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Semifinal A: INTERNATIONAL COOPERATION IN CRIMINAL MATTERS

Execution of the European Arrest Warrant within Deportations from Non-EU Countries



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Introduction

While extradition proceedings serve as a widely known legal ground for transferring a wanted person to a country that has issued an international arrest warrant (red notice), there is another (widely used rather than widely known in criminal proceedings) practice usually referred to simply as “deportation”. Deportations are mostly used when the two countries concerned have not concluded an extradition treaty or extradition would seem e.g. too lengthy or costly. In order for a deportation to take place, the wanted person must be expelled from the territory in accordance with domestic law of the departing country (e.g. for lacking a residence permit) and then the wanted person is escorted from the departing country to the country that has issued the international arrest warrant. Deportations therefore represent an effective way how to ensure a transfer of a wanted person from problematic regions (mostly South America and Asia).

However, as these deportations are based mostly on informal police cooperation and they are not governed or even reflected in International or European Law, there seems to be a lot of confusion within their execution which leads to a creation of a number of problems. In Europe, one of the pressing issues that arise is when a wanted person that is being deported to an EU member state is simultaneously a subject of an alert for arrest in the Schengen Information System (i.e. the European Arrest Warrant has been issued).

As it was suggested during consultations with the Police of the Czech Republic, if a wanted person is being deported to an EU member state without a big international airport (such as the Czech Republic and other smaller countries), there sometimes needs to be a layover in another European member state, typically at Paris or Frankfurt airports. However, based on current regulation of deportations (or rather the lack of it) the EU member state in which the layover is taking place is forced to execute the European Arrest Warrant and so the transfer of a wanted person is suspended at least for several weeks, sometimes even for months. As a consequence the EU member states resort to different practices, e.g. a temporary deactivation of a wanted person in the Schengen Information System or a complete revocation of the European Arrest Warrant (EAW). But these practices are a) inconsistent within the EU, b) not necessarily based on any legal rule (as holds for deactivation) or c) a security threat (revocation of the EAW).

Such findings raise concerns not only because this hinders the effectiveness of international judicial cooperation but also the European system of protection of human rights is at stake

here as the current situation leads to unjustified differences in treatment of wanted persons. Research of the authors suggests that a whole range of actions might be carried out without any legal ground (e.g. the aforementioned deactivation from the Schengen Information System) and therefore there is an interference with the principle of legal certainty.

The abovementioned issue poses a real obstacle to an effective judicial cooperation of EU member states with third countries within execution of deportations. It is therefore necessary to raise awareness about this issue and discuss possible solutions which should focus on amending relevant European legislation and unification of various practices and procedures in different EU member states as indicated in Chapter V of this paper.

I. Judicial and Police Cooperation

In the 18th century, the perception of criminal law and its absolute conjugation with state sovereignty led to statements such as: “Penal laws of foreign countries are strictly local, and affect nothing more than they can reach, and can be seized by virtue of their authority”¹, or “crimes, including in that term all breaches of public law punishable by pecuniary mulct or otherwise, at the instance of the state government, or of someone representing the public, are local in this sense, that they are only cognizable and punishable in the country where they are committed”², or “the courts of no country execute the penal laws of another”³, or also “no society takes concern in any crime, but what is hurtful to itself”⁴.

The situation is very different now. In our era more and more people work, study and live abroad. Crime has become an increasingly sophisticated and international phenomenon. We are also facing considerable increase in crime as a result of numerous factors, such as developments in technology, transportation, communications through social media, fundamental political changes in many parts of the world etc. International crime has to be fought by international co-operation between law enforcement agencies.⁵ That means that the principle that one state will not recognize the penal law of another state requires re-examination. We have to develop a common criminal justice and police cooperation area, with mutual trust and support among national law enforcement authorities. The European

¹ *Folliott v Ogden* (1789) 1 Hy Bl 123, per Lord Loughborough, p. 135.

² *Huntington v Attrill* (1893) AC 150, per Lord Watson, p. 156.

³ *The Antelope* (1825) 10 Wheat 123 (US Sup Ct), per Marshall CJ.

