

European Arrest Warrant: revolution in extradition?

The last decade of the XX century has witnessed the emergence of a new form of international cooperation in criminal matters, called “surrender”. It was given birth in the Statute of the International Criminal Tribunal for the former Yugoslavia (hereinafter: ICTY)¹, the Statute of the International Criminal Tribunal for Rwanda (hereinafter: ICTR).² This procedure has found a clear and unequivocal definition and normative regulation as well as solid legal foundation in the Rome Statute of the International Criminal Court (hereinafter: the ICC)³. From these instruments, it could have been inferred that this new mechanism is applicable in the relations between an international criminal tribunal (court) and a state. However, one could argue that this conclusion will have to be modified in the light of the Framework Decision on the European arrest warrant and the surrender procedures between Member States of the European Union (hereinafter: EU), adopted by the Council of the European Union on 13 June 2002.⁴ This Decision uses the term “surrender” for delivering up offenders among this group of countries. This is a troubling development, particularly for states that interpret Article 102 of the Rome Statute in good faith and, therefore have already passed domestic legislation on “surrender” thereby distinguishing it from “extradition”.

Practical problems inherent in the inter-state mechanism of delivering up offenders are almost as old as the extradition itself. No one knows them better than law enforcement officers as well as public prosecutors and the employees of the criminal justice system (especially judges and magistrates) for whom the mounting obstacles on the way towards effective prosecution are often a major source of frustration. The efforts undertaken so far to

¹ *Statute of the International Tribunal for the former Yugoslavia*, in Report of the Secretary-General Pursuant to paragraph 2 of U.N. Security Council Resolution 808, U.N. GAOR, 48th Sess., 3175th mtg., U.N. Doc. S/2-5704 (1993), *reprinted in* 32 I.L.M. 1159, p. 1198-1200 [hereinafter ICTY Statute].

² *Statute of the International Criminal Court for Rwanda*, Article 23, in UN Sec. Council Res. 955, UN SCOR, 49th Year, Res. and Dec., at 15, UN Doc. S/INF/50 (1994) [hereinafter ICTR Statute].

³ *Rome Statute of the International Criminal Court*, 17 July, 1998, U.N. Doc. A/Conf. 183/9, *reprinted in* 37 I.L.M. 999 (1998) [hereinafter Rome Statute].

⁴ *Council Framework Decision on the European arrest warrant and the surrender procedures between Member States of the European Union*, 13 June 2002, O.J. L 190/1 (18.07.2002). For an overview of the Framework Decision and highlight of its major issues, see B. Gilmore, ‘The EU Framework Decision on the European Arrest Warrant: An Overview from the Perspective of International Criminal Law’, *ERA Forum* (2002), No. III, p. 8.

improve the situation by modernizing the procedure and up-dating the existing legal instruments, have achieved limited results. One of the major problems has been the diversity of legal systems and practice among the states. It was, therefore, felt that any more significant and meaningful results can only be possible on a regional scale, that is, restricted to countries that are closer and whose ties include common tradition and culture as well as shared values.

The Council was convinced that the aim of replacing the system of multilateral extradition built upon the European Convention on Extradition of 13 December 1957 cannot be sufficiently achieved by the Member States acting unilaterally. Instead, this task, by reason of its scale and effects, could be better achieved at Union level. Therefore, the Council decided to adopt this measure in accordance with the principle of subsidiarity as referred to in Article 2 of the Treaty on European Union and Article 5 of the Treaty establishing the European Community. In doing so, the Council went even further than the proposals submitted by the European Commission shortly after 11/09/2001.⁵

