# Mutual recognition and the right to damages for criminal investigations

Henning Bang Fuglsang Madsen Sørensen*

*This article considers how the citizen who has been surrendered on an EAW in a case ending with acquittal or non-prosecution may achieve compensation for the loss of freedom and the surrender to another Member State. The analysis shows how the EAW and the principle of mutual recognition have been implemented in a manner which allow the decision to arrest and surrender the citizen will be able to travel freely across the Union while the liability for the EAW stops at the border of the issuing Member State. Different models for granting the citizen the power to hold Member States liable for their use of EAW's are considered before a model based on the principle of mutual recognition is proposed.*

## I. Preface

The framework decision on the European Arrest Warrant (EAW) does not contain any regulation on how the citizens may obtain compensation for the loss of the freedom following from being surrendered to another Member State on an EAW in a criminal case which ends with acquittal. The compensation therefore has to be determined on the basis of the national law of the Member States.

Most Member States have legislation which provides the citizens with a privileged position when they claim compensation for damages following criminal law investigations. Legislation varies of course between the Member States so that some Member States only compensate losses following deprivation of freedom while other Member States also compensate losses from other measures such as seizure of certain assets, house searches, and wiretapping.

A case where a suspect has been kept in custody for 50 days before being acquitted and released may serve as an example of these differences. This case will lead to a compensation of at least 6.106 Euros[1] if the case is dealt with according to Danish law,[2] and the same case will lead to a compensation of 5.992[3] Euro under to Swedish law[4] – yet it will only lead to a compensation of 1.250 Euro under to German law.[5] Differences may also be observed in regard to procedural matters, where Denmark will accept the claim within two months after the acquittal[6] while

* Assistant professor, Department of Law, University of Southern Denmark.

[1] 6.300 DKR for the first day, 800 DKR for the following 49 days = 45.500 DKR, appr. 6.107 Euro. These rates are increased by 50 % if the charge concerns severe sexual crimes and by 100 % if the case concerns murder and arson

[2] Rigsadvokatens Meddelelse nr. 1/2015

[3] App. 55.000 SEK, appr. 5.992 Euro

[4] The amount is settled in the individual case, but is in general settled by 30.000 SEK for the first month and 25.000 SEK for the following month.

[5] Gesetzüber die EntschädungfürStrafverfolgungsma#nahmen, § 7(3) sets the amount to 25 Euro per day.

[6] Code of Administration Act, § 1018 e(1).

https://doi.org/10.5771/2193-5505-2015-2-194
Generiert durch IP '3.142.194.12', am 23.07.2024, 18:12:06.
Das Erstellen und Weitergeben von Kopien dieses PDFs ist nicht zulässig.

Sweden will accept the claim ten years after the acquittal[7] and Germany will accept the claim within six months after the acquittal.[8] The differences between the national legislation of the Member States will only become more obvious if more than these three neighbouring countries are included in this small comparative study.

But let us for a moment consider the purpose and the content of the EAW. Art. 1[9] of the EAW makes it clear that *"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 […]"* and *"Member States shall execute any European Arrest Warrant on the basis of the principle of mutual recognition […]"*. An EAW is thus a judicial decision that is supposed to travel freely across the Area of Freedom, Security and Justice. But what about the responsibility for the EAW – does that also travel freely across the Area of Freedom, Security and Justice, or does it stay within the borders of the issuing State?

The article will first give a short introduction to liability and the principle of mutual recognition. Then the choice of forum and choice of law in damage cases between private parties will be analysed before the immunity of States is analysed. The article will then propose another solution as to how citizens may be given a better position when it comes to claiming damages for losses following from being arrested and surrendered on an EAW.

## II. Liability and the principle of mutual recognition

The European Council defined the principle of mutual recognition as the cornerstone of judicial co-operation in both civil and criminal matters at the Tampere meeting in October 1999.[10] The Council also requested a programme of measures introducing the principle of mutual recognition into EU criminal law, which was presented by the Commission in January 2001.[11]

The Commission found that the use of mutual recognition was dependent upon the nature of the decision and the stage of the criminal proceedings and that the effectiveness of mutual recognition is therefore dependent upon a number of parameters such as whether double criminality should be a requirement, the safe-guarding of the rights of the victims etc. Whether States had liability arrangements in the event of acquittal was mentioned as one such specific parameter. It was further stressed that the specific parameters could either be taken into account in the specific measure under consideration or in autonomous measures which should apply for a specific parameter in general.

---

[7] Preskriptionslagen (1981:130), 2 §.

[8] Gesetz über die Entschädigung für Strafverfolgungsma#nahmen, § 10(1).

[9] OJ 2002 L 190/1: Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States.

[10] Tampere European Council 15 and 16 October 1999 – Presidency Conclusions, par. 33.