⁴ Lord Kames, *Principles of Equity*, 3rd edn (J Bell and W Creech, 1778), bk 3, ch 8, §1, § 622

⁵ *Lord Griffiths, Liangsiriprasert v. United States Government*, 1991. Available at: <http://swarb.co.uk/somchai-liangsiriprasert-v-government-of-the-united-states-of-america-pc-1991/>

Union and the whole international community shall endeavour to ensure a high level of security through measures to prevent and combat crime, racism and xenophobia, and through measures for coordination and cooperation between police and judicial authorities and other competent authorities, as well as through the mutual recognition of judgments in criminal matters and through the approximation of criminal laws.⁶

It is necessary for countries from all over the world with diverse legal systems and different criminal justice structures to work on further improvement of judicial and police cooperation. Crime and organized crime are not domestic issues anymore.

International level

International police assistance and cooperation is based on an incomplete patchwork of bilateral or multilateral treaties. The procedure tends to be slow and uncertain, with requests often being delayed by bureaucratic restraint, broad grounds for refusal, and differences in criminal and procedural law.

International contacts between prosecutorial authorities are based mostly on bilateral and a few multilateral treaties on mutual legal assistance. Informal contacts are facilitated by the International Association of Prosecutors and other similar non-governmental organizations.

EU level

Police and judicial cooperation in criminal matters in the European Union has three forms. The first form is cooperation between national police forces, second is cooperation between national administrations (in particular customs services) and finally, third is cooperation between national judicial authorities. This cooperation is implemented with the help of the EU agencies such as Eurojust, Europol and the European Judicial Network. Judicial cooperation in criminal matters is based on the principle of mutual recognition of judgements and judicial decisions by EU countries for example in the area of detention, transfer of prisoners or the European Arrest Warrant.

On the other hand there is a traditional form of judicial cooperation called mutual legal assistance. This form of cooperation enables the opportunity for any judicial authority to send a letter of request to a foreign judicial authority to perform an action in its territory. Legal

⁶ Article 67 of the The Treaty on the Functioning of the European Union. Available at: <http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:12012E/TXT&from=cs>.

assistance may be requested for instance in cases where there is a need for a house search, to confiscate a property or freeze assets.

The EU disposes of specific structures, instruments and tools to carry out mutual assistance and to support cooperation between judicial authorities. Europol is an international organization which co-ordinates cross-border investigations and provides support to law enforcement and also produces reports on organized crime with data from all EU Member States. Eurojust is an EU agency dealing with judicial co-operation in criminal matters. European Judicial Network is a network of contact points within the EU, designed to facilitate judicial cooperation across borders.

II. Extradition and Deportation in International Law

As already indicated in the annotation, extradition is well defined and established in international law. On the other hand, deportations remain largely a matter of practice. The following sub-chapters describe these two international judicial cooperation instruments and evaluate their differences, advantages and disadvantages.

II.a Extradition

It was laid down in Chapter I that international judicial and police cooperation is the backbone of the fight against crime in today's globalised world. Extradition, however, which is one of the typical instruments of judicial cooperation in criminal matters, is not a new institute. It is quite the opposite since the oldest extradition treaty on record is the extradition and peace agreement concluded between Egyptians and Hittites in 1280 B.C.⁷ and the first inter-state extradition treaties are said to have been concluded in the 12th century.⁸ Extradition generally refers to such proceedings where a requested state removes a wanted person who is taking refuge on its territory to a requesting state so that this wanted person may be either tried in the requesting state or serve a sentence already imposed by a judgement.

Today, we observe an exuberance of extradition treaties⁹ and such a growth in their existence is often linked to the increase of transnational crime, globalisation and “disappearing” borders

⁷ J. Martin Rochester: *Between Peril and Promise: The Politics of International Law*. CQ Press, 2011, ISBN 1483301613, p.84.

⁸ Geert Corstens, Jean Pradel: *European Criminal Law*. Kluwer Law International, 2002, 9041113622, p. 117.

⁹ Although there are regions where extradition treaties are scarce, such as the South America. Ivan Anthony Shearer: *Extradition in International Law*. Manchester University Press, 1971, ISBN 9780719004179, pp. 2-3.

in some regions.¹⁰ In the European context, the 1957 Convention¹¹ is presumably the most important international legal authority on extradition since it is the first multilateral extradition treaty of this magnitude and at the same time sets general principles for extradition.

