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**“NON-EXTRADITION OF NATIONALS
SOVEREIGNTY VERSUS JUSTICE”**

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1. Introduction

With the increase of globalization we are witnesses that the criminality, even common crime, has lost its primarily territorial (domestic) nature and we are faced with the problem of international or transnational crime. With criminals acting and moving across borders, a need and a common practice for exercise of extraterritorial criminal jurisdiction has arisen. Also, with migration across borders, resettlement and intermarriage of people becoming an everyday fact of life, phenomena such as multiple nationality and naturalization have become increasingly normal features of our globalized life. Due to the increased mobility of individuals including criminals and due to the trans-boundary or international nature of crimes involved, extradition is thus often indispensable to bringing the accused to justice in a foreign jurisdiction. It is thus clear that extradition is not an outdated institution but remains central to international criminal law and to international criminal justice even in the era of international criminal jurisdictions.

One of the most prominent examples of this development relates to one of the subjects of this study, the non-extradition of nationals.¹ A realistic study of the subject must recognize that the (non-) extradition of nationals is a question surrounded and a business driven by emotions and national sentiments. It is for this reason that the nationality exception has survived so many changes in the international community. In a world where a considerable amount of persons hold multiple nationalities and naturalization is increasingly open to the masses, the determination of the relevant status of individuals in relation to extradition is not a straightforward matter. It thus requires focused study, especially because attitudes to international criminal justice have been significantly altered over the years, changing our perception of the non-extradition of nationals.

2. Historical review – origins and development

Non- extradition of national is a principle that is well known in the extradition practice all over the world and even thought it dates from medieval times and considerable changes in the international legal system, in international criminal law and in

¹ In the following text the principle of non-extradition of nationals is also named as nationality exception rule

international cooperation in criminal matters have occurred, the non-extradition of nationals has survived and it remains a constant feature of every-day life.

Albeit the roots of the practice go back to ancient times, this ancient practice is no longer relevant in modern times.² The origins of the modern practice of non extradition of nationals date back to medieval times. The starting point appears to be the policy that governed the extradition relations between Low Countries and France, but the first treaty in which an express exemption of nationals appeared was the treaty of 1834 between France and Belgium.³ Since then, the non extradition of nationals as a rule mainly was prescribed in the bilateral agreement between states, for later to be mentioned in the international agreements.⁴

The treatment that was given to the nationality exception rule in the bilateral treaties defer from state to state, or case to case, mainly depending on the fact whether the state had continental or common law system, as well as on the treatment that by the national system was given to this rule.⁵

As to the international agreements, focusing on the territory of Europe, the existence of the nationality exception rule and its predominance is well documented in multilateral European extradition agreements.

The European Convention on Extradition⁶ in its Article 6, with the provision that the Contracting Parties have the right to refuse extradition of their nationals, accepts the

² Ivan A. Shearer, *Non extradition of nationals, A review and proposal*, Adelaide Law Review Association, School of Law, University of Adelaide, 1966, pg.274

³ o.c. sq. In also can be mentioned that France led the world in the matter of extradition and its practice in regard of nationals was widely emulated.

⁴ The accent of the study will be put on the territory of Europe, even though in the infra another countries may be mentioned.

⁵ For example the France was strong supporter of this rule and consider it as a well stated international principle deeply implemented in national legal system, whereas the British Courts have never countenanced the argument that the non extradition of nationals is a customary rule of international law and ought therefore to be implied in the treaties. Here it is worthy to mention that Germany extended its jurisdiction to nationals that committed a crime abroad and that this principle directly influenced on non extradition of German nationals. As to the Italy, even though in the early 1889, following the Government Commission Rapport, a new article in the Penal code that forbade the extradition of national, was added, after 1930 whole different practice was adopted, since the Penal code of that year enacted that extradition of national is not granted unless specifically provided for in international conventions. Republic of Macedonia falls under the countries that in the constitution have implemented the rule of non extradition of nationals.

⁶ It was concluded within the Council of Europe in 1957. The European Convention on Extradition was followed by two additional protocols: Additional Protocol to the European Convention on Extradition from

non extradition of nationals as one of extradition principles, also prescribing opportunity for the States to clarify the complicated status of certain number of their inhabitants, by attaching a declaration defining the meaning of the term 'nationals' for the purposes of the application of the convention.

The Benelux Treaty on Extradition and Mutual Assistance in Criminal Matters⁷ prevents the extradition of nationals of the contracting parties and it lays down an obligation not to extradite, which provision makes it more categorical than the European Convention on Extradition.

