaf, 2003).

A doctrinal issue with surrender procedures is that judicial control over the act of surrender (as opposed to extradition[6]) is significantly restricted. Thus, there is no judicial control over reasonable suspicion that a criminal offence was committed – the judicial verification of evidentiary basis is gone.

Because of the mutual recognition principle and the principle of trust the Slovenian Court must recognize judgments of foreign courts, even if this decision

5 *This view was opposed numerous times by the Constitutional Court of Germany. The view of the Constitutional Court is that Germany will follow EU legislation as long as these regulations will respect the standards of safeguarding the basic human rights. If these conditions are not met, the German constitution will prevail over the legislation of the European Union (Hecker, 2005). This view was overturned by the Court of Justice of the European Union in the case of Pupino (Court of Justice of the EU, 2005). According to the Court of Justice european legislation prevails over the legislation of each Member State (including each state's constitution).*

6 *This was evident in the case of Ramda v Secretary of State for the Home Department (High Court of England, 2002, EWCHC 1278). Ramda was a suspect of terrorist attack and was demanded by France from United Kingdom. English High Court quashed the Home Secretary's decision to extradite Ramda, since the evidence against Ramda were gained by inhuman methods (alleged torture of a suspect that gave French authorities evidence against Ramda).*

could not be issued according to our law. As Šugman (2004: VII) comments: "Overall, the country that executes the European Arrest Warrant cannot (except in the extremely narrow context) assess the content and justification of the warrant."

It is also interesting that the surrender procedure does not include the clause that prevents surrendering of persons who are prosecuted for a political offence. On the other hand, Article 9 of the Slovenian Act on Cooperation in Criminal Matters with Member States of the European Union (ZSKZDČEU, 2007) contains a judicial verification of discriminatory reasons – if they are present, the surrender is rejected. One is to trust legal systems of other countries, however to trust them blindly and without reservation is another matter entirely. Numerous cases from the European Court of Human Rights teach us that Member States of European Union frequently violate basic human rights – especially in criminal procedures.

We have already stated that the surrender procedure is a judicial process (rather than political, as the extradition procedure). This is certainly welcome, but the problem arises when a Member State does not name a court as its executing judicial authority. In this way a political phase is again implemented in the surrender procedure, which is contrary to the demands of the Council's Framework Decision (2002).

There is also a question as to whether the executing judicial authority can verify the grounds for human rights violations – is there an option to refuse surrender if there are grounds for suspicion that human rights will be violated in the requesting State? The Council's Framework Decision (2002) does not directly provide this ground for non-execution, however respect for human rights arises from the Treaty on the European Union and from the European Convention on Human Rights[7]. Paragraph 3 of Article 1 of Framework Decision (2002) directly states that this Framework Decision shall not have the effect of modifying the obligation to respect fundamental rights and fundamental legal principles as enshrined in Article 6 of the Treaty on the European Union[8]. Verification of human rights is therefore provided on a constitutional level. It is however questionable to what extent the Member States will enforce this constitutional reason for non-execution of a European Arrest Warrant.

There were some known cases where a Member State has refused the surrender of a person to another State because of the possibility that there will be human rights violations due to unsatisfactory prison conditions. This was evident in MJELR v. Rettinger (Supreme Court of Ireland, 2010, IESC 45), where the Supreme Court of Ireland refused the surrender to Poland on the grounds that the person may be subjected to inhuman or degrading treatment in Polish prisons[9]. Judgment of the Irish Supreme Court in fact abolishes the automatic aspects of the European

7 *In a known case Soering v. United Kingdom the European Court of Human Rights (European Court of Human Rights 1989) decided that the requesting country violates the European Convention if extradition is granted to a country where human rights will be or could possibly be violated.*

8 *Here we have in mind all known EU treaties up to date – Treaty on European Union – Maastricht Treaty (1992), Treaty of Amsterdam (1997), Treaty of Nice (2011) and Treaty of Lisbon (2007).*

9 *This was however not the case in Minister of Justice v. Rajki, where the Irish High Court granted an order to surrender an alleged offender to Hungary under a European arrest warrant, despite evidence of inhuman and degrading treatment in Hungarian prisons (High Court of Ireland, 2012).*

Arrest Warrant. The need for a deeper and more active judicial review will arise when the requesting country is an EU Member State with well-known problems in its state prisons (such as Poland, Italy and Romania). Thus, the question arises as to whether Slovenia can successfully request a person with an European Arrest Warrant, since it cannot provide decent conditions in terms of cell size, safety (not enough prison guards), medical care of prisoners, lack of privacy (particularly for those prisoners who are preparing their defence) (Sinn & Worner, 2007). This could be a big problem if Slovenia was sued and sentenced for these reasons in Strasbourg.