Firstly, extradition is possible only when the (alleged) offence of the wanted person is in itself “**extraditable**”. Extraditable offences are either listed in the treaty or they are determined by the length/seriousness of the penalty that may be imposed in the requesting state. Secondly, the requirement of **dual criminality** must be met, i.e. the offence for which the extradition is sought “is punishable under the domestic law of both the requesting State Party and the requested State party”.¹² Thirdly, extraditions are governed by the **rule of speciality** which ensures that the offence for which the requesting state seeks extradition is the only offences for which the suspect will have to answer in the requesting State. Lastly, typically there are provisions that enable a **refusal of an extradition request** (non-extradition of nationals, concerns over the severity of punishment of the fugitive in the requesting state, human rights issues with respect to punishment or the fairness of the trial in the requesting state, non-extradition for fiscal offences, the political offence exception to extradition) and of course the prohibition to extradite refugees and the obligation to uphold *non-refoulement* will apply as well.¹³

As for the European Union, Member States have concluded and are still bound by extradition treaties with third countries. However, there are several extradition agreements concluded between the EU and third countries,¹⁴ namely the United States, Japan, Iceland and Norway.¹⁵

II.b Deportation

International law has not developed yet to a point where it would contain a positive obligation to extradite as a customary rule. Therefore, the obligation to extradite exists only when a

¹⁰ *Ibid*, p. 117-118.; The Law Commission: Extradition and Mutual Assistance in Criminal Matters. New Zealand, 2014, NZLC IP37, p. 6; EU webpage on Mutual legal assistance and extradition, available at: http://ec.europa.eu/justice/criminal/judicial-cooperation/legal-assistance/index_en.htm.

¹¹ The Council of Europe’s *European Convention on Extradition* from 1957, available at: <https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/024>.

¹² Article 16, paragraph 1 of the *UN Convention against Transnational Organised Crime*, available at <https://www.unodc.org/unodc/treaties/CTOC/#Fulltext>.

¹³ UNODC Manual on Mutual Legal Assistance and Extradition, pp. 41-49. Available at: https://www.unodc.org/documents/organized-crime/Publications/Mutual_Legal_Assistance_Ebook_E.pdf.

¹⁴ The issue of competence, however, is a subject of numerous publications, e.g. Loïc Azoula: *The Question of Competence in the European Union*. OUP Oxford, 2014, ISBN 9780191015304, p. 79.

¹⁵ EU webpage on Mutual legal assistance and extradition, op.cit.

treaty rule between the requested and requesting states is in effect.¹⁶ As a consequence, it is not always possible to evoke extradition proceedings¹⁷ and it is necessary to resort to alternative practices. One of these practices is deportation¹⁸ which is the manifestation of **voluntary cooperation between governments**.¹⁹

The use of deportation for criminal proceedings – although not recognized officially in international law – is not a new practice and has been described by various scholars and international organisations.²⁰ Shearer draws attention to the fact that the evolution in the field of extraditions did not keep pace with the increase in criminality²¹ (and he writes that already in 1971) but also already in that time points out that this might be due to the rising number of executed deportations.

The UNODC describes deportations as being used only when the wanted person is a citizen of the requesting state and that deportations may take place only when there is no extradition treaty.²² However, Shearer also acknowledges that deportations are in fact used in some states as an alternative means of rendition even when extradition treaty would be applicable in a particular case and that is because “other methods of disposing of the problem appear swifter and less demanding in terms of trouble and expense”.²³ This was confirmed to the authors during consultations with the Police of the Czech Republic and in addition the authors have learned that in some cases it is necessary to resort to a deportation instead of extradition even with an existing extradition treaty because the requested state is not in fact particularly inclined to conduct extradition proceedings. Deportations, therefore, represent a much quicker and more effective process that is based on good police cooperation and the authors were surprised to learn that often the deportation is carried out for some sort of a “reciprocal service”.

In the Czech Republic, pursuant to sec. no. 10 of the Act no. 104/2013 Coll., on International Judicial Cooperation in Criminal Matters, the Czech Republic may cover the expenses of the

¹⁶ UNODC Manual, p. 41, op.cit.

¹⁷ This holds true especially for certain regions such as South America or Southeast Asia (and infamous criminal safe havens are thus being created).

¹⁸ We can talk about deportation or expulsion depending on the domestic law of the requested state in question. For the purposes of this paper, the term deportation will be used.