[11] OJ 2001 C 12/10–22: Programme of measures to implement the principle of mutual recognition of decisions in criminal matters.

https://doi.org/10.5771/2193-5505-2015-2-194
Generiert durch IP '3.142.194.12', am 23.07.2024, 18:12:06.
Das Erstellen und Weitergeben von Kopien dieses PDFs ist nicht zulässig.

Unfortunately, the issue of liability arrangements was not taken into account when the Commission later drew up the list of specific measures in the appendix to the programme and a general regulation of State liability under the principle of mutual recognition does not yet exist. Instead, the specific access to damages is regulated in each respective measure.

Examples of such regulation can be found in the freezing order,[12] the confiscation order,[13] the EEW[14] and the EIO.[15] In these instruments, the competent authorities of the executing State recognise the specific order as it is issued in the issuing State, and the citizen may afterwards direct a claim for damages against the authorities in the executing State. This way of handling the claim for damages has been called *the principle of authority*,[16] and seems widely used in cases where authorities in the executing State enact some measure of criminal investigation on the basis of recognition of a specific order by the competent authorities of another Member State. Another principle of liability, *the principle of proxy*,[17] is also found in instruments such as the Schengen Convention,[18] EIO[19], and the framework decision on Joint Investigation Teams.[20] These instruments provide the legal basis for the operation of an official from one Member State in another Member State. Should this official by liable for damages, the citizen may direct the claim towards the Member State on whose territory the damage occurred and this Member State will settle the case as if the official has been an official from that Member State. The Member State, from where the official was coming is then to reimburse the Member State of territory.

*The principle of authority* is generally used if the Member State is directly involved in the specific measure while *the principle of proxy* is generally used if the Member State has allowed officials from other Member State to operate within the territory of the Member State. The citizen will thus be able to direct his claim against the State on whose territory the investigation is conducted, regardless of whether the Member State itself or another Member State is to be seen as the Member State in charge of the criminal investigations.

---

[12] OJ 2003 L 196/45–55: Council Framework Decision 2003/577/JHA of 22 July 2003 on the execution in the European Union of orders freezing property or evidence, art. 11 and 12.

[13] OJ 2006 L 328/59–78: Council Framework Decision 2006/783/JHA of 6 October 2006 on the application of the principle of mutual recognition to confiscation orders, art. 9 and 18.

[14] OJ 2008 L 350/72–92: Council Framework Decision 2008/978/JHA of 18 December 2008 on the European evidence warrant for the purpose of obtaining objects, documents and data for use in proceedings in criminal matters, art. 18 and 19.

[15] OJ 2014 L 130/1–36: Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 regarding the European Investigation Order in criminal matters.

[16] H.B. F. M. Sørensen: *Den europæiske arrestordre og retten til erstatning for frihedsberøvelse*, Karnov Group, 2015, p. 89.

[17] ibid.

[18] OJ 2000 L 239/1-473: The Schengen Acquis as referred to in Article 1(2) of Council Decision 1999/435/EC of 20 May 1999, The Schengen Convention, art. 43, p. 32.

[19] OJ 2014 L 130/1–36: Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 regarding the European Investigation Order in criminal matters, art. 18.

[20] OJ 2002 L 162/1–3: Council Framework Decision of 13 June 2002 on joint investigation teams, art. 3.

https://doi.org/10.5771/2193-5505-2015-2-194
Generiert durch IP '3.142.194.12', am 23.07.2024, 18:12:06.
Das Erstellen und Weitergeben von Kopien dieses PDFs ist nicht zulässig.

It is of course relevant to consider if the Member State on whose territory an act causes damage under certain conditions may refuse liability even though the Member State has participated in the criminal proceedings. This possibility has been labelled *the principle of requisition,*[21] and requires the citizen to direct the claim towards the authorities of the Member State that has requested the criminal investigation in another Member State. This principle is not used anywhere in EU criminal law.

But the principle is found in national legislation in many Member States. Danish, German and Swedish law was used to show how the amount offered and the time limit to claim compensation varies. The legislation and case law of these three countries[22] all use the *principle of requisition* when citizens claim compensation for surrender from these three Member States to other Member States. In fact, only eight Member States seems to use *the principle of authority* when it comes to liability for arrests and surrenders following an EAW from another Member State.[23] *The principle of requisition* seems therefore to be the dominant principle when it comes to liability for arrests and surrenders on an EAW despite the fact the principle gives the citizen a weak procedural position as the citizen will have to direct the claim towards the issuing and typically foreign Member State.

The citizen who has to direct his claim towards the issuing Member State faces a first, important question: Which court shall be used– how shall the question of choice of forum be answered?

## III. Choice of forum in civil matters

As mentioned above, the framework decision on the EAW does not include any regulation of how the citizen should be able to claim damages for arrest and surrender and therefore does not include an answer to the question of choice of forum. We will therefore have to look into other sources, and we will start by comparing the damages case with a civil case, where a private party by his actions or negligence causes a loss for another private party and then faces a claim for compensation.