As to the Convention on Extradition between Member States of the European Union⁸ this convention makes attempt to reverse the traditional regime relating to the nationality exception, stating in article 7 that extradition may not be refused on the ground that the person claimed nationality of the requested Member State within the meaning of Article 6 of the European Convention on Extradition. In other words, this EU Convention aimed at rendering the nationality exception an exception in European extradition.⁹

If an overview of the European extradition agreements is made, it can be summed that these agreements demonstrate a hesitant move away from the nationality exception, even though some fail to provide an obligation to prosecute if the requested State refuses to hand over its nationals.

Considerable progress regarding nationality exception was made with the Council Framework Decision on the European Arrest Warrant and The Surrender Procedures

15 October 1975 and Second Additional Protocol to the European Convention on Extradition from 17 March 1978.

⁷ The treaty was signed on 27 June 1962 in Brussels and was followed by one supplementing and amending protocol from 11 May 1974.

⁸ Council Act of 27 September 1996, published OJ C 313 of 23.6.1996

⁹ This comes from the explanatory report attached to the Council Act on the convention where in paragraph 1 the principle that extradition may not be refused on the ground that the person claimed is a national of the requested Member State within the meaning of Article 6 of the European Convention on Extradition, is being established and in paragraph 2 a possibility for derogation from the general principle laid down in paragraph 1, is provided, for, in paragraph 3, a system, which will encourage a review of the reservations made, to be provided.

between the Member States.¹⁰ Even though the EWA still mentions nationality as a ground for refusal of execution of the warrant, this is done in the article 4(6) that deals with optional grounds for refusal of execution and may be invoked only under certain conditions, which makes the non extradition of nationals exception, not a rule. The article gives the possibility to the executing Member State to refuse execution of the EAW if the requested person is staying in, or is a national or a resident of the executing Member State and that State undertakes to execute the sentence or detention order in accordance with its domestic law. The logical consequence of this article is that if local laws do not permit enforcement of the sentence in the State of nationality and the undertaking referred to cannot be given, the execution of the European arrest warrant may not be refused.¹¹ From non less importance for the subject is Article 5(3), which permits Member States to condition the execution of an EWA to the fact that the person surrendered – being a national or a resident of the executing Member State – is returned to the executing Member State in order to serve there the custodial sentence or detention order passed against him in the issuing Member State. So although the nationality exception rule is not abandoned totally, with the birth of a restriction on the right of parties to refuse extradition/surrender of their nationals, a new climate that eventually will lead to this abandonment was created. In this sense, despite the fact that the European Arrest Warrant is a truly novel instrument, it does not signal an era free from disputes relating to the extradition or surrender of nationals.

Albeit, a move towards a decreasing reliance on the nationality exception in the past years can be noticed, the fact that the nationality exception is not completely abandoned and the fact that not every country on the territory of Europe is member state of EU, remain. Thus the European conventions dealing with extradition still remain in force for these non-EU countries, being basic source of extradition regulations, thus source for implementation of the principle of non-extradition of nationals.

¹⁰ Adopted by the Council of the European Union on 13 June 2002

¹¹Zsuzsanna Deen-Racsmany, *Active Personality and Non-extradition of Nationals in International Criminal Law at the Dawn of the Twenty-first Century; Adapting Key Functions of Nationality to the Requirements of International Criminal Justice*, Leiden, E.M. Meijers Institute of Legal Studies, Faculty of Law, Leiden University, 2007 chapter 4 pg.22

3. Legal nature and content of the principle of non-extradition of nationals

3.1. *Legal nature of the principle of non-extradition of nationals*

One of the most interesting topics arising from the principle of non-extradition of nationals is its legal nature, laying the main question: “Has the non-extradition of nationals a human right element to it”? The answer, as obvious as it may seem needs to be elaborated since it contains several important aspects.

It is clear that here we are dealing with a principle which is prescribed in international documents or in national law¹² and relays first and foremost with the pure concept of nationality and through it to the state sovereignty. The nationality is inseparably linked to the concept of state-hood, as permanent population (i.e. nationals) is one of the elements of the definition of the state. Thus the non-extradition of nationals is more of a state policy regarding its nationals, then a right that the State provides for its nationals. The protection of nationals and their non-extradition among other things lays in the states’ fear of loss of sovereignty or some other reason that has its roots in the matter that touches the state sovereignty and not in the human rights concept.¹³

If we observe the position that Republic of Macedonia has in terms of non-extradition of national, it is obvious that we are talking more about state policy rather than human rights. The Constitution of Republic of Macedonia prescribes the principle of non-extradition of nationals as a non-exceptional rule. This is done in the part 1 of the Constitution¹⁴ that contains only the basic provisions regarding the State, thus it is clear that this principle is a matter of a state policy. Moreover, the rights and liberties guaranteed to citizens are prescribed in the part 2 of the Constitution, separately for the basic provisions and non-extradition of nationals, respectively.