¹⁹ Charles A. Caruso: *Overcoming Legal Challenges in Extradition*. American Bar Association, Asia Law Initiative, p. 11.

²⁰ Shearer, p. 3, p. 67. Op. cit.; Caruso, Op. cit.

²¹ Shearer, p. 3. Op. cit.

²² It is only logical that the UNODC will not incite evading international obligations of state in its Manual on Mutual Legal Assistance and Extradition (p. 68, Op. cit.).

²³ *Ibid*, p. 67.

investigation in the requested state and also other expenses related to the journey of the escorting police officers that are able to visit Prague. It may be surprising to some but the promise of visiting a European country serves as a strong motivation for the officers and they are eager to get involved in the investigation. Moreover, meeting the foreign officers in the domestic country is a strong asset as it deepens existing police cooperation, enables sharing of information on policies and develops stronger relationship for potential future cases.

Unfortunately, the abovementioned gives rise to significant concerns. The very nature of deportation – as a means of removing a person from one state’s territory mostly for immigration reasons – entails that deportation carried out for the purpose of criminal proceedings is not embedded in international law. Consequently, this process, which is carried out for the same purpose as extradition, does not ensure the same level of protection of the wanted person’s rights. None of the criteria mentioned above (extraditability, dual criminality etc.) are examined (perhaps except for the principle of *non-refoulement*). The UN Manual on Mutual Legal Assistance and Extradition warns that this method is illegal in some jurisdictions always depending on the domestic law of the requested state and also warns that states must avoid accusations of **disguised extraditions**:

Disguised extraditions have been depicted in case law of international and domestic courts. Pursuant to *Rebmann v. Canada (Solicitor General) (F.C.)*,²⁴ a deportation is not legitimate if the purpose is to surrender the person as a fugitive criminal to another state because it asked for him. On the other hand, pursuant to this ruling deportation should be perfectly legitimate if the purpose of the exercise is to deport the person because their presence is not conducive to the public good. Disguised extraditions have also been a subject of interest to the European Court of Human Rights, e.g. in the *Bozano case*²⁵ where the Court held that a detention Mr. Bozano was placed into for the purpose of a subsequent deportation was not lawful and in fact amounted to a disguised form of extradition.²⁶

To conclude, it is necessary to acknowledge that deportations have been used as an alternative to extradition for a very long time and that (especially since it is not possible to negotiate and conclude extradition treaties with states in problematic regions as mentioned above) this

²⁴ *Rebmann v. Canada (Solicitor General) (F.C.)*, 2005 FC 310 [2005] 3 F.C.R. 285.

²⁵ *Bozano v. France*, European Court of Human Rights, 18th December, 1986 (no. 9990/82).

²⁶ „Depriving Mr. Bozano of his liberty in this way amounted in fact to a disguised form of extradition designed to circumvent the negative ruling of 15 May 1979 by the Indictment Division of the Limoges Court of Appeal, and not to "detention" necessary in the ordinary course of "action ... taken with a view to deportation". From *Bozano v. France*, 18th December, 1986 (no. 9990/82).

practice is not going away. Even though there might be human rights concerns about the use of deportations for the purposes of criminal proceedings, the international community should not accept the *status quo* in which deportations are used but their use for the purpose of criminal proceedings is not governed by international law. It can be argued that such absence of rules even worsens the situation and uncertainty of both the wanted person and the police officers.

III. European Arrest Warrant and Regulation of International Arrest Warrant Concurrence

Council Framework Decision no. 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States²⁷ has brought a substantial change into the field of judicial cooperation in criminal matters in the European Union. The traditional cooperation methods were replaced by a system of mutual recognition of decisions. The concept of extradition was put aside and a **surrender** of an individual to the issuing authority was introduced.²⁸

One of the main differences of the surrender is the deviation from the well established requirement of double criminality.²⁹ Article 2 paragraph 2 of the European Arrest Warrant (EAW) Council Framework Decision enlists 32 crimes or rather categories of crimes whose extraditability is determined by being punishable by at least three years of a custodial sentence by the issuing member state only and specifically underlines that this is without the verification of double criminality. For other crimes, that are not included in the list, double criminality may be a reason for refusing to surrender a person, although not necessarily; and this is to be decided by the court competent in terms of decisions on surrender.³⁰ Also, certain grounds for the refusal to execute have been eliminated within the surrender, namely the non-extradition of nationals.³¹

What is crucial, however, for the purposes of this paper is that article 25 paragraph 5 of the Council Framework Decision provides that in case of extradition article 25 is applicable

²⁷ Council Framework Decision no. 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States. Available at: <http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32002F0584&from=EN>.

