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The use and abuse of universal jurisdiction
and the European Arrest Warrant in European Criminal Justice.

"Pre-trial detention rules in Europe, with emphasis on EAW"

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The theme of provisional arrest is always a delicate issue. In fact, the deprivation of liberty in a pre-sentential phase of the procedure is to be dealt with extreme care and to be reserved for cases where the aims of the procedure can not be reached if the suspect or defendant is left free before the trial takes place.

Therefore criminal procedural codes, at national level, establish requisites or set conditions in the absence of which the provisional arrest may not be imposed.

As an example, the Portuguese Procedural code[1] includes the provisional arrest in the list of coercive measures that may only be imposed if there is risk of escape, if there is danger for the investigation, specially if the acquisition, conservation or trueness of the evidence may be harmed, or if there is a risk, due to the circumstances of the offence or the personality of the defendant, that the criminal activity will be continued or that the defendant will create a perturbation for the public order or the public tranquillity.

[1] Article 204º.

Even in the presence of one of these circumstances, the provisional arrest may only be considered as applicable if there is strong evidence that the crime committed is punishable with a prison term of more than 5 years or, exceptionally, in the case of terrorism, violent or highly organised criminality, even if the crime is punishable with just a prison term of more than 3 years[2].

The third hypothesis relates directly to today's theme. Provisional arrest may be imposed, independently of the applicable prison term, and once the general conditions are verified, if the person presented to the Court under detention is the object of an extradition or deportation procedure.

We can then conclude that the Procedural Law, in my country, is less demanding, in terms of conditions of application of the coercive measure of provisional arrest when the extradition, and now surrender, of the person has been requested, than in the cases when this person is wanted for an internal procedure.

This creates a *de facto* situation of lesser protection under the Law in what concerns international fugitives who are found out in the territory of a particular State. The explanation for this situation appears to be simple: the risk of escape seems reasonably higher in the case of an international fugitive who, in fact, and quite often, was already trying to abscond and avoid criminal responsibility in the State where the crime has been committed.

[2] Article 202

This possibility of placing under detention a fugitive from abroad corresponds to the international commitments assumed by the States, when they ratify international instruments that look for the possibility of internationally locate, arrest and surrender someone who is escaping criminal responsibility in a State in whose territory he or she committed facts considered as a crime.

A clear and good example of this is article 16 nº1 of the European Convention on Extradition[3] that reads as follows:

"*In case of urgency the competent authorities of the requesting Party may request the provisional arrest of the person sought. The competent authorities of the requested Party shall decide the matter in accordance with its law*".

In what concerns this specific issue I call for your attention to the fact that the Council of Europe considered this possibility only for cases of urgency and left clear that the decision on provisional arrest would be taken according with the internal Law of the requested State Party. Otherwise and before placing someone under detention, a demand of extradition should be presented, considered, and only if considered admissible would then the person be placed under arrest.

This provisional situation of arrest may be maintained up to 18 days and, exceptionally, up to 40 days , at the term of which the demand of extradition has to be received; if not, the person provisionally arrested will be mandatorily released.

[3] Opened for signature in Paris on December 13th 1957.

In line with this discipline the Portuguese internal Law on international cooperation in criminal matters[4] foresaw this possibility of provisional arrest, under demand of the requesting State that had to be decided upon by application of the internal procedural rules.[5] That is, the rules seem to be the same: urgency plus decision according with the internal law.

The result was no other than it became a general rule to provisionally keep under detention persons that were intercepted following a demand for that purpose, generally, diffused through the INTERPOL channel, as admitted by article 16 nº3 of the European Convention on Extradition[6].

Reasons for this were simple: on the one side, the fact that the Law was less exigent in the case of international arrests; on the other side, the fact that, in the case of international fugitives, the risk of escape as being considered high, was not questioned.

This rule and its subsequent practice was maintained in the Schengen Agreement as well as in the so called Dublin Convention on Extradition between the Member States of the European Union[7].