The situation is same in Croatia, where in article 9 of the Constitution a nationality exception is prescribed, separately from human rights and liberties. The non-extradition of nationals is mentioned in the German Constitution as a non-exceptional

¹² Till now this principle has never been considered as a principle of customary international law, hence the customary international law does not impose a duty on states to extradite persons apprehended on their territory. Also, among the states there is a lack of general obligation (practice) of extradition or prosecution of nationals, thus the material element needed to qualify this principle as a customary rule is missing.

¹³ For the reasons justifying the non-extradition of nationals, see *infra*.

¹⁴ The Constitution of Republic of Macedonia was adopted in 1991 and was followed by 31 amendments

rule and this is done in the part I of the constitution that deals with the basic rights. In the Bulgarian Constitution the non-extradition of nationals is prescribed as an exceptional rule in the article 25 (4), in the part of fundamental rights and duties of citizens. In part I of the Italian Constitution that deals with rights and duties of citizens, in the part concerning civil rights, precisely in article 26, the extradition is mentioned, not mentioning the non-extradition of nationals as a rule.

Despite the fact that the states' practice in prescribing the non-extradition of nationals in its constitutions is not a clear indicator of the legal nature of the nationality exception rule, hence this practice is far from uniform and there are legal systems in which the non-extradition of nationals is mentioned in the constitution as one of the basic rights that the state provides to its citizens, it is the authors opinion that the principle of non-extradition of nationals is not, and cannot be seen as a human right. The state first and foremost is the one that prescribes who are its nationals and defines the circumstances for acquiring a state citizenship, and thus the conditions under which a citizenship can be subtracted and also prescribes the policy for protection of its nationals, whether this policy is subject to limitations or not. Also, in addition to the fact that non-extradition of nationals is matter of state policy is the fact that the international agreements dealing with extradition contain provisions according to which it is up to the state to decide whether a national will be extradited or not, so it is a state policy whether a national will be protected in sense of refusing its extradition or not. Here it is the requested state which claims the "privilege" on the behalf of the extraditee to refuse the extradition, without making any inquiry into the opinion of its national.

The general court practice that the nationals can not invoke to the violation of the provision for non-extradition of nationals as they can invoke to violation of their human rights prescribed in national law as well as in the international conventions refers to the fact that the non-extradition of nationals in general is a principle which is established as a state policy concerning protection of nationals. In verification of this statement is the case law of ECHR, which speaks of violations of human rights in respect of extradition¹⁵, thus a case law practice concerning only the violation of principle of the non-extradition of

¹⁵ ex: length of detention while waiting of extradition, extradition as a possibility of violation of art.3 etc.

nationals could not be found.¹⁶ That the European Convention on Human Rights does not provide specific protection against extradition is clearly seen from the opinion shared by the European Commission on Human Rights concerning Article 3, paragraph 1, of the Fourth Additional Protocol to the Convention followed by the explanatory report on this Protocol.¹⁷ In the case of *X v. Austria*, the Commission defined expulsion as a procedure under which "a person is obliged permanently to leave the territory of the State of which he is a national without being left the possibility of returning later", using terminology that evidently serves to support the decision of the Commission that extradition does not fall under the concept of expulsion and, consequently, does not fall under the prohibition of Article 3. Similarly, in *Brumuckmann v. Federal Republic of Germany*, the Commission, referring to international law, made another attempt to distinguish between expulsion and extradition: "Expulsion is the execution of an order to leave the country, while extradition means the transfer of a person from one jurisdiction to another for the purpose of his standing trial or for the execution of a sentence imposed upon him."

Nevertheless the non-extradition of nationals is closely linked to the concept of protection of human rights. Mutual relationships between human rights and extradition are often characterized as a "tension" between protective and cooperative functions of this form of international legal assistance".¹⁸ Thus a need for balance or reasonable compromise between protection of human rights and extradition needs to be found, hence the "critical point" beyond which human rights become unbalanced and, therefore, constitute an obstacle to an effective cooperation in the fight against crime, will be avoided.¹⁹

The potential violation of nationals' human rights can be seen as a point, were the non-extradition of nationals and human rights meet. This violation can be observed from

¹⁶ Since the composition of the expose, the authors were not familiar with such case law practice of the ECHR, concerning only the principle of non extradition of nationals.

¹⁷ Article 3, paragraph 1, of the Fourth Additional Protocol to the Convention, provides that no one shall be expelled, by means either of an individual or of a collective measure, from the territory of the State of which he is a national and the explanatory report on this Protocol states that it was understood that extradition was outside the scope of this paragraph.