²⁸ Blakxtoon, Rob: Handbook on the European Arrest Warrant. Cambridge University Press, 2005, ISBN 9067041815, p. 47.

²⁹ See Chapter II.a.

³⁰ Makiefa, Magdalena. Basic Differences between European Arrest Warrant and Extradition Procedures, p. 3.

³¹ The only exception being when the European arrest warrant has been issued for the purposes of execution of a custodial sentence or detention order (article 4 paragraph 6 of the Council Framework Decision).

mutatis mutandis. That means that when executing an extradition from a Non-EU Member State the requesting state (an EU Member State) does not have to concern itself with the possibility that the European Arrest Warrant should be concurrently applied and the transit is governed by the same rules as exist for the transit within the EAW. However, **no such provision applies when it comes to deportations**. Such absence of regulation in the Council Framework Decision is quite logical since deportations are not primarily intended to serve as an alternative to extraditions and to assist in criminal proceedings. Still, as described above, deportations are in fact used in such a way and neglecting this fact in international and European law leads to numerous complications as described in the following Chapter.

IV. Problematic aspects of Execution of the EAW within Deportations from Non-EU Countries

When moving on to the practical part of police cooperation in deportations it must be reminded that the speed of the process of arresting the wanted person is essential. The investigation is consuming in both time and finances and thus a successful transport of the wanted person from the state executing the International Arrest Warrant to the requesting state is vital. Unfortunately the absence of regulation of deportations in EU Law gives rise to situations that hinder this fundamental purpose of police cooperation. For the Czech Republic this is mainly tangible when it is not possible to execute the deportation by a direct flight or a flight with a layover in a non-EU Member State.

In this chapter the authors present **five scenarios based on real cases that regularly occur during such layovers and that are a direct cause of the absence of any regulation of deportations** and their concurrence with the European Arrest Warrant:

1. The wanted person is not removed from the Schengen Information System (SIS) and is arrested during transit – the transit state follows to execute the EAW;
2. The wanted person is not removed from the SIS and during transit is permitted to make the transfer and continue to the Czech Republic;
3. The wanted person is removed from the SIS and during transit is permitted to make the transfer and continue to the Czech Republic;
4. The EAW is revoked and the transit to the Czech Republic is enabled;
5. The wanted person is removed from the SIS and during transit is released by police officers of the transit state.

1. The wanted person is not removed from the SIS and is arrested during transit – the transit state follows to execute the EAW

Requesting State: Czech Republic

Requested State: Honduras and Mexico

Nationality of the Wanted Person: Czech

Warrants: International Arrest Warrant and 6 EAWs

A Czech citizen was deported from Honduras and transferred by the police from Honduras to Mexico. The United States have a liaison FBI officer in Mexico with whom cooperation was established and the whole operation was carried out with the assistance of this FBI officer. Both the police from Honduras and Mexico were willing to cooperate and deport the wanted person as his further stay in the country was not desirable and there were domestic-law related reasons to deport.

This particular case transpired in 2016, took six months and was half successful. The wanted person was transferred to Mexico (due to better existing police cooperation and flight connections) and then escorted by the Mexican police to Frankfurt International Airport. The German police was notified about the transit and it was agreed that the outstanding EAWs and the entry in the SIS will stay in place. After the wanted person with the escort landed in Frankfurt, the German police arrested the wanted person and carried on with an execution of the EAW. The surrender to the Czech Republic took three more months and additional expenses as well.

Requesting State: Czech Republic

Requested State: Dominican Republic

Nationality of the Wanted Person: Czech

In another case a wanted person was deported from the Dominican Republic. Normally there are two police officers and one wanted person. In this case, one of the police officers was not issued a visa to enter the Schengen area on time and the captain of the aircraft did not let the

lone officer get on board on the last segment of the journey. The wanted person then had to stay in Paris International Airport and was surrendered on the bases of the EAW.