Experience showed that some problems arose from these situations of provisional arrests. Release at the term of the maximum delay of 40 days, because the formal

[4] Law 144/99 from August 31st.
[5] Article 38 para. 1 and 2 reads as follows: 1. In case of urgency the provisional arrest of the person sought may be requested as a preliminary to a formal extradition request.
2. Any decision on such a provisional arrest, or on the continuation of such an arrest, shall be taken in accordance with the Portuguese law.
[6] A request for provisional arrest shall be sent to the competent authorities of the requested Party either through the diplomatic channel or direct by post or telegraph or through the International Criminal Police Organisation (Interpol) or by any other means affording evidence in writing or accepted by the requested Party
[7] Made in Dublin on September 27th 1996.

demand of extradition was not presented, would not delete the extremely heavy situation of defendants, deprived from their liberty in view of a demand of extradition that was never presented. Or lapse of time revealed only after the presentation of the formal demand of extradition that turned the extradition not possible and therefore unsustainable the arrest provisionally imposed.

And yet the formality of the procedure itself and the multiple causes for refusal created a sort of filter through which the situation of deprivation of liberty had to be, first, carefully imposed, and secondly submitted to periodic reviews.

Also the formality of the extradition procedure itself and the time taken for an extradition to be granted, according with most of the internal rules of the States, allowed a natural state of proportionality; extradition was then reserved for severe cases, for situations where the time needed for an extradition to be granted did not discourage judicial authorities because the facts were serious and the criminal responsibility would have, with no doubts, to be satisfied.

In 2002 an extreme revolution took place in the European Union. Based on the so called mutual trust between Member States and giving a first expression of the principle of mutual recognition, the European Arrest Warrant[8] replaced largely the extradition procedure in the European Union.

Its principles are very simple and easy to be understood[9].

[8] European Frame Work Decision 2002/584/JHA of June 13th 2002.
[9] Joana Gomes Ferreira, "The extradition and the European Arrest Warrant (EAW) regimes", paper presented to the ERA Conference "International surrender of persons: a transcontinental approach" (Lisboa, 6-7 November 2008).

1. For the first time direct judicial cooperation replaced cooperation between States, and, accordingly, all trace of political intervention in the surrender procedures has been deleted.
2. There has been a significant reduction of causes of refusal of the surrender, namely the surrender of nationals is now a principle and a general rule with few exceptions limited in time and in enforcement requirements.
3. To enable the executing authorities to provide for the surrender it was created a system of guarantees associated with some of the facultative causes for refusal; that is, in some case where there is a facultative cause for refusal, the surrender can be considered in the presence of guarantees presented by the requesting issuing authority[10].
4. The control of double incrimination has been limited by the introduction of a list of criminal behaviours where it is assumed and can not be questioned by the executing authority.
5. Maximum delays for decision have been introduced.
6. In the line of what was already permitted in the Schengen and in the Dublin Conventions, the consent of the deffendant has been considered relevant to give way to an immediate decision of surrender, based on the judicial homologation of that consent.
7. The formal demand of extradition, which included all documents mentioned in article 12 of the European Convention on Extradition[11], was replaced by a unified

[10] It's the case of article 5 of the Frame Work Decision where the surrender in case of nationals for criminal procedure, in case of possible application of prison for life or in case of applicated prison term produced after a in absentia trial can be considered if guarantees are presented that the national will be returned after being sentenced, or the prison for life term will be reviewed or there exists a possibility of a new trial.

[11] 12.2 The request shall be supported by:

form, the same for all States and therefore for all judicial authorities, that incorporated the decision of arrest and the demand of surrender in one single document.

This new form of cooperation made surrender procedures extremely easy and productive, much more than mutual legal assistance. The time expected for the execution of a letter of request is much longer than the time needed to obtain the surrender of a person, of course when his or her whereabouts are known. Therefore, a certain abuse of the EAW procedure can be remarked when the surrender, in fact, will lead to no more than, for instance, a hearing or even a confrontation, that could well be obtained by the use of other and much less intrusive means of cooperation, like the video conference.