¹⁸ Michael Plachta, *Contemporary problems of extradition: human rights, grounds for refusal and principle aut derere aut iudicare*, pg.64

¹⁹ *id. sq.*

two different criteria: the nature of a specific right as vital or necessary²⁰ and the scope, degree or severity of the violation, rather than the nature of the right.²¹ This second criteria as standard was elaborated by the European Court of Human Rights, stating that the requested state, must have not extradited a fugitive “where substantial grounds have been shown for believing that the person concerned, if extradited, faces a real risk of being subjected to torture or to inhuman or degrading treatment or punishment in the requesting country”.²² Even though this case deals with violation of the mentioned right of a fugitive, the authors of the text did not find any obstacle the same decision to be given in a case of violation of the mentioned right to a national that might hold a dual nationality.

Another category of human rights, that may raise the question whether their violation may occur if extradition happens, are the so called fair trial rights of the accused, in our case national of the requested state, since one of the main reason for justifying the non-extradition of nationals is to protect them from an unfair foreign trial. ECHR has established a court practice concerning fair trial rights, independently of extradition cases.²³ This points out that the right to a fair trial confirmed in the majority of constitutions of the world without respect to the nationality of the person concerned, is quite different from the constitutional provision of non-extradition of nationals.

Also the existence of a set of rights that are not human rights but have great influence concerning non-extradition of nationals should be emphasized. This set of rights is consisted of the advantage related to conducting one’s defense in a language the accused understands, in a legal system that is reasonably familiar with, the availability of character witnesses and closeness of family and friends – beneficial to rehabilitation etc.

²⁰ This concept is based on the understanding that out of all human rights a group has been recognized as non-derogative in all universal and regional instruments and has one obvious disadvantage of offering a very restrictive scope of human rights which are covered under the notion of “fundamental human rights”: the right to life; the prohibition on torture and other forms of cruel, inhuman and degrading treatment and punishment; the prohibition on slavery; and freedom from ex post facto or retroactive criminal laws.

²¹ This approach indicates that controlling is not the right as such, but the way it was or likely to be violated.

²² Soering v. United Kingdom, E.C.H.R. Series A, No.161 (1989); 28 ILM 1063 (1989).

²³ Kirakosyan v. Armenia, E.C.H.R. Series A, No. 31237/03

Thus it is obvious that human rights do not as such stand in the way of extradition. On the contrary, extradition is an important tool of legitimate law enforcement, not least enabling States to ensure that those responsible for serious human rights violations and international crimes such as war crimes and crimes against humanity are brought to justice. As noted by the UN Human Rights Committee, extradition is “an important instrument of cooperation in the administration of justice, which requires that safe havens should not be provided for those who seek to evade fair trial for criminal offences, or who escape after such fair trial has occurred”. In the context of human rights and the fight against terrorism, this has been affirmed for example, by the UN General Assembly and Security Councils as well as the Council of Europe. Thus, there is no general right not to be extradited.

3.2. Content of the principle of non-extradition of nationals

As stated previously the principle of non-extradition of nationals is a principle that is prescribed by the states in the national legislation, in the constitution or in the law dealing with the respective subject²⁴ and can also be found in international agreements. As a matter of state policy, every state that prescribes this principle states an obligation not to extradite its own nationals or contains a provision that extradition of nationals is forbidden, or some other provision that in final instance, as a result, has the implementation of nationality exception. Some countries, even very rare, implement in their national legislation so called extended nationality or resident exception, expanding the nationality exception to permanent residents.²⁵

With the proscribing of the extradition of nationals the countries usually provide opportunity for prosecuting nationals for crimes committed abroad, by giving the national law an extraterritorial competence. This principle is known as the active personality principle and its main justification is in the fact that jurisdiction over crimes committed by nationals abroad is necessary to prevent such crimes and criminals from escaping

²⁴ ex. in criminal procedure law (China, Cyprus, Czech Republic, Ethiopia, France, Germany, Hungary, Indonesia, Latvia, Norway, Slovak Republic, Slovenia, Switzerland and Zambia), in penal code etc.