1. Extradition order in the context of mutual recognition

By placing extradition in the context of the concept of mutual recognition both the Commission and the Council assumed that the implementation of this principle means that each national judicial authority should *ipso facto* recognise requests for the surrender of a person made by the judicial authority of another Member State with a minimum of formalities. In this regard, an extradition order is considered as one of the procedural decisions being made by the criminal justice authorities. However, in order to achieve this desired result, the extradition procedure had to be re-structured. Traditionally, the decision whether or not to deliver up an offender is being made by the administrative body, usually the executive authority of the state. Therefore, such a decision would lie outside the realm of the new concept of mutual recognition. The only way to bring it in was through the “judicialisation” of the extradition process. Although courts have traditionally been involved in this procedure (albeit the form and extent of this involvement vary considerably among states), their role is limited to rendering an opinion – which is not binding on the government in all cases – on the admissibility of extradition in legal terms. However, generally, the courts have been helpless where the politicians intervene – particularly in high profile cases – to prevent extradition which was otherwise legally possible. Such instances have been a source of friction between states and concerns (particularly by law

⁵ *Proposal for a Council Framework Decision on the European arrest warrant and the surrender procedures between the Member States*, European Commission, 25.09.2001 COM(2001) 522 final/2, 2001/0215 (CNS).

enforcement).⁶ The newly established mechanism for delivering up offenders was meant not to leave any “political safe heavens” within the EU.

Fundamental to the whole concept embodied in the Framework decision is the definition of the “European Arrest Warrant” (hereinafter: EAW). It is found in Article 1 (1) which reads as follows: *The European arrest warrant is a judicial decision issued by a Member State with a view to the arrest and surrender by another Member State of a requested person, for the purposes of conducting a criminal prosecution or executing a custodial sentence or detention order.* Interestingly, this definition differs from the proposal submitted by the European Commission.⁷ Although the purpose of the European arrest warrant is the enforced transfer of a person from one Member State to another a careful reading of the Framework Decision does not allow a conclusion that this instrument amounts to an “automatic extradition” or surrender on demand. The new procedure replaces the traditional extradition procedure. It must be pointed out and underscored that what we have in the Framework Decision is a *horizontal* system, as opposed to a vertical one.

The EAW is not restricted *ratione criminis*. Article 2 (1) provides that the warrant may be issued for acts punishable by 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.

2. Double criminality

One of the most visible features of the new system is an attempt to remove the traditional requirement of double criminality, that is, the rule which demands that extradition is allowed only where acts which are stipulated in the request are also categorised as criminal by the domestic law of the requested state.⁸ However, it has to be said at the outset that the Framework Decision fell short of total abolishment of this fundamental extradition standard. Article 2(2) contain a list of 32 generic types of offences for which it removes the possibility of examination of double criminality. This provision stipulates that these offences, if they are punishable in the issuing Member State by a custodial sentence or a detention

⁶ The Pinochet case, where the British Government refused to extradite the former president of Chile to Spain, is but one illustration of this phenomenon.

⁷ The European Commission’s proposal contained the following definition: “*European arrest warrant*” means a request, issued by a judicial authority of a Member State, and addressed to any other Member State, for assistance in searching, arresting, detaining and obtaining the surrender of a person, who has been subject to a judgment or a judicial decision, as provided for in Article 2 (Article 3 (a)). See *supra* note 14.

⁸ See M. Plachta, ‘The Role of Double Criminality in International Cooperation in Penal Matters’, in N.Jareborg, ed., *Double Criminality. Studies in International Criminal Law*, (Uppsala 1989), pp. 84-134.

order for a maximum period of at least three years and as they are defined by the law of the issuing Member State, shall, under the terms of this Framework Decision and without verification of the double criminality of the act, give rise to surrender pursuant to a European arrest warrant. The very broad coverage appears to have been heavily influenced by the 1995 Europol Convention Annex.⁹

Undoubtedly, the most troubling item on this list is “terrorism”, for no definition of this type of activities has been agreed upon at the international level and, as the progress of the work on the new comprehensive, UN-sponsored, convention against terrorism clearly indicates,¹⁰ no such universal definition is in sight. The EU-made definition,¹¹ which is more a makeshift description, raises serious concerns, mainly from the point of view of its consistency with the principle *nullum crimen sine lege certa*.¹² It is noteworthy that outside the scope delimited by these 32 categories of offences,¹³ the double criminality requirement still prevails. For offences other than those covered by paragraph 2, surrender may be subject to the condition that the acts for which the European arrest warrant has been issued constitute an offence under the law of the executing Member State, whatever the constituent elements or however it is described (Article 2(4)).

