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EUROPEAN COMMITTEE ON CRIME PROBLEMS
(CDPC)

Committee of Experts on the Operation
of European Conventions in the Penal Field
(PC-OC)

European Convention on Extradition
Explanatory notes

This document was prepared and is published under the responsibility of the Secretariat.
It is based on but does not reproduce exactly the Explanatory Report to the European Convention on Extradition.

The following material concerning the European Convention on Extradition is separately available with the Secretariat:

Explanatory Report to the Convention

Reservations and declarations to the Convention

Chart of signatures and ratifications

Guide to Extradition Procedures

Recommendations of the Committee of Ministers on the practical application of the Convention

Human Rights Requirements relating to Warrants of Arrest for Extradition Purposes.

European Convention on extradition

Paris, 13.XII.1957

The governments signatory hereto, being members of the Council of Europe,

Considering that the aim of the Council of Europe is to achieve a greater unity between its members;

Considering that this purpose can be attained by the conclusion of agreements and by common action in legal matters;

Considering that the acceptance of uniform rules with regard to extradition is likely to assist this work of unification,

Have agreed as follows:

Article 1 – Obligation to extradite

The Contracting Parties undertake to surrender to each other, subject to the provisions and conditions laid down in this Convention, all persons against whom the competent authorities of the requesting Party are proceeding for an offence or who are wanted by the said authorities for the carrying out of a sentence or detention order.

Article 2 – Extraditable offences

- 1 Extradition shall be granted in respect of offences punishable under the laws of the requesting Party and of the requested Party by deprivation of liberty or under a detention order for a maximum period of at least one year or by a more severe penalty. Where a conviction and prison sentence have occurred or a detention order has been made in the territory of the requesting Party, the punishment awarded must have been for a period of at least four months.
- 2 If the request for extradition includes several separate offences each of which is punishable under the laws of the requesting Party and the requested Party by deprivation of liberty or under a detention order, but of which some do not fulfil the condition with regard to the amount of punishment which may be awarded, the requested Party shall also have the right to grant extradition for the latter offences.
- 3 Any Contracting Party whose law does not allow extradition for certain of the offences referred to in paragraph 1 of this article may, in so far as it is concerned, exclude such offences from the application of this Convention.
- 4 Any Contracting Party which wishes to avail itself of the right provided for in paragraph 3 of this article shall, at the time of deposit of its instrument of ratification or accession, transmit to the Secretary General of the Council of Europe either a list of the offences for which extradition is allowed or a list of those for which it is excluded and shall at the same time indicate the legal provisions which allow or exclude extradition. The Secretary General of the Council shall forward these lists to the other signatories.

- 5 If extradition is subsequently excluded in respect of other offences by the law of a Contracting Party, that Party shall notify the Secretary General. The Secretary General shall inform the other signatories. Such notification shall not take effect until three months from the date of its receipt by the Secretary General.
- 6 Any Party which avails itself of the right provided for in paragraphs 4 or 5 of this article may at any time apply this Convention to offences which have been excluded from it. It shall inform the Secretary General of the Council of such changes, and the Secretary General shall inform the other signatories.
- 7 Any Party may apply reciprocity in respect of any offences excluded from the application of the Convention under this article.

Article 3 – Political offences

- 1 Extradition shall not be granted if the offence in respect of which it is requested is regarded by the requested Party as a political offence or as an offence connected with a political offence.
- 2 The same rule shall apply if the requested Party has substantial grounds for believing that a request for extradition for an ordinary criminal offence has been made for the purpose of prosecuting or punishing a person on account of his race, religion, nationality or political opinion, or that that person's position may be prejudiced for any of these reasons.
- 3 The taking or attempted taking of the life of a Head of State or a member of his family shall not be deemed to be a political offence for the purposes of this Convention.
- 4 This article shall not affect any obligations which the Contracting Parties may have undertaken or may undertake under any other international convention of a multilateral character.

Article 4 – Military offences

Extradition for offences under military law which are not offences under ordinary criminal law is excluded from the application of this Convention.

Article 5 – Fiscal offences

Extradition shall be granted, in accordance with the provisions of this Convention, for offences in connection with taxes, duties, customs and exchange only if the Contracting Parties have so decided in respect of any such offence or category of offences.

Article 6 – Extradition of nationals

- 1 a A Contracting Party shall have the right to refuse extradition of its nationals.

- b Each Contracting Party may, by a declaration made at the time of signature or of deposit of its instrument of ratification or accession, define as far as it is concerned the term “nationals” within the meaning of this Convention.
 - c Nationality shall be determined as at the time of the decision concerning extradition. If, however, the person claimed is first recognised as a national of the requested Party during the period between the time of the decision and the time contemplated for the surrender, the requested Party may avail itself of the provision contained in sub-paragraph a of this article.
- 2 If the requested Party does not extradite its national, it shall at the request of the requesting Party submit the case to its competent authorities in order that proceedings may be taken if they are considered appropriate. For this purpose, the files, information and exhibits relating to the offence shall be transmitted without charge by the means provided for in Article 12, paragraph 1. The requesting Party shall be informed of the result of its request.

Article 7 – Place of commission

- 1 The requested Party may refuse to extradite a person claimed for an offence which is regarded by its law as having been committed in whole or in part in its territory or in a place treated as its territory.
- 2 When the offence for which extradition is requested has been committed outside the territory of the requesting Party, extradition may only be refused if the law of the requested Party does not allow prosecution for the same category of offence when committed outside the latter Party's territory or does not allow extradition for the offence concerned.

Article 8 – Pending proceedings for the same offences

The requested Party may refuse to extradite the person claimed if the competent authorities of such Party are proceeding against him in respect of the offence or offences for which extradition is requested.