The choice of forum in civil cases is settled in EU law by a regulation from 2012.[24] According to article 4(1), a person may be sued in the Member State, where he lives. However, a number of exceptions have been given, so a person in certain situations may be sued in a Member State other than the one where he lives. Article 7(2) is one of these exceptions, granting the injured party the possibility to

[21] Sørensen (fn. 16), p. 89.

[22] Sweden: see ibid., pp. 129–130.Denmark: H. B. F. M. Sørensen: Erstatning for strafferetlig forfølgning i udleveringssager, *Tidsskrift for Kriminalret*, 2015, no. 1: 1–7.Germany: Gesetz über die Entschädigung für Strafverfolgungsma#nahmen (StrEG), § 2(3) ;Oberlandesgericht Köln, 6 Ausl 53/05 – 24/05.

[23] HB.F. M. Sørensen: *Den europæiske arrestordre og retten til erstatning for frihedsberøvelse*, 2015, p. 133.

[24] OJ 2012 L 351/1–32: Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

https://doi.org/10.5771/2193-5505-2015-2-194
Generiert durch IP '3.142.194.12', am 23.07.2024, 18:12:06.
Das Erstellen und Weitergeben von Kopien dieses PDFs ist nicht zulässig.

use the courts for the place where the harmful event occurred in cases related to tort, delict, or quasi-delict.

Let us for a moment compare the EAW from the issuing State and the subsequent arrest in the executing Member State with a private party who causes non-contractual damage to a citizen in another Member State. Given the arguments of a group of Member States, including Denmark, Germany, and Sweden as described above, the issuing Member State must be considered as the party responsible for the damage and therefore as the party who shall be sued. The party that suffers the loss is the citizen who is arrested on the basis of the EAW, and the loss suffered is the loss of freedom and the derived loss of income.

Article 4(1) of the regulation makes it clear that the responsible party must be sued at the courts at the place where the responsible party lives. The issuing Member State should then be sued in the courts of the issuing Member State. But article 7 (2) gives the injured party to right to also sue the party responsible for the damage at the place where the loss has been suffered. The citizen would then be able to sue the issuing Member State before the courts of the Member State where he lives.

But is it that obvious that "the harmful event", as understood by the regulation, is the arrest? Another understanding of "the harmful event" could be that the event was the decision to issue the EAW. If so, then "the harmful event" was initiated in one Member State, the issuing Member State, but "the harmful event" unfolded in another Member State, the executing Member State. In this understanding, where did "the harmful event" occur as understood by the regulation?

The CJEU has been asked this question, not in regards to an EAW but in regards to pollution. The case concerned a French mining company, *Mines de Potasse d'Alsace*, who apparently had released waste products from the mining operations into the Rhine. The water from the Rhine was then used by the Dutch gardener *G.J.Bier BV* in their production, where a number of plants were killed due to the waste products in the water. The gardener sued the mining company at the court of Rotterdam, which found itself incompetent as "the harmful event" of releasing the waste products to the Rhine had taken place in France. The gardener appealed this ruling, and the case ended before the Luxembourg court. The Court found, *"[…] that where the place of the happening of the event which may give rise to liability in tort, delict or quasidelict and the place where that even results in damage are not identical, the expression 'place where the harmful event occurred', […], must be understood as being intended to cover both the place where the damage occurred and the place of the event giving rise to it"*.[25] The court then found that it was for the plaintiff to decide whether he would prefer the courts for the place where the damage occurred or the courts for the place of the event which caused the damage.

Were the same principle to be applied to a case of surrender on an EAW, the citizen could refer to the fact that he has suffered his loss where he had his daily

[25] European Court of Justice (ECJ) 30.11.1976, case C-21/76 *(Handelswekerij G. J. Bier BV/Mines de potassed'Alsace SA)*,ECR 1735, margin no. 24.

https://doi.org/10.5771/2193-5505-2015-2-194
Generiert durch IP '3.142.194.12', am 23.07.2024, 18:12:06.
Das Erstellen und Weitergeben von Kopien dieses PDFs ist nicht zulässig.

living as this would be the place where he would have enjoyed his freedom if he had not been arrested on an EAW. This would then entitle him to use the courts of the Member State where he lives and where he in general would be assumed to be in a position to understand the legal culture and the language when the case is heard in court.

But States are not private parties and therefore not bound by the regulation – article 1(1) explicitly omits liability of the State for acts and omissions in the exercise of State authority, the principle of *acta iure imperii*. If a citizen should be able to use the courts of the Member State where he lives, then the first requirement would be that the Member State agrees to remove the exception of *acta iure imperii* from the regulation in cases concerning an EAW. But is this enough to solve the problem – or is the general principle of State immunity as this is defined in international customary law also an obstacle?