3. Grounds for no-execution of the EAW

One of the biggest stumbling blocks for any efforts to modernize and substantially modify the extradition system is the question of grounds for refusal of the surrender of the

⁹ The offences include e.g. participation in a criminal organisation, 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, laundering of the proceeds of crime, counterfeiting currency, including of the euro, computer-related crime, facilitation of unauthorised entry and residence, murder, grievous bodily injury, illicit trade in human organs and tissue, kidnapping, illegal restraint and hostage-taking, racism and xenophobia.

¹⁰ M. Cherif Bassiouni, ‘Legal Control of International Terrorism: A Policy-Oriented Assessment’, 43 *Harvard International Law Journal* (2002), p. 93.

¹¹ *Council Framework Decision on combating terrorism*, 13 June, 2002, (2002/475/JHA), O.J. 22.6.2002, L 164/3.

¹² M. Plachta, W. Zalewski, ‘Controversies around the Definition of Organized Crime under the 2000 UN Convention against Transnational Organized Crime’ (in Polish), *Przegląd Sadowy* (2003), No. 3.

¹³ The Council may decide at any time, acting unanimously after consultation of the European Parliament under the conditions laid down in Article 39(1) of the Treaty on European Union (TEU), to add other categories of offence to the list contained in paragraph 2. The Council shall examine, in the light of the report submitted by the Commission pursuant to Article 34(3), whether the list should be extended or amended.

requested person.¹⁴ The European Commission and the Council also faced this problem. The way it has been resolved is very much along the traditional lines of the extradition legislation. The solution has resulted in two provisions inserted in the Framework Decision; they embody both the mandatory and optional grounds for non-execution of the EAW. According to Article 3, the execution of such a warrant shall be refused in the following cases:

1. if the offence on which the arrest warrant is based is covered by amnesty in the executing Member State, where that State had jurisdiction to prosecute the offence under its own criminal law;

2. if the executing judicial authority is informed that the requested person has been finally judged by a Member State in respect of the same acts 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 Member State;

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

Article 4 provides for the following grounds for optional refusal:

1. double criminality – for acts which fall outside the list of 32 types of specific offences;
2. *lis pendens*;
3. statute of limitations;
4. *res judicata* (based on a judgment passed in a third state);
5. non prosecution;¹⁵
6. two jurisdiction-related grounds: if an offence is regarded by the law of the executing Member State as having been committed in whole or in part in the territory of the executing Member State or in a place treated as such; or an offence has been committed outside the territory of the issuing Member State and the law of the executing Member State does not allow prosecution for the same offence when committed outside its territory.

Based on the concept of the “European (Union) citizenship”, the Council concluded that the traditional exception made for nationals of the requested state – as a ground for

¹⁴ M. Plachta, ‘Contemporary Problems of Extradition: Human Rights, Grounds for Refusal and the Principle *Aut Dedere Aut Judicare*’, 57 *UNAFEI Resource Material Series* (2001), pp. 64-86.

¹⁵ Where 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, or where a final judgment has been passed upon the requested person in a Member State, in respect of the same acts, which prevents further proceedings.

refusal of extradition¹⁶ – should no longer apply. That explains the absence of this circumstance in both of the lists discussed above. The council was of the view that the primary criterion is not nationality but the place of the person's main residence, in particular with regard to the execution of sentences. Provision is made for facilitating the execution of the sentence passed in the country of arrest when it is there that the person is the most likely to achieve integration, and moreover, when a European arrest warrant is executed, for making it possible to make it conditional on the guarantee of the person's subsequent return for the execution of the sentence passed by the foreign authority (Article 5(3)). This possibility for "conditional surrender" notwithstanding, the solution adopted in the Framework Decision will create serious legal problem for countries which have constitutional prohibition on extradition of nationals.