2. The wanted person is not removed from the SIS and during transit is permitted to make the transfer and continue to the Czech Republic

Requesting State: Czech Republic

Requested State: Thailand

Nationality of the Wanted Person: Czech

Warrants: International and European Arrest Warrants

The wanted person was escorted from Thailand in January 2017. The International and European Arrest Warrants were issued, however, there is no extradition treaty between the Czech Republic and Thailand. As domestic law conditions for expulsion were met, the police departments agreed on deportation to the Czech Republic. The layover took place at the Frankfurt International Airport and the wanted person was not arrested.

The situation where the wanted person is not removed from the SIS and there are no obstacles during the transit is clearly ideal. Unfortunately as is evident from the presented cases, it is not possible to rely on the successful completion of the escort because that is the exception rather than the rule. Especially considering that in this case the success was caused most likely by not specifically alerting the German police about the planned deportation.

Requesting State: Czech Republic

Requested State: Dominican Republic

Nationality of the Wanted Persons: Two Czech Citizens

Warrants: International and European Arrest Warrants

An opposite situation happened when there were two people arrested in the Dominican Republic in autumn 2015. As two wanted persons cannot be escorted together they were split into two groups. Both groups travelled through Frankfurt International Airport, the EAW was issued on both persons and neither EAW was revoked and neither SIS entry was deactivated.

On Friday one of the wanted persons travelled all the way to Prague while the following day the second person was arrested in Frankfurt and had to be surrendered pursuant to the EAW. This form of conduct is truly misleading and it spread uncertainty between the police departments.

3. The wanted person is removed from the SIS and during transit is permitted to make the transfer and continue to the Czech Republic

Requesting State: Czech Republic

Requested State: Panama

Nationality of the Wanted Person: Czech

When applying this method, what usually happens is that the police officer removes the wanted person from the SIS only for the time of the transfer at the airport. This scenario is also not transparent as in practice the police officers usually delete this information from the SIS only by saying that there was a technical error and for that reason the person is not in the system during the transfer and there is no fear of him being arrested by the local police. Such action, however, is carried out without any legal ground and is rooted merely in practice.

In February this year a wanted person was deported from Panama through Spain with a transit permit issued by the Spanish Ministry of Justice. The Spanish still insisted on arresting the wanted person during the transit and therefore the Czech police department requested to “flag” the wanted person in the SIS. This was a so called “alternative action flag” which is only possible for “Article 26 Alerts”³² which indicates that the country receiving the alert cannot carry out the prescribed action (arrest) but may carry out a lesser action, such as provide an address.

In this case, the wanted person was flagged and consequently was not arrested and was allowed to continue to the Czech Republic.

³² Council Decision 2007/533/JHA of 12 June 2007 on the establishment, operation and use of the second generation Schengen Information System (SIS II), available at: <http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32007D0533&from=EN>.

4. The EAW is revoked and the transit to the Czech Republic is enabled.

Requesting State: Czech Republic

Requested State: Dominican Republic

Nationality of the Wanted Person: Czech

In 2014 a wanted person was deported from the Dominican Republic. The deportation was preceded by a request to a judge to revoke the EAW. Since the EAW was revoked (at the last minute) and the wanted person's alert was removed from the SIS, the transit went ahead without problems and the wanted person was successfully escorted to Prague.

It must be pointed out that the process of revoking the EAW is highly time consuming, since it must be revoked by a judge. More importantly, once again there is no legal ground to revoke an EAW for the reason of deportation.

5. The wanted person is removed from the SIS and during transit is released by police officers of the transit state.

Requesting State: Czech Republic

Requested State: Thailand

Nationality of the Wanted Person: Czech

This is presumably the worst possible scenario, even though it starts with the same narrative as scenarios no. 3 and 4 (removing the person from the SIS, alternatively revoking the EAW).

This case from spring 2015 involved a wanted person deported from Thailand, the itinerary accounted for a transfer at the Frankfurt International Airport. During the layover, the local police approached the Thai police officers escorting the wanted person and demanded that they release him. The German police officers have informed the Thai escort that the wanted person is not in the SIS and therefore, there is no reason for his deprivation of liberty. The wanted person was given back his passport and was accompanied to the exit of the airport and released. The wanted person has been on the run since the incident.