## IV. The principle of State immunity

### 1. International Law

The International Law Commission started analysing the principle of State Immunity in 1977, but it did not manage to present a draft for a convention on State immunity until 14 years later, in 1991.[26] The UN General Assembly then worked on the matter for another 13 years before the Convention of State Immunity was adopted in 2004.[27] Article 5 of the convention states that:

"A State enjoys immunity, in respect of itself and its property, from the jurisdiction of the courts of another State subject to the provisions of the present Convention."

The International Law Commission found that article 5 expressed the main principle of State Immunity as the Commission had "considered all relevant doctrines as well as treaties, case law and national legislation" when formulating article 5.[28]

However, according to the Convention, State immunity is not absolute. Article 7 gives a contracting Party the opportunity to give its consent to the exercise of jurisdiction by the courts of another State, while article 8 removes State immunity if a State initiates or intervenes in proceedings in front of a court of another State and article 9 removes State immunity regarding counterclaims in proceedings initiated by the State in front of a court of another State.

Furthermore, the Convention denies State immunity in eight specific areas, where the State engages in commercial or civil matters in another State. Article 10

---

[26] Official Records of the General Assembly, Forty-sixth session, Supplement No. 10: A/46/10: Report of the International Law Commission on the work of its forty-third session, 29 April – 19 July 1991.

[27] United Nations Convention on Jurisdictional Immunities of States and Their Property, adopted by the General Assembly of the United Nations on 2 December 2004

[28] Official Records of the General Assembly, Forty-sixth session, Supplement No. 10: A/46/10: Report of the International Law Commission on the work of its forty-third session, 29 April – 19 July 1991, page 23.

https://doi.org/10.5771/2193-5505-2015-2-194
Generiert durch IP '3.142.194.12', am 23.07.2024, 18:12:06.
Das Erstellen und Weitergeben von Kopien dieses PDFs ist nicht zulässig.

thus denies State immunity when a State engages in commercial transactions, article 11 denies immunity when a State has entered into contracts of employment, article 12 denies immunity when a State is responsible for personal injuries and damage to property, article 13 denies immunity when a State is the owner or user of a property, article 14 denies immunity in cases concerning intellectual and industrial property, article 15 denies immunity when a State participates in commercial and collective bodies, article 16 denies immunity in regards to ships owned or operated by a State and finally article 17 denies immunity in regards to arbitration agreements.

These exceptions must be seen as exhaustive, and liability for criminal proceedings and instruments like the EAW is thus protected by State immunity as this is defined by the Convention's definition of the so-called restrictive doctrine, described above.[29]

The Convention was opened for State signatures in 2004, and would, according to article 30, enter into force when 30 countries had deposited their instrument of ratification. Article 28 made it possible to sign the Convention until 17 January 2007. Unfortunately, only 28 States have signed the Convention and only 17 States have deposited the instrument of ratification. The Convention has therefore not entered into force. 15 Member States of the European Union have signed or ratified the Convention.[30]

The Convention however has to be seen as the codification of international law, regardless of the fact that it has not entered into force. The first reason for this is the exhaustive preparatory work on the Convention as described above. The second reason for this is the case law of ICJ and ECtHR, who have dealt with the matter of State immunity in a number of cases.[31]

## 2. Case Law of the ICJ

The leading case is the case *Germany v. Italy*,[32] where a number of Italian and Greek courts had found Germany liable for damages caused by German occupational forces during WWII. The judgment had been followed by measures of constraint on German assets in Italy. Germany asked the ICJ to find that Italy had violated its obligations to accept the immunity of Germany in front of Italian courts.

The case concerned *jus cogens* obligations as the claim for damages was related to the violations of human rights committed by the German occupational forces. Such

[29] H. Fox: In Defence of State Immunity: Why the UN Convention on State Immunity Is Important, *The International and Comparative Law Quarterly*, 55, no. 2 (2006): 399–406.

[30] https://treaties.un.org/Pages/ViewDetails.aspx?mtdsg_no=III-13&chapter=3&lang=en, last visited on 1 April 2015.

[31] H.B. F.M. Sørensen: International and European Approaches to Extraterritorial Liability for Violation of Fundamental Rights in International Criminal Law, in Wolfgang Benedek et al. (eds.), *European Yearbook on Human Rights*, Intersentia Uitgevers N. V., 2014, 269–281.

[32] ICJ February 3, 2012 *Germany v. Italy: Greece intevening – Judgement of 3 February 2012 on Jurisdictional Immunities of the State*.

https://doi.org/10.5771/2193-5505-2015-2-194
Generiert durch IP '3.142.194.12', am 23.07.2024, 18:12:06.
Das Erstellen und Weitergeben von Kopien dieses PDFs ist nicht zulässig.

violations are not comparable to the depreciation of freedom on the basis of an EAW, but the case involves two important questions of relevance for an analysis of State immunity in regards to claims based on an EAW. The first question is related to the analysis done by the ICJ regarding the content of State immunity and the existence of a tort exception to State immunity while the second element is related to the argument of the Italian government concerning an obligation to disregard State immunity if the case must be considered the last resort of the plaintiff.