4. "Judicialisation" of the surrender

Arguably the most striking feature of the extradition system based on the Framework decision is its removal outside the realm of the executive. The sole responsibility for this procedure has been placed in the hands of the judiciary. Both the issuing and executing authorities shall be such judicial authorities which are competent to issue or execute the EAW by virtue of the law of the issuing or executing state (Article 6). The proposal for the Framework Decision submitted by the European Commission was more specific by referring to "the judge or the public prosecutor" in the definition of such an authority. It seems that the same holds true for the terms used in the final version although this reference has been abandoned. Since the procedure for executing the European arrest warrant is primarily judicial the political phase inherent in the extradition procedure is abolished. Accordingly, the administrative redress phase following the political decision is also abolished.

The elimination of the executive from the process has been achieved also by entrusting two separate functions with a single decision: the EAW serves both as a warrant for arrest and detention as well as a warrant for surrender of the requested person. The Framework Decision does not use the term "request". As a consequence, the role of the "central authority" in the new extradition system has been significantly diminished. Its involvement, restricted to certain types of tasks which should be exhaustively listed, is meant to be an exception rather than a rule. Article 7 provides that a Member State may, if it is necessary as a result of the organisation of its internal judicial system, make its central authority (or authorities) responsible for the administrative transmission and reception of European arrest warrants as well as for all other official correspondence relating thereto.

¹⁶ M. Plachta, '(Non-) Extradition of Nationals: A Neverending Story?', 13 *Emory International Law Review* (1999), pp.77-159.

5. Simplification and speedy process

Several solutions adopted in the Framework Decision should contribute to achieving one of the main goals: simplification and speed of the process. One such example is the transmission of the EAW: instead of traditional diplomatic channels the Council provided for an alternative mechanism: (a) When the location of the requested person is known, the issuing judicial authority may transmit the European arrest warrant directly to the executing judicial authority (Article 9(1)); (b) If the issuing judicial authority does not know the competent executing judicial authority, it shall make the requisite enquiries, including through the contact points of the European Judicial Network,¹⁷ in order to obtain that information from the executing Member State (Article 10(1)). Another important feature is the very short time limits imposed on both the execution of the EAW and the actual surrender of the requested person. In addition to a general statement to the effect that such a warrant must be dealt with and executed “as a matter of urgency”, the Council demands that the final decision on the execution of the EAW be made either within 10 days (in cases where the requested person consents to his surrender) or 60 days (in other cases) (Article 17). Where in specific cases the European arrest warrant cannot be executed within these time limits, the executing judicial authority shall immediately inform the issuing judicial authority thereof, giving the reasons for the delay. In such case, the time limits may be extended by a further 30 days. On top of these short time limits, Article 23 stipulates that the requested person shall be surrendered no later than 10 days after the final decision on the execution of the European arrest warrant. However, if the surrender of that person within this period is prevented by circumstances beyond the control of any of the Member States, the executing and issuing judicial authorities shall immediately contact each other and agree on a new surrender date. In that event, the surrender shall take place within 10 days of the new date thus agreed.

6. Rule of speciality

The framework Decision represents yet another attempt to eliminate one of fundamental principles of extradition: the rule of speciality. Already, the 1995 Convention made a step in this direction, by reversing the presumption: instead of assuming – as it is being done traditionally – the lack of consent by the requested state for further prosecution and/or re-extradition of the *extraditurus*, the Convention suggested that the consent is implicit, unless stated otherwise. The Framework Decision follows that concept – except that the solution has been based on a system of notifications that may be submitted by individual Member States. Article 27(1) provides that each Member State may notify the General

¹⁷ *Council Joint Action 98/428/JHA on the creation of a European Judicial Network*, 29 June, 1998, O.J. L 191, 7.7.1998, p. 4.

Secretariat of the Council that, in its relations with other Member States that have given the same notification, consent is presumed to have been given for the prosecution, sentencing or detention with a view to the carrying out of a custodial sentence or detention order for an offence committed prior to his or her surrender, other than that for which he or she was surrendered, unless in a particular case the executing judicial authority states otherwise in its decision on surrender. Other than that, the Council has adopted the traditional formula for non-prosecution, accompanied by seven circumstances in which this protection does not apply. A similar solution has been adopted for re-extradition of the requested person to another Member State (Article 28). It is noteworthy that the Framework Decision specifically provides that the consent of the requested state for the surrender of the extraditee to another Member State shall (or may) be refused on the same grounds which are stipulated for the non-execution of the European Arrest Warrant itself.