This issue is also pointed out by Erbežnik (2010: 11) who states that "an individual may rely (in case of violation of human rights) only on the European Act, and even then only indirectly in terms of interpretation, since direct effect does not apply to the acts of the third pillar. Such a defect is not in accordance with the constitutional rights belonging to a person who is in criminal proceedings and which has been deprived of his liberty. The fact is that the concept of mutual recognition is constitutionally problematic." Erbežnik (2010) further points out that enforcement of a European Arrest Warrant means that a Slovenian Court must allow the transfer of a Slovenian citizen who has been sentenced to or prosecuted on the basis of evidence that should fall under absolute exclusion in our law and is therefore inadmissible. Thus, the court is applying double standards, namely certain standards of human rights protection for persons who are standing trial in the Republic of Slovenia, and other standards for the people who are being surrendered to another Member State, provided that those standards are not the same between the two countries. The author further proposes a solution along the lines of the views of the German Federal Constitutional Court (2005) in case ref. no. 2 BvR 2236/04 of 18 July 2005, after which the national authority in a concrete case has to take into account the fundamental human rights of its own constitution, which excludes automatic transfer after the European Arrest Warrant is issued. A similar conclusion was also adopted by the Polish Constitutional Tribunal (2010) in judgment of 5th October 2010 (Ref. No. SK 26/08).

Both our Criminal Procedure Code (1994: Article 533) and the European Convention on Extradition regulate very thoroughly the extradition of a person required by more countries. Article 533 stipulates that if a request of extradition of the same person is given by several foreign countries for the same offence, the priority is given to the country of the offender's nationality, or the country in which territory the crime was committed. If the offence is committed in the territory of several countries or if it is not known where the offence was committed, extradition is given to the country that first requested the extradition. If several countries request extradition for various offences, the priority is given to the country of nationality of the requested person or to the country where the worst criminal offence was committed.

The Slovenian Act on Cooperation in Criminal Matters with Member States of the European Union (ZSKZDČEU, 2007) is in this respect much vaguer. Article 30 stipulates that in case of multiple requests of the same person a District Court Senate will pass judgment considering the weight of the crime, territory where the

crime was committed, date of requested warrant and whether they are requested for the purpose of sentencing or prosecuting the offence.

From this perspective, the surrender procedure is much vaguer than the extradition procedure.

4 CONCLUSION

The aim of this study was to demonstrate the characteristics, differences and some of the dilemmas regarding extradition and surrender procedures of suspects and those convicted of criminal offences. While the process of extradition is more political and based on cooperation between States, the surrender process is judicial and based on the law unification of Member States of the European Union. Extradition procedures in Slovenia give suspects more legal guarantees, since the court must also verify reasonable suspicion that the criminal offence was committed. This suspicion must be based on evidence justification. Double criminality must also be taken into consideration – the requested offence must be a criminal offence in our criminal law otherwise extradition is rejected.

Surrender processes on the other hand, strengthen the principles of trust and mutual recognition between countries. Therefore, the requested country does not verify the grounds for reasonable suspicion that a crime was actually committed (the requested country trusts the judgment of the requesting country). However deviations may occur for reasons of potential human rights violations, which were clearly shown in the Irish case MJELR against Rettinger (Supreme Court of Ireland, 2010).

An important distinction is that Slovenia does not extradite its own citizens – this does not apply to surrender procedures where Slovenian citizen could be requested and surrendered.

Although the surrender procedure is more effective in practice than the extradition procedure certain legal dilemmas still arise. While the European Union is pursuing the unification of various criminal laws, certain security mechanisms of verification are being phased out. This of course leads to process efficiency. However, human rights and civil liberties may suffer on account of it. Article 6 of the active European Union Treaty (2011) should be respected – Member States should refuse to surrender a person at the expense of potential human rights violations (which of course does not follow the main idea of the European Arrest Warrant and surrender procedure - the harmonization of regulations, efficiency and speed of the procedure).

It is clear that the goal of the European Union is the harmonization of criminal procedures between Member States, but this could prove to be very problematic since criminal procedures differ substantially between Member States. Unification on the lowest common ground weakens the quality standard of human rights in criminal procedures and cannot be the correct answer for the future of European criminal procedural law.

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