The ICJ recalled that neither Germany nor Italy are parties to the UN Convention on State immunity, and the ICJ therefore had to determine whether State immunity was part of customary international law. The ICJ referred to the work of the International Law Commission on the UN Convention on State Immunity, and concluded on this basis that *"States generally proceed on the basis that there is a right to immunity under international law, together with a corresponding obligation on the part of other States to respect and give effect to that immunity"*.[33] Following this, the ICJ found that *"[…] customary international law continues to require that a State to be accorded immunity in proceedings for torts allegedly committed on the territory of another State by its armed forces and other organs of State in the course of conduction an armed conflict"*.[34] It seems most likely that the ICJ would reach the same result in a case of surrender on an EAW as the ICJ in paragraph 64 questions whether the UN Convention on State immunity reflects customary international law when deciding to include acts of *acte jure imperii* in the tort exception provided by article 12 of the Convention. The answer to the first question must therefore be that State immunity covers acts of *acte jure imperii* regardless of whether the damage is suffered on the territory of another State.

The second question is related to arguments by the Italian Government saying that Italian courts had to exercise jurisdiction as the proceedings were the last resort for the claimants to seek compensation for their losses. If the argument of last resort is accepted, the court of the executing Member State must accept the case if this would be the last resort for the surrendered citizen. The ICJ concluded here that *"The Court can find no basis in the State practice from which customary international law is derived that international law makes the entitlement of a State to immunity dependent upon the existence of effective alternative means of securing redress. Neither in the national legislation on the subject, nor in the jurisprudence of the national courts which have been faced with objections based on immunity is there any evidence that entitlement to immunity is subjected to such a precondition"*.[35]

The ICJ thus seems to consider that State immunity of acts covered by *acte jure imperii* is absolute and not dependent upon whether the claimant may be able to seek redress through other proceedings or not. State Immunity will therefore apply to cases where a citizen is seeking compensation following the surrender on an EAW.

[33] ibid., par. 56.
[34] ibid., par. 78.
[35] ibid., par. 101.

https://doi.org/10.5771/2193-5505-2015-2-194
Generiert durch IP '3.142.194.12', am 23.07.2024, 18:12:06.
Das Erstellen und Weitergeben von Kopien dieses PDFs ist nicht zulässig.

### 3. Case Law of the ECtHR

The right to liberty and security is guaranteed by ECHR article 5. Article 5(1)(a)-(f) allows for the deprivation of freedom in six situations, of which the arrest on the basis of a reasonable suspicion for having committed an offence and the arrest with a view to extradition are especially important. These arrests are lawful under art. (5)(1)(c) and 5(1)(f), respectively.

ECtHR has dealt with arrests in extradition cases in two important cases: *Stephens v. Malta*[36] and *Toniolo v. San Marino and Italy*.[37]

Charles Stephens resided in Spain when Maltese authorities issued a request for his extradition from Spain to Malta. He was arrested on 5 August 2004, but was released again on 22 November 2004 as the Maltese court did not have the competence to issue such a request. The Maltese authorities issued a new request, following which he was arrested again on 1 December 2004 and extradited to Malta on 9 September 2005.

Mr. Stephens then requested ECtHR to examine whether Spain and Malta had violated art. 5 ECHR claiming to have been unlawfully arrested as the request of his extradition was issued by an incompetent court.

The ECtHR started its analysis by commenting on ECHR art. 1, saying "The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms in Section 1 of [the] Convention" as a Contracting State only may be held responsible for violations of the convention within its jurisdiction. The ECtHR then referred to the case law of the court and found that the term "jurisdiction" is essentially a term referring to territorial jurisdiction. The ECtHR then concluded that Mr. Stephens had been under the control and authority of the Spanish authorities during his arrest, but that the Spanish authorities had only acted on the basis of the Maltese request for extradition. The responsibility for the procedural and substantive legality of this request lay solely with the Maltese authorities as the extraditing State in general should be able to presume the validity of such a request. The Court then decided to only hold Malta responsible for any violation of the Convention.[38]

The question was brought to the ECtHR again in *Toniolo v. San Marino and Italy.* This case started by Italy's issuance of a request for the arrest and extradition of Giuseppe Toniolo from San Marino to Italy on 10 August 2009. Toniolo was then arrested on 12 August 2009 and extradited on 19 September 2009. Toniolo took the case to the ECtHR as he found his rights according to article 5 of the Convention violated by Italy and San Marino. The Court dealt with the complaints against Italy by stating that *"The Court reiterates, that an act, having been instigated by a requesting country on the basis of its own domestic law and followed-up by the requested country in response to its treaty obligations, can be attributed to the requesting country […] notwithstanding that the act was executed by the requested country […]. However, the Court*