The local police's reasoning for their actions was that they require an official transit permit, which needs to be obtained from the Ministry of Justice, and therefore they released him. Sometimes transit permits can be negotiated only between the police departments of the two

states and this again needs time that is not available in most cases (as there is no extradition detention). The German police officers did not provide any reasons as to why they released the wanted person when there still was an outstanding International Arrest Warrant (and an active Red Notice).³³

Apart from different police officers having different opinion on what is to be done in the situations described above, there is another aspect adding to the diversity in treatment of these cases. That is the fact that border police officers do not always have time (or access) to screen everyone in the relevant databases of wanted persons. Again the time plays a leading role, as checking each passport against the databases would be too lengthy. However, at some airports the police start checking the list of all passengers right after they take off which could give them a sufficient amount of time to thoroughly screen the travellers. Nevertheless, as a rule the police officers of the requesting state inform the officers at the respective airport that an escort with a wanted person are going to land at their airport.

The abovementioned differing practices, which result in the non-completion of the deportation, are not controversial only in terms of the unsuccessful deportation itself but they also represent a significant waste of money and other resources. In the context of the Czech Republic, the non-completion is all the more problematic since pursuant to section no. 10 of the Act on International Judicial Cooperation in Criminal Matters the wanted person must be delivered to the Czech Republic in order to finance the escort and any other endeavours undertaken on the foreign territory from the state budget.

It might come as a surprise that there are also cases where the wanted persons buy a ticket to the domestic country themselves and announce at what time and where they are going to land. Such a case occurred in the Czech Republic in spring 2016. The wanted person decided to return from Belize and face criminal charges in the Czech Republic. The person bought a ticket from Belize to Germany, was arrested and subsequently surrendered to the Czech Republic based on the EAW.

The authors outlined all the possible situations that may arise during layovers in EU Member States within deportations from Non-EU countries. These situations are in principle the result of an International Arrest Warrant (Red Notice) and European Arrest Warrant concurrence.

³³ Interpol: Red Notices webpage. Available at: <https://www.interpol.int/INTERPOL-expertise/Notices/Red-Notices>.

Even though extradition – and not deportation – is the primary means of execution of an International Arrest Warrant, the law must adapt to current practice. One of the key legal principles is the predictability of law and legal certainty. However, as it was presented, there is no predictability at all.

V. Possible Solutions

It is evident from the different cases described in Chapter IV. that the execution of deportations from Non-EU countries with an outstanding European Arrest Warrant is complicated, at least for those EU Member States that do not have their own international airport and must transit through other EU Member States. As a consequence of the absence of any regulation on the clash between deportation and the EAW, the requesting Member States started to resort to different practices to avoid any holdbacks in the execution of their deportations, e.g. a temporary deactivation of the wanted person in the SIS or a complete revocation of the EAW. On the other hand, transit Member States are resorting to different practices – sometimes they do apprehend the wanted person when the EAW and the SIS alert are in place and sometimes they do not, sometimes there is no problem when the person's alert has been removed from the SIS and in some cases that leads to much bigger issues, such as the escape of the fugitive.

The authors are of the opinion that such inconsistency is unacceptable. What is even more unacceptable is that some of these actions described above are being carried out without any legal ground. That holds for the temporary deactivation of the person's alert in the SIS which – as the authors have learned through consultations with the Police of the Czech Republic – is a common practice. Nonetheless, it undermines the principle of legal certainty and in addition, it puts the responsible police officers to a difficult position as they are torn between what is legal, what is necessary, what is efficient and what are their superior's orders.

Also, the temporary deactivation of an alert in the SIS or the revocation of the EAW pose a serious security threat. First, the deactivation/revocation may lead to a release of the wanted person (as has happened in the past, described in Chapter IV., scenario no. 5) and in case this person goes into hiding and the EAW is revoked, it will take a long time to issue a new EAW and the window of opportunity to apprehend the wanted person on a territory from which extradition is possible may be missed.

For the reasons presented above, the authors are firmly convinced that a solution must be found to regulate EAW-deportation concurrence and unify the current practices and put an end to legal uncertainty. The authors have learnt through a consultation with the Ministry of Justice of the Czech Republic that there were efforts to raise this issue within the Council of the EU's Working Party for Schengen Matters (SIS/SIRENE) on the 6th October 2015. It was suggested that practices similar to those used for intra-EU transits should be implemented. Unfortunately, there was no follow-up to this debate.