²⁵ Since the focus on the study is the nationality exception concerning nationals, this question is simply mentioned as one of the ways that this principle occurs. More for this in Zsuzsanna Deen-Racsmany, *Active Personality and Non-extradition of Nationals in International Criminal Law at the Dawn of the Twenty-first Century; Adapting Key Functions of Nationality to the Requirements of International Criminal Justice*, Leiden, E.M. Meijers Institute of Legal Studies, Faculty of Law, Leiden University, 2007 Chapter 7

prosecution.²⁶ Thus, the active personality principle, seen as a remedy against the complete frustration of criminal justice and the impunity of an offender, usually follows the nationality exception rule.²⁷

Hence, the contents of nationality exception lay down in the prohibition for extradition of nationals, it is clear that the state can refuse the extradition of national, without seeking additional grounds or reasons for refusal of extradition. Here the ground for refusal is in the mere fact whether a person is a national of the requested country. As stated by the Permanent Court of International Justice in *Nationality Decrees in Tunis and Morocco* and confirmed in various contexts since then, “questions of nationality are ... in principle within [the] reserved domain [of domestic jurisdiction]”.²⁸ Thus, it is for each state to determine who are its nationals and on base of that determination, a nationality exception may occur.

Albeit, it is up to the states to determine who its nationals are, the meaning of the term national and its definition aren't given in the international instruments dealing with the subject, even though exceptions that leave space for additional defining can be found. The European Convention of Extradition, as mentioned previously, gives a possibility for attaching a declaration by the states defining the meaning of the term nationals. Having in mind the time when the convention was adopted it is clear that this provision was made for the mentioned purpose, despite the fact that now it can be seen as an opportunity for implementing an extended nationality principle.²⁹ Another international agreement that gives an opportunity to define the term national is the Framework decision of the EAW, where the fact that the requested person is staying in, or is a national, or a resident of the executing Member State is mentioned as an optional ground for refusal of execution of the EAW. Even though in the EAW a clear definition over the mentioned notions is not given, according to the competence of the European Court of Justice to give a preliminary reference, a case law practice that defines the term “national”, “resident” or

²⁶ more for active personality principle in o.c. chapter 2

²⁷ exception can be found in the Benelux treaty on Extradition and Mutual legal assistance in criminal matters, where the nationality exception rule is not followed by an obligation to prosecute domestically.

²⁸ *Nationality Decrees in Tunis and Morocco* (Fr. v. Gr. Brit.), Advisory Opinion, 1923 PCIJ (ser. B) No.4, at 24.

²⁹ More for extended nationality principle in o.c. chapter 7

“staying in” was established. In the case of Szymon Kozłowski³⁰, after the court stated that the definition of the terms cannot be left to the assessment of each Member State, since it follows from the need for uniform application of Community law (...) its meaning and scope must normally be given an autonomous and uniform interpretation throughout the Union, the court ruled an interpretation of the term “resident” and the term “staying”.

As shown above, in general absence of definition of term national and freedom of the states to determine their nationals, having in mind the phenomenon of migration and possibility to acquire nationality in different states, a specific situation, regarding state jurisdiction over crimes committed by its nationals, arises with the mere existence of double and multiple nationals (a person holding nationality of two or more countries). In this situation questionable is the fact which of the countries has grater right over the national, meaning grater right to amend extradition or to apply nationality exception rule, when in fact an extradition is requested from one of countries of nationality against another country of nationality. There are generally two known principals: the dominant nationality or dominant link principle, under which the state that has dominant link with the suspect has the grater right and the principle of equality which holds that since all states of which the person is a national are equals, they may derive the same rights from this link irrespective of its strength, including the right to exercise jurisdiction over crimes committed by that person. This second principle of equality has found its confirmation above that of dominant nationality in international criminal law as regards the state’s jurisdiction not only in the legal theory, but also in some municipal decisions, as well as in the international sources.³¹

Another question in terms of double nationality and nationality exception rule is the one that arises from the fact that the combination of these two aspects gives the criminals protection. Thus the statement that “criminals are protected by the law” is not

³⁰ Case C-66/08, JUDGMENT OF THE COURT (Grand Chamber), 17 July 2008

³¹ One of the few international sources that deals with criminal jurisdiction in relation to multiple national offenders is the 1935 Harvard Draft Convention, which, even not binding, supports the right of any state of which the accused is a national to prosecute the crime, stating that “whether, in case of double or multiple nationality, an accused is a national of the State which is attempting to prosecute and punish is a question to be determined by reference to such principles of international law as govern nationality. *If international law permits the State to regard the accused as its national, its competence is not impaired or limited by the fact that he is also a national of another State*”.

far from the truth. This question gains on importance since the nationality exception rule and multiple nationality are common practice in the Balkans, and the possession of dual citizenship and its use to avoid extradition is allowed or prescribed by the constitution or laws of almost all the countries in the region. The fact that none of the Balkan countries extradites its own nationals, means that their legal system allow the criminals with dual citizenship to leave as a free citizens, although there are international arrest warrants against them. With this problem lot of the European countries are faced since the criminals escape from the country where the crime has been committed in the one of the Balkan counties and gain nationality in order to avoid extradition. Such a case was the case of Basri Bajrami.