---

[36] *Stephens vs. Malta, No. 1*, application no 11956/07, Judgement 21 April 2009.
[37] *Toniolo vs. San Marino and Italy*, application no44853/10, Judgement 19 November 2012.
[38] *ECtHR, Stephens vs. Malta, No. 1, (fn. 36), margin 46-54.*

https://doi.org/10.5771/2193-5505-2015-2-194
Generiert durch IP '3.142.194.12', am 23.07.2024, 18:12:06.
Das Erstellen und Weitergeben von Kopien dieses PDFs ist nicht zulässig.

*notes that, while it is true that the complaint may engage the responsibility of Italy under the Convention, and that the responsibility lay with Italy to ensure that the arrest warrant and extradition request were valid as a matter of Italian law, both substantive and procedural, the unlawfulness in the present case, unlike in the case of Stephens, did not arise from the non-compliance with Italian domestic legal requirements. The unlawfulness arose as a result of the quality of San Marino law on the matter".*[39] Italy was then not held responsible, while San Marino was found to have violated art. 5(1).

The two cases show that the executing Member State will fulfil its obligations according to the ECHR if the extradition procedure is handled according to the national laws of the executing Member State. The executing Member State is thus responsible according to ECHR art. 5(1)(f). The issuing Member State is responsible for the criminal proceedings as such, and will therefore be responsible according to ECHR art. 5(1)(c). A claim for compensation for criminal proceedings which have ended in acquittal or non-prosecution, will therefore, according to the case law of the ECtHR, have to be directed against the issuing Member State.

The result will therefore be the same, regardless of whether the analysis starts from customary international law, from the case law of the ICJ, or from the case law of the ECtHR: The executing Member State is responsible only for handling the procedure of surrender according to national law in the surrendering Member State while the responsibility for the criminal case as such lays with the issuing Member State. The citizen will then have to use the courts of the issuing Member State if he wants to claim compensation for the arrest and surrender on the EAW except for cases where the executing Member State has failed to handle the surrender procedure according to its own laws.

## V. Liability and mutual recognition

It has been shown that it is of procedural as well as substantive importance for the citizen whether he may direct a claim for compensation against the issuing or the executing Member State – a 50 day arrest would only lead to a compensation of 1.250 euros in Germany while the same period would lead to a compensation of at least 6.106 Euros in Denmark, but Denmark would only accept the claim within two months after the criminal proceedings has ended while Sweden will accept the claim within ten years. These are just examples based on three neighbouring countries, and an even bigger divergence must therefore be expected if the same analysis is conducted across all Member States. It was also shown, that the three Member States along with a huge number of other Member States use *the principle of requisition* in these cases – a principle that is only used in these cases, as claims for compensation in general are handled by *the principle of authority* or *the principle of proxy*. The citizen, who has been arrested and surrendered on an EAW will there-

[39] *ECtHR, Toniolo vs. San Marino and Italy* (fn. 37), margin no 56.

https://doi.org/10.5771/2193-5505-2015-2-194
Generiert durch IP '3.142.194.12', am 23.07.2024, 18:12:06.
Das Erstellen und Weitergeben von Kopien dieses PDFs ist nicht zulässig.

fore have to hold the issuing Member State responsible for the losses suffered from the arrest and surrender.

The case has some similarities with a civil case where a private party in one Member State is responsible for the acts leading to losses for a private party in another Member State. The general principle in such cases is to use the courts where the Party responsible for the losses is domiciled, but the suffering party is also given the possibility to use the courts of the place where the loss has been suffered. If the same principle should be applied to a case concerning the arrest and surrender on the EAW, then the citizen should be able to choose to use the courts of the place of the criminal proceedings or the courts of the place where he would have enjoyed his freedom if he had not been arrested. These rules however do not apply to the acts of *acte jure imperii*, and the citizen may therefore only use these rules if the wrongdoer is a private party. If the wrongdoer is another Member State, then the wrongdoer would in general be assumed to have a huge advantage in regards to resources and legal capacities, and it may therefore also in general be assumed that the legal position of the citizen is strengthened compared to the situation of the wrongdoer as a private party.

However, this assumption cannot be confirmed. Customary international law and the case law of the ICJ confirm the principle of State immunity, and the citizen will therefore have to go to the courts of the issuing Member State. The assumption cannot be confirmed through the case law of the ECtHR either, as the case law shows that the executing Member State may only be held liable for not having observed the procedural requirements for extradition or surrender according to the national law of the executing Member State while the responsibility for the criminal proceedings as such lays with the issuing Member State even though the initial arrest took place in the executing Member State.