The authors wish to emphasize that the above described findings raise concerns not only because this hinders the effectiveness of international judicial cooperation but also the European system of protection of human rights is at stake here as the current situation leads to unjustified differences in treatment of deported persons.

For these reasons, the authors propose the following solution:

Firstly, the authors propose to amend the relevant provision of the Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States and so lay down the legal basis for deportation-EAW concurrence. Pursuant to our suggestion, article 25 paragraph 5 of the Council Framework Decision would read:

“Where a transit concerns a person who is to be extradited from a third State to a Member State or who is to be deported from a third State to a Member State and a Red Notice has been issued for this person this Article will apply mutatis mutandis. In particular the expression "European arrest warrant" shall be deemed to be replaced by "extradition request" or “Red Notice”.”

This would ensure that deportations to the EU Member States would be governed by the same transit rules as are applicable within executions of the EAWs and extraditions. Specifically the requesting state would be obliged to provide certain information to the transit state but there would be no fear that the EAW would be executed concurrently or that any of the practices described in Chapter IV. would be carried out.

Secondly, the authors propose to amend the Council Decision 2007/533/JHA of 12 June 2007 on the establishment, operation and use of the second generation Schengen Information System (SIS II). A new system of indications called “flags” was introduced into the SIS by this Council decision and pursuant to the preamble a flag to an alert serves to the effect that

the action to be taken on the basis of the alert will not be taken on its territory. **The authors propose to introduce a new type of flag preventing arrest** (therefore expanding the scope of art. 25) which will indicate that the Member State was informed on the planned deportation passing through its territory and that it will not execute the EAW.

Simultaneously, the authors reject such possible solutions that may consist in revoking the EAW in each case for two reasons. The authors do realize that since the EAW is a judicial decision this would give the deportation proceedings at least a semblance of judicial review. But firstly, the EAW revocation can be a too lengthy process and deportations are on the contrary often time-sensitive. And secondly, the revocation of the EAW may pose a security threat as explained above in this Chapter. For that reason the authors are confident that the proposed amendments are the best possible solution, should be discussed at appropriate EU levels and implemented accordingly.

Finally, the authors state that including the proposed provisions into the law of the EU offers human rights guarantees as well. Pursuant to the proposed amendments, only deportations for the purpose of criminal proceedings to the EU (and not from the EU to third countries) would be recognized and simplified. Thanks to the EU Member States' high level of protection of human rights there is no need to fear *refoulement* or other ill-treatment.³⁴ ensures that fundamental principles such as *non-refoulement* will be observed.

VI. Conclusion

The authors have portrayed that deportations for the purpose of criminal proceedings are an existing phenomenon that has been used as an alternative for extradition for a very long time. It is therefore highly unlikely that the practice will change anytime soon. It is possible that the International Law never resorted to regulation of deportations for the purpose of criminal proceedings quite intentionally as such use of deportations is essentially an undesirable phenomenon due to its possible human rights impacts. However, this paper establishes that ignoring this phenomenon worsens the human rights concerns as it deepens legal uncertainty and it also hinders police and judicial cooperation.

It is therefore necessary to bring this issue to the competent forums and platforms and endeavour to find a solution so that a) the purpose of judicial and police cooperation is

³⁴ And in case of an excess there is judicial recourse. More information on the EU and human rights available at: https://europa.eu/european-union/topics/human-rights_en.

fulfilled (especially the acceleration and simplification of prosecution), and b) the principle of legal certainty in relation to the treatment of deported persons is strengthened.

For those reasons the authors have come to the conclusion that certain legislative changes on the level of the EU need to be made to ensure the abovementioned improvements. The proposed solution consists of two legislative changes which will enable the “flagging” of an alert in the Schengen Information System for the purpose of deportation when such a flag will signal to all EU Member States that the respective person is being deported to the “flagging” Member State and the EAW is not to be executed.

In conclusion, the authors wish to point out that this paper is dealing with an issue that might not seem as important to all EU Member States because not all Member States encounter these problems since they a) have a big international airport and are connected with problematic regions (mostly South America, Southeast Asia) by direct flights, or b) their police officers are permitted to search and arrest directly on the territory of the otherwise requested state. However, such practice is not possible for every Member State, mainly due to financial constraints.

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