3.2.1 Case of Basri Bajrami

3.2.1.1 Macedonian legislation in terms of extradition

In the Republic of Macedonia the extradition of accused and convicted persons shall be requested and performed according to the provisions of the Law on Criminal Procedure, unless it is otherwise prescribed by the European Convention on Extradition and its Protocols or the other international agreements ratified.

The legal conditions applying to extradition are established in the Criminal Procedure Code and International agreements.³² In accordance with the Law on Criminal Procedure in the Republic of Macedonia, the Minister of Justice reaches a decision with which he allows the extradition for a given criminal offense only for persons who are not citizens of the Republic of Macedonia. Moreover, the conditions under which extradition is allowed are enumerated but only for a criminal offense for which the extradition has been approved. Republic of Macedonia refuses extradition of its nationals though they can be prosecuted in for offences committed abroad. The Criminal code applies to the citizens of Republic of Macedonia for crimes committed by them abroad.

³² In the field of international legal assistance, Republic of Macedonia has ratified some key international instruments: the European Convention on Extradition with its additional protocols, the European Convention on Mutual Legal Assistance in Criminal Matters with its additional protocol, the European Convention on the transfer of sentenced persons and its additional protocol and the European Convention on the Transfer of Sentenced Persons

3.2.1.2 Expose of the case

Basri Bajrami, known as “Toska” or “The Fly” in the late 80’s and early 90’s was a member of the famous Patrick Hamers criminal gang. Among numerous criminal acts that this gang was famous for, including spectacular violent robberies, was the kidnaping of the former Belgian prime minister Paul Vanden Boeynants. Despite the fact that the members of the gang were caught and put in prison while awaiting for trial, Basri Bajrami managed to escape from prison. After escaping from prison he went in Republic of Macedonia, where with a help and support of his family in 1993 got Macedonian citizenship. At that point Basri Bajrami was a dual national: national of Belgium and national of Macedonia. Since Macedonian legislation forbides extradition to its nationals, in Belgian newspapers there were statements that "the sudden attack of patriotisam of Basri happend only for a reason to escape the extradition in Belgium". However, this situation did not last very long. After the Belgian authorites requested Basri's extradition, for putting him on tial for kidnaping the former Belgian prime minister, a review on the administrative prosedure of acquireing the Macedonian citizenship was made. In the renewed procedure the Macedonian citizenship was subtracted from Basri Bajrami, and the obstacle for his extradition in Belgium was asphyxiated. Republic of Macedonia has a constitutional provision that proscibes the extradition of nationals and because of it, the extradition of Basri Bajrami prior the subtract of his citizenship, was impossible.

In this case a person holding multiple nationality sought a protection from the Republic of Macedonia in terms of applying the nationality exception rule, thus his extradition was only possible if the Macedonian citizenship was subtracted, as it was the case. It is authors’ opinion that, even in a case where this kind of possibility is present, subtract of the citizenship of the national is not a desirable solution. In this case Republic of Macedonia, according to the principle of equality of the states, had a chance to choose whether to extradite Basri Bajrami or to prosecute him, since the Penal Code provides an extraterritorial competence of the Macedonian legislation. However, this case clearly shows that not only the solutions that are proposed in the legal theory or practice, can lead to final solution in a certain case and that international cooperation in criminal matters, extradition especially, can be done through diplomatic channels and influences and as so serves the purpose.

Also this case can indicate the possibility of an appearance of a phenomenon that criminals will escape in the countries that prescribe the non-extradition of nationals and gain the nationality of that country in order to avoid prosecution in the *loci delicti*. However, the effect of change of nationality in extradition cases is not unknown in the legal literature and has been treated more or less, anonymously.³³

As mentioned previously the dual citizenship sometimes can represent an advantage or an opportunity for abuses and evasions of the justice, but still the dual citizenship, as a democratic benefit, should not be abolished. Instead, the accent should be put on removal of the nationality as an obstacle for extradition.

4. Principle of non-extradition of nationals - pros and cons

Explaining the pros and cons of principle of non-extradition of nationals will eventually come to elaborating the reasons that stand for this principle versus the reasons that go against it. When approaching this elaboration two general systems can be found: one of the continental or civil law countries that stand for the principle of non-extradition of nationals and one of the common law countries that stand against this principle.