If criminal proceedings involve the issuance of an EAW, the citizen will have to direct his claim for compensation against the issuing Member State and he will have to use the courts of the issuing Member State, unless the Member State is among the few who have accepted responsibility for criminal proceedings following the surrender or extradition.

If the issuing Member State is the home State of the citizen, the situation would be as if the case had been a traditional national criminal case and the EAW is of no relevance as such. But if the issuing Member State is not the home State of the citizen, the citizen will have to use the courts and the laws of a foreign Member State with all the difficulties in regards to language, understanding of the law, understanding of the legal culture etc. The procedural costs and the procedural risks must then be taken into consideration against the perhaps only few thousand euros that the citizen may be entitled to if the case is won. These considerations will most likely often lead to the conclusion that the citizen should not attempt to pursue the question of compensation any further, regardless of the fact that he has been acquitted or the prosecuting authorities have dropped the charges before the case has been heard in court.

https://doi.org/10.5771/2193-5505-2015-2-194
Generiert durch IP '3.142.194.12', am 23.07.2024, 18:12:06.
Das Erstellen und Weitergeben von Kopien dieses PDFs ist nicht zulässig.

But the EAW is an instrument of mutual recognition, and the limited liability of the Member States as shown above must therefore be evaluated in this context. The principle of mutual recognition means, as is well known by now, that decisions of the judicial authorities in one Member State will be recognised by the judicial authorities in any other Member State unless one of the specific reasons for non-execution is established. The principle of mutual recognition thus means that judicial authorities in any Member State can make decisions with a binding effect for the judicial authorities and the citizens in any other Member State.

The principle of mutual recognition is however only applicable in regards to the issuance and execution of the EAW, not subsequent decisions on liability. Should the citizen seek compensation, he cannot rely on the principle of mutual recognition and use the courts of the Member State where he lives. Instead, he will have to use the law and the courts of the executing Member State unless he lives in one of the few Member States who accept liability on behalf of other States in extradition cases. The principle of mutual recognition is thus constructed so that the EAW has legal power throughout the Union while the liability for the EAW stops at the borders of the issuing Member State. It is of course a political decision whether or not the principle of mutual recognition shall have this feature, but it would from an overall understanding of the principle of mutual recognition and the understanding of an area of freedom, security and justice seem more logical to use the same principles on liability as apply to the EAW before questions of liability arise.

Should the Member States decide to let the principle of mutual recognition cover not only the judicial decision but also the liability flowing from this judicial decision, then two options seem available. The first option is to remove State immunity within the Union in cases concerning liability for mutual recognition instruments, the second option is to apply mutual recognition on liability.

The first option, removing State immunity, requires two decisions. First, the Member States must agree to amend article 1(1) of regulation no. 1215/2012 on jurisdiction and the recognition and enforcement of judgements in civil and commercial matters, so *acte jurii empirii* are covered by the regulation, at least in regard to acts related to the Area of Freedom, Security and Justice. And second, the Member States must declare that they will not plead State immunity if they are brought before courts of other Member States in regard to acts related to the Area of Freedom, Security and Justice.

This will provide the legal basis to allow a citizen to bring a case against the issuing Member State concerning damages for arrest and surrender on an EAW before the courts in the Member State where the citizen lives. This will allow the citizen to use the courts and the laws that are most easily available to him as the language and the legal culture will be the language and legal culture of the place where he lives. However, this will also make it possible for e. g. a Danish judge to rule on the liability of e. g. Germany, and the construction will therefore also represent a new approach to the principle of mutual recognition. This new approach may be complicated by the fact that Member States have different liability

https://doi.org/10.5771/2193-5505-2015-2-194
Generiert durch IP '3.142.194.12', am 23.07.2024, 18:12:06.
Das Erstellen und Weitergeben von Kopien dieses PDFs ist nicht zulässig.

schemes when it comes to State liability also in internal cases. If, in the example mentioned above, Denmark were to have developed State liability to cover areas which are not covered by State liability in Germany, Germany will be held liable in Denmark for an act for which Germany would not be liable for under German law. The solution therefore has its special complications, which makes it difficult to see this option implemented in real life.

Let us therefore consider the second option, in which mutual recognition is applied to the decision of liability. The citizen must then direct his claim for damages against the authorities in the Member State where he lives. These authorities will process the claim as if the case had been a normal criminal case within that Member State and thus without the question of the citizen's having been surrendered on an EAW. The claim will be settled according to national law and with the amounts that are used for criminal proceedings in that specific Member State, and the citizen will therefore not get a result any different from any other criminal case direct against citizens in the specific Member State. This may then be supplemented by an agreement of reimbursement between the Member States, but that is irrelevant for the citizen. This model is an example of *principle of proxy* as described above and is general used in other instruments within EU law.