7. Other issues

An interesting step has been made by the Council to solve two particularly difficult and controversial issues involved in the extradition system: convictions (judgments) *in absentia* and life imprisonment. Where the European arrest warrant has been issued for the purposes of executing a sentence or a detention order imposed by a decision rendered *in absentia* and if the person concerned has not been summoned in person or otherwise informed of the date and place of the hearing which led to the decision rendered in absentia, surrender may be subject to the condition that the issuing judicial authority gives an assurance deemed adequate to guarantee the person who is the subject of the European arrest warrant that he or she will have an opportunity to apply for a retrial of the case in the issuing Member State and to be present at the judgment (Article 5(1)). As for the other problem, if the offence on the basis of which the European arrest warrant has been issued is punishable by custodial life sentence or life-time detention order, the execution of the said arrest warrant may be subject to the condition that the issuing Member State has provisions in its legal system for a review of the penalty or measure imposed, on request or at the latest after 20 years, or for the application of measures of clemency for which the person is entitled to apply under the law or practice of the issuing Member State, aiming at a non-execution of such penalty or measure (Article 5(2)).

8. “Surrender”: a misnomer?

Terminology is not the strongest feature of the Framework Decision. Several terms and expressions are used in rather inconsistent manner whereas in other places, the language is ambiguous. One of such instances is the list of 32 types of offences in respect of which the double criminality requirement has been abolished (Article 2(2)). In addition to

“terrorism”, a few other terms which appear on this list will create considerable difficulties in the process of practical application of this instrument, such as “computer-related crime”, “racketeering” and, above all, “swindling”. To make things worse, the Framework Decision does not include a provision which would correspond to Article 3 of the proposal submitted by the European Commission; that provision contained a set of definitions. Nor has an official explanatory report been annexed to the Decision.

In the same vein, the Decision uses the term “surrender” throughout its provisions for what used to be known as extradition. The question arises as to whether this change in name means also the change in substance. In other words, has the Council created in its Framework Decision a new form of international cooperation among the member states of the EU – a form which is different and separate from extradition? The background of this Decision and origin of the idea embodied in it might suggest that this is the case. Some support for this proposition may also be found in provisions and solutions adopted in the Decision – particularly those which signify a departure from the traditional standards of the extradition law. However, what is seriously questionable is the term which was adopted for this new procedure. Given the lack of any official enunciation on this matter we can but speculate why this particular term, “surrender”, was chosen: did the Commission and the Council run out of appropriate terms? or was it done on purpose – to send a clear message to member states, governments and national legislators: the procedure based on the European Arrest Warrant is not an extradition, instead this is a form that the states have already been familiar with through the statutes of international criminal tribunals (courts). If the last hypothesis were true, this would be a very unfortunate terminological coincidence. Furthermore, one could even argue that – viewed from the perspective of recent developments in international criminal law – the language adopted in the Framework Decision is misleading.

It is submitted in this paper that the word “surrender” used in the Decision is a misnomer and the procedure based on the EAW does not bring about a qualitatively new form of international cooperation; instead, this is extradition under a different name. It would have been probably less objectionable had another name been chosen. The present choice is particularly regrettable in view of serious obstacles on the way towards ratification of the Rome Statute and the tremendous efforts made by several countries to overcome one of the constitutional impediments, that is, the prohibition of extradition of nationals. It was demonstrated elsewhere that the major and prevailing line of arguments in favor of the “interpretative approach” was to point out and prove that “surrender” is a distinct form of delivering up requested persons which is operated between a state and an international

criminal tribunal (or a court).¹⁸ These arguments have been advanced and articulated before national parliaments. Now, ignoring these developments and events, the Council has come in with the Decision which purports that the process of delivering up persons between states is a “surrender”. If this term were to be treated seriously and literally, it seems that the most likely reaction from the parliamentarians would be for them to say that they were misled during the ratification of the ICC Statute. It could be also argued that the change in name is an arbitrary decision which has no material substance in the Framework Decision.