Also, the mutual trust that is the basis of this particular system of cooperation can be weakened when strong differences between criminal legislations or procedural rules are revealed. For instance, and this is not as simple as a mere question of proportionality, different penalties will fatally lead to different convictions and if, in same States, cutting off a tree can be punished with a prison term of 2 years, in other States this

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a the original or an authenticated copy of the conviction and sentence or detention order immediately enforceable or of the warrant of arrest or other order having the same effect and issued in accordance with the procedure laid down in the law of the requesting Party;

b a statement of the offences for which extradition is requested. The time and place of their commission, their legal descriptions and a reference to the relevant legal provisions shall be set out as accurately as possible; and

c a copy of the relevant enactments or, where this is not possible, a statement of the relevant law and as accurate a description as possible of the person claimed, together with any other information which will help to establish his identity and nationality.

might even not be considered as a crime. And yet the EAW procedure creates little escapes for situations like these.

As was already considered in the traditional extradition procedure, the possibility of provisionally arrest someone in view of the execution of the EAW is established by article 12 of the Framework decision, that also admits an early conditional release, according with the internal rules of the executing authority. And according with article 9 nº3 the SIS alert produces the same effects of the EAW itself.

The evaluation reports on the execution of the European Arrest Warrant, however, show that the general rule that already arose in the case of traditional extradition procedures remains the same, this meaning that, usually, persons arrested for the purposes of surrender according with the EAW system are deprived from their liberty during the whole procedure of execution. In the specific case of my country, Portugal[12], the conclusion was that the *clear practice was that the majority of such applications (for early release from custody at any stage of the surrender procedure) will be refused so as to ensure the best conditions for the surrender to take place*.

Because we are in Madrid I'll also use the example of Spain, that seems rather similar to the Portuguese one in what concerns this same conclusion. Spain's report[13] informs that *whereas it is true that there is constitutional precedent confirming that remands in custody should be the exception rather than the rule (with other non custodial means*

12 http://www.eurowarrant.net/documents/cms_eaw_id1554_1_CouncilDoc.7593.2.07%20rev%202.pdf

13 http://www.eurowarrant.net/documents/cms_eaw_id1537_1_CouncilDoc.5085.2.07%20Rev%202.pdf

being deployed in alternative as appropriate) the expert team noted that, as a matter of practice, such detention seemed to be deemed necessary in all EAW procedures.

The practice shows, then, that the EAW system created much more conditions for persons to be provisionally arrested when, internally, in similar cases, they will never be submitted to similar measures.

I could have titled this informal intervention *as time goes by* not only because I, like so many other, love Casablanca, but also because time going by teaches us much more then we thought it could be possible.

The reaction of the judicial authorities, after a first state of euphoria for having discovered an instrument that, unlike so many others developed in the EU or elsewhere, is truly successful, is becoming of more and more prudence. Because the European Arrest Warrant longs for justice but can not ignore, for instance, the rehabilitation of criminals, served by time going by. If, due to the rules of the EAW, we are obliged to face someone that, having committed some not so serious facts a long time ago (and we must not forget that not only the systems diverge in what concerns applicable penalties but also lapse of time delays) and, afterwards, managed to find in reintegration a meaning for his or her life, should this state of balance be broken? Couldn't we look for solutions that, for instance, in the case of enforcement of foreign decisions are there and might be used?

In this specific issue the provisional state of arrest in view of a possible surrender must be very carefully dealt with. It is true that conditions must be kept for a possible

surrender to take place; but other and less intrusive measures are surely at disposal, allowing judicial authorities to withhold to the surrender decision the break of a situation that shows that sometimes, not so often unfortunately and not to serious crimes, the defendant, by his or her own walked the path of reintegration. In fact, that is what we are all looking for!