Civil law countries generally protect their nationals from foreign prosecutions and enforcement of the sentences rendered abroad, compensating the negative effects by providing for jurisdiction over crimes committed by their nationals abroad. The reasons for the approval of the existence and necessity of the nationality exception can be classified in two main categories: reason of emotional nature and reasons of practical nature, even though they all seem to search the legal bases of the existence of this principle. The reasons of emotional nature can be found in the principle that a man ought not to be withdrawn from his national judges, the principle that a State owes to its subjects the protection of its laws and the principle that a citizen has a right to remain undisturbed in his homeland, often guaranteed in constitutions. The reasons of a practical nature generally come to the avowal that a foreigner cannot expect the same standard of justice to be applied to him in a foreign court as may be expected by a national of that State or by the foreigner in his home court and that it is a serious disadvantage for a person to be tried in a foreign language, and separated from friends and resources and

³³ O.c. chapter 2, part 2.2

from those who could bear witness to persons' previous life and character. Yet, there are also other arguments advanced against the surrender of a national: the fundamental right of asylum; popular instinct of society; disparity in domestic legal systems with respect to both substantive law and procedure and potential for bias and prejudice against the surrendered person, based solely on his foreign origin and nationality. The justification of the rule of non-extradition of nationals largely derives from a jealously guarded conception of national sovereignty, and it presupposes the existence of sharp contrasts in the administration of criminal justice between states, resulting in potentially unfair treatment.³⁴ However, the main problem in justifying the rule of non-extradition is in the fact that arguments advanced in its favor were developed in the nineteenth century, and some of them are based on an even earlier era.

As to the common law countries, their attitude is dictated by the concept of the strict territoriality of crime and they usually allow extradition of their nationals. The reasons with which they support the extradition of nationals, are generally practical, concerning the expenses and inconveniences of bringing the witnesses, experts and other interested parties before court, the unsatisfactory form of a written affidavits in exchange of testimony, the difficulties of transportation of documents and exhibits, the possibility for reconstruction of the case at the place of the crime etc. It is clear that the mentioned reasons indeed go in favor of extradition of nationals and present the common sense in this never-ending debate.

5. Alternative solutions

Due to the fact that the principle of non-extradition of nationals is reality and is not yet abandoned, alternative solutions have been presented, aiming to balance the negative effects of this principle, having in mind the differences between the law system of the states involved and the obstruction of justice in terms of fight against organized crime that may arise.

³⁴ Michael Plachta, *(Non-) Extradition of Nationals: A Neverending Story*, Emory University School of Law, Emory International Law Review, Spring, 1999, pg.5

The so-called discretionary (facultative) clause³⁵, seen as a way that may accommodate the feelings of States that proved to be intransigent, in a practice has not resulted with voluntary surrender of nationals. The reasons for failure of this clause are in the fact that this clause, as an idea, originated from common law countries and stands against the principles that were established and traditionally held over the years in the civil law systems; in the difficulty of obtaining a guarantee of reciprocity etc. For this clause to make the desirable effect it should be followed by an additional provision, which in final instance will enable the extradition of nationals from one side and protection of state of nationality interests, from another.

One of the additional provisions that can be added the discretionary clause is the obligation of the requested state to prosecute the national if the extradition is being refused. Stating that a state is obligated to prosecute whenever the extradition has been refused means nothing else but implementing the maxim *aut derere aut judicare*, that carries a main idea that from the point of view of criminal justice it should not matter in the territory of which state the national is prosecuted and punished as long as the justice is done. For this maxim/principle to be implemented and to substitute the nationality exception rule, it has to be prescribed in international agreement-bilateral or multilateral, since it has not gained the status of a norm of international customary law. This principle is formulated in such language that does not seem to accord any special priority to extradition, thus the accent here lays down in the alternative of the requested state to grant the extradition request or to take the necessary and reasonable steps to apprehend an alleged offender and to ensure the prosecution and trial of such an individual by a competent jurisdiction.³⁶ Yet, with prescribing this principle the problems that arise in prosecution at the place of extradition³⁷ continue to exist, thus this prosecution in place of

³⁵ This clause can be found in different forms ex: «nither party shall be bound to surrender its own nationals» or «party shall be held free from any obligation to surrender its own nationals» or «nither party shall be bound to deliver its own citizens»

³⁶ More for this see Michael Plachta, *Contemporary problems of extradition: human rights, grounds for refusal and principle aut derere aut judicare* pg.81-84

³⁷ Here three types of problems are present: first, bringing witnesses from distant countries imposes a heavy financial burden on both them and the accused, not to mention serious practical difficulties; second, some evidence are not available at all, such as the viewing of the scene of the crime and third, if the evidence were taken abroad the court might have troubles to use them at the trial due to possible procedural restrictions on such evidence.

extradition is viewed as a sort of “second class” criminal proceedings.³⁸ On base of this principle, a system called “substituting prosecution” was proposed by the Institute of International law in 1981, inspired by the imperfect solution that occurred in the Lockerbie case, pointing the need of stipulating detailed methods of legal assistance; including observers to the trial sent from the state where the crime has been committed to the state of nationality and the need of the enforcement of an appropriate penalty similar to that which would be applied to nationals in a cognate case if the concerned tribunal determines that the accused is guilty. A proposal that presents further changes concerning the principal *aut derere aut judicare*, by, among other things, prescribing this rule as a logical supplement of the duty to extradite, can also be found.³⁹