There are several reasons why this author cannot take this change nor the new name seriously. One of the most obvious is that it would set a very dangerous precedent: we create a new structure just by changing the name of the existing one. It seems to be commonly accepted that it is not the name that matters, nor the institution (or authority) that is involved. Otherwise, unrestricted arbitrariness allowed in the legislative work and process would bring total chaos in the legal system. With regard to extradition this would mean that one day, two states sign a bilateral treaty under which they commit themselves to deliver up offenders but call this procedure “*hula-gula*”. The governments pretend to create a new form of international cooperation by pointing out some of the features of this new procedure, such as: the term “request” has been replaced by “order”, it must be written on a pink paper, it has to be delivered by special forces (or a secret agent), the “order” must be decided within 48 hours (no matter what), the only competent authority in the matter of this new procedure is the Supreme Court, etc. etc. The whole exercise was undertaken in order to circumvent the constitutional restraints imposed on extradition (e.g. non-extradition of nationals, life imprisonment, political offence exception).

To avoid further attempts to ridicule the extradition system it is time to stress fundamental differences between “extradition” and “surrender”.¹⁹ There is only one primary difference; there may be also several other differences but they are of secondary importance to the central issue. From a methodological point of view it would be a serious mistake to overlook the primary difference and concentrate on secondary ones. No matter how many of

¹⁸ M. Plachta, ““Surrender” (“Extradition”) as a Constitutional Impediment to the Ratification of the Rome Statute of the International Criminal Court”, in T. Camen & R. Varga, eds., *Regional Conference on the Implementation of the Rome Statute of the International Criminal Court*, (ICRC, Budapest 2002), pp.177-194; H. Duffy, ‘National Constitutional Compatibility and the International Criminal Court’, 11 *Duke Journal of Comparative and International Law* (2001), p. 8.

¹⁹ See F. Mosconi, N. Parisi, ‘Co-Operation Between International Criminal Court and States Parties’, in F. Lattanzi, ed., *The International Criminal Court: Comments on the Draft Statute*, (Naples 1998), p. 314; D. Rinaldi, N. Parisi, ‘International Co-operation and Judicial Assistance between the International Criminal Court and States Parties’, in F. Lattanzi, W.A. Schabas, eds., *Essays on the Rome Statute of the International Criminal Court* (Sirente 1999), vol. I, p. 345.

them would be pointed out, this would not change the substance and nature of the process. The primary difference between “extradition” and “surrender” lies in the level of the relation between parties: while extradition can only be considered between states, surrender has been created only recently for the relationship between a state and an international criminal tribunal (court). This distinction is sometimes referred to as “horizontal model” as opposed to “vertical model” of international cooperation.²⁰ Both the origin and history of extradition have demonstrated that the very nature of this procedure can only be justified in the context of inter-state relations. Extradition does not operate in the vacuum – and it never did. All the safeguards and procedural mechanisms which have developed over the centuries make sense only if related to the relationships between states. The main determinants of such cooperation are sovereignty and equality of partners, reciprocity, the existence of mutual interests (or the lack thereof), and the need to protect individuals against unfair treatment abroad.

Several arguments have been advanced to support the view that the process of handing over of a person to the ICC (or another international criminal tribunal) should not be subjected to the same procedural mechanism as in ordinary extradition cases.²¹ It was argued that the fundamental distinction between “extradition” and “surrender” is based on various important considerations which include: formal (or normative) argument, historical argument, “structural” argument, teleological argument, substantive argument as well as country-specific arguments.²² Moreover, the distinct nature of the “surrender” is a corollary of the unique nature of the ICC. It should also be pointed out that the Rome Conference has succeeded in creating a special regime for delivering up persons accused or convicted of crimes within the scope of the jurisdiction of the ICC.²³ It was then appropriate for the Statute to underline this fundamental (“primary”) difference by choosing the name “surrender” for the process of delivering up persons for the ICC – instead of “extradition”. This approach has been followed, albeit not without considerable difficulties, by states parties to the Rome Statute; they have created special procedural regime in their domestic systems in order to

²⁰ C. Kreß, K. Prost, A. Schlunck, P. Wilkitzki, ‘Part 9: Preliminary Remarks’, in O. Triffterer, ed., *Commentary on the Rome Statute of the International Criminal Court* (Baden-Baden 1999), p. 1048; A. Cassese, ‘The Statute of the International Criminal Court: Some Preliminary Reflections’, 10 *European Journal of International Law* (1999), p. 144.