This model will furthermore not require any amendments in regulation 2015/2012 or any declarations concerning partial abolition of customary international law on State immunity. Furthermore, this model will let the citizen use the language, the law, and the courts of the place, where he lives and therefore will probably be most familiar with. Furthermore, the result of the case concerning damages would be as if the case had been a traditional national criminal case in his Member State, meaning the conditions of liability and the rates used to calculate the compensation would be as if the case had been a traditional national criminal case. This model would thus respect Member State sovereignty, national legislation on damages for criminal proceedings ending with acquittal or non-prosecution, and the principle of mutual recognition. The model must be considered simple to implement and easy to use; the only problem of the model is of course the costs that will be put on the issuing Member State.

## VI. Conclusion

It has been shown that the EAW implements the principle of mutual recognition in a manner which grants the Member States the power to have citizens arrested in other Member States and then surrendered to the issuing Member State without giving the citizens the possibility to hold the Member States liable for their actions in regards to issuing and executing an EAW.

Instead, a claim for damages must be handled using national law of the Member States. This is extremely difficult, as the differences between even neighbouring Member States are of such a magnitude that professional assistance is needed. The costs for such assistance, the procedural risks, and the amount of compensation the

https://doi.org/10.5771/2193-5505-2015-2-194
Generiert durch IP '3.142.194.12', am 23.07.2024, 18:12:06.
Das Erstellen und Weitergeben von Kopien dieses PDFs ist nicht zulässig.

citizen may receive if the case is won make it almost impossible for citizens to pursue such claims. The result is an effective immunity for the Member States in regards to liability for issuing and executing EAWs.

The analysis has also shown that if the damage had been caused by a private party and not a State, then the citizen would be able to use the courts of the place where the damage had been suffered. As the EAW is an instrument which deprives the suspected citizen of his freedom, the loss will be the personal freedom. The place where the damage has been suffered would be the place where the citizen would have enjoyed his freedom if he had not been arrested. This would in general be the Member State where he normally lives.

But States are States and not private parties. It is therefore not possible to use the courts of the citizen home State if the home State is the executing and not the issuing Member State – had the home State been the issuing Member State, the case in general would be a normal criminal case involving only one jurisdiction and there would then not be a problem in regards to liability. But the issuing Member State will enjoy State immunity as this is defined in customary international law and in the case law of the ICJ before of the courts of the executing Member State, and the citizen cannot use the courts of the executing Member State to claim damages. Instead, he will have to go to the executing Member State and use the courts of this State with all the problems and risks in regards to language, understanding of the law etc. The ECtHR has taken the same approach – the issuing Member State is responsible for the criminal case as such, while the executing Member State only is responsible for handling the surrender procedure in accordance with national law.

Regardless of how the possibility to claim damages for an arrest and a subsequent surrender is addressed, the conclusion remains the same: it is very difficult, if not impossible, to hold Member States liable for issuing and executing EAW's.

But this result is also very difficult to align with the understanding of the European Union as an area of freedom, security and justice. The instruments of mutual recognition that are used within this area must not only give the Member States the powers needed to provide for an effective criminal procedure but must also give the citizens the powers needed to hold Member States liable for their actions in this regard.

Should the citizens be given the possibility to hold Member States liable for their actions, then two models seem relevant.

The first model was based on the possibility to bring the issuing Member State in front of the courts of the home State of the citizen. This model would require an amendment of regulation 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, and would require a declaration concerning waiver of State immunity as this is defined in customary international law. This model did not seem convincing as this would allow for judges in one Member State to rule upon the liability of the executing Member State and would therefore contain a risk for the executing Member State to be held

https://doi.org/10.5771/2193-5505-2015-2-194
Generiert durch IP '3.142.194.12', am 23.07.2024, 18:12:06.
Das Erstellen und Weitergeben von Kopien dieses PDFs ist nicht zulässig.

liable beyond what was possible in national law of the executing Member State. This model was found to be unrealistic.

The second model was based on the possibility to let the courts in the home State of the surrendered citizen make a final ruling on damages for the arrest and the surrender as if the case had been a normal, national criminal proceeding within that Member State. The issuing Member State may then be obliged to reimburse the home State of the citizen the costs which have been paid in damages as the issuing Member State then accepts the ruling on the principle of mutual recognition. This model develops the principle of mutual recognition so that the Member States not only oblige each other to recognise judicial decisions concerning the EAW but also judicial decisions concerning the liability following from issuing an EAW. The model will also be in line with general principles of customary international law, the case law of the ECtHR, and general principles of EU law concerning liability and tort. The main problem with the model is of course the financial burdens it will put on the Member States – but one could ask if the financial burden for issuing EAW's is for the citizens or for the Member States to bear.

https://doi.org/10.5771/2193-5505-2015-2-194
Generiert durch IP '3.142.194.12', am 23.07.2024, 18:12:06.
Das Erstellen und Weitergeben von Kopien dieses PDFs ist nicht zulässig.