Another approach is the one that suggests that the extradition ought to be limited to the trial and judgment only, conducted in the requesting state, and that an extradited national, sentenced in foreign court, should be returned to the home state to serve the sentence imposed abroad, which will be subject to regulations, including those relating to remission or reduction of sentence, parole and probation, in force in the home State. This solution could be proposed as a *modus vivendi* between the conflicting interests of an effective suppression of criminality and constitutional requirements and restrictions. It should serve as a remedy to the inconveniences emerging from the transfer of criminal proceedings and extradition.⁴⁰ The main purpose of the proposal is to secure to the most appropriate forum jurisdiction over a crime and at the same time to secure to the most appropriate organs the task of corrective punishment and rehabilitation.⁴¹ Sort of this solution can be found in the Framework Decision on the EAW.

Further refinement of this proposal might be to allow to the national State the right of imposing sentence and limiting the jurisdiction of the trial state to a determination of guilt or innocence only, allowing the sentence to be formulated in a

³⁸ o.c. pg.79

³⁹ o.c. pg.84-86

⁴⁰ Michael Plachta, *(Non-) Extradition of Nationals: A Neverending Story*, Emory University School of Law, Emory International Law Review, Spring, 1999, pg.30

⁴¹ for more see in Ivan A. Shearer, *Non extradition of nationals, A review and proposal*, Adelaide Law Review Association, School of Law, University of Adelaide, 1966

manner reflective of the social convictions and corrective methods existing in the national State.

Alternative solution that might lead to total abandonment of the nationality exception rule is the possibility of replacement of the rule of non-extradition of nationals by the new ground for refusal of surrender: the possible violation of procedural safeguards in the criminal proceedings carried out against the requested offender in the territory of the requesting state. This solution has many advantages compared to nationality exception rule, as more flexible solution and at the same time a solution that offers full protection to the nationals of the requested state, provided that concern regarding the well-being of the requested state's nationals is the underlying reason for that state's refusal to extradite. In this way the integrity and effectiveness of extradition would be saved and at the same time, the requested state would not be compelled to relinquish its duty of loyalty toward its citizen sought for trial in a foreign country.⁴²

6. Conclusion

According to previously stated, the non-extradition of nationals is principle, that still exist and states do not seem to have a will to abandon it. The main reason, as it was pointed out, can be found in the states' fear of loss of sovereignty. However, albeit the principle of non-extradition of nationals is constitutionally granted and is applied in extradition cases between states, when it comes to international tribunals this constitutional guarantee does not presents an obstacle a national to be extradited, since in this case the national is not a subject to extradition but is a subject to surrender. Surrender of nationals can be considered as a new form of bringing fugitives to face justice, enabling many offenders who committed crimes in Yugoslavia and Rwanda to be tried before the Ad Hoc International Criminal Court for the former Yugoslavia and the Ad Hoc International Criminal Court for Rwanda, respectively. Thus the states should consider the surrender of nationals throug bilateral agreements as solution to the proplems that arise from the principle of non-extradition of nationals and multiple nationality, hence the importance of increasing the safeguards and making the extradition procedure more administrative and less judicial, thus less state involving, is pointed out.

⁴² Michael Plachta, *(Non-) Extradition of Nationals: A Neverending Story*, Emory University School of Law, Emory International Law Review, Spring, 1999, pg.34

Also, having in mind that the basic concept of criminal justice is criminals to face justice, it is clear that if a certain rule stands against this concept, then that rule cannot be justified by any reason at all. In a situation when certain criminals will not be extradited only because of the fact that they are nationals of a certain state, then the states' sovereignty appears as a problem. Thus it is authors' opinion that when it comes to principle of non-extradition of nationals, the states' sovereignty stands in a way of the justice. In a world where globalization and migration appear as a democratic benefit, criminals are acting and moving across the borders, leaving the states to find a way to fight organized crime and find a way that these criminals will be hold responsible for their acts. Thus, the extradition of criminals should not be seen as debilitation of sovereignty, but its' empowerment.

For exceeding the principle of non-extradition of nationals states should take giant strides towards enacting laws that allow their nationals to be extradited, since it is clear that the exception of non-extradition for nationals jeopardizes international efforts to fight transnational organized crime.

It is hoped, however, that the difficulties examined here will increase awareness of the problem and contribute to a creative process enabling the development of appropriate solutions.