²¹ See, B. Swart, ‘International Cooperation and Judicial Assistance: General Problems’, in A. Cassese, P. Gaeta, J.R.W.D. Jones, eds, *The Rome State of the International Criminal Court: A Commentary*, (Oxford 2002), vol. II, pp. 1592-98.

²² M. Plachta, “Surrender”, loc. cit., pp. 182-184.

²³ M. Plachta, ‘Contribution of the Rome Diplomatic Conference for the Establishment of the ICC to the Development of International Criminal Law’, 5 *University of California Davis Journal of International Law and Policy* (1999), pp. 181-198.

accommodate the distinct nature of the ICC. Under such circumstances, an attempt made by the Council to simply re-label these procedures cannot succeed.

It is noteworthy that the European Commission, when confronted with this problem, inserted the following explanation in its Draft Framework Decision: "It [the proposed procedure, MP] is to be treated as equivalent to it for the interpretation of Article 5 of the European Convention of Human Rights relating to freedom and security".²⁴ Specifically Article 5(3) provides that: "Everyone arrested or detained in accordance with the provisions of para 1(c) of this article²⁵ shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial". However, if the deprivation of liberty is effected "(...) with a view to deportation or extradition", this safeguard is not available (Article 5 (1)(f)). If we took it that the Framework Decision has created a new mechanism, distinct and separate from extradition, then logically, all the procedural safeguards provided for in Article 5 of the ECHR would be fully applicable. Paradoxically, the whole body of the Strasbourg jurisprudence on extradition, intended to relax the procedural requirements with regard to extradition, would become obsolete for the purpose of "surrender". It is hard to believe that this is what the drafters of the Framework Decision really had in mind. Therefore, it is submitted that the procedure adopted in the Decision and labelled "surrender" is in fact an extradition – for all purposes, not just in the context of Article 5 of the ECHR.

This approach has already been adopted by some member states of the EU. One of them is Austria which has received a transitional period until the end of 2008 for amending Article 12(1) of its Extradition and Legal Assistance Act (ARHG) which prohibits extradition of Austrian nationals.²⁶ Interestingly, Austria had no problem in interpreting this provision as consistent with both the Statute of the ICTY and the ICC. However, when it came to the Framework Decision Austria concluded that simply using the word "surrender" does not do the trick; as Roman jurists would put it: *Idem non est idem*. The German government made a "pre-emptive" step already in 2000, by amending its Constitution (*Grundgesetz*): to the existing Article 16(2), which stipulates the prohibition of the extradition of German nationals, a new sentence was added which allows extradition of nationals to international criminal

²⁴ *Proposal for a Council Framework Decision*, loc. cit., 14.

²⁵ "The lawful arrest or detention of a person effected for the purpose of bringing him before the competent authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having committed so", ECHR, Article 5 (1)(c).

²⁶ This particular provision, although it appears in a statute, has a rank of a constitutional norm.

courts and to member states of the EU.²⁷ Finally, the United Kingdom does not consider the “surrender” as adopted in the Framework Decision to be a new and separate mechanism nor a *sui generis* procedure. For the purpose of implementing the Decision, the Draft Extradition Bill 2002 addresses the necessary amendments in the context of the existing system of extradition.²⁸

²⁷ BGBl 2000 I, p.1633; Bundestag 14/2668.

²⁸ B. Zagaris, ‘Blair Administration Introduces Bill to Simplify Extradition’, 19 *International Enforcement Law Reporter* (2003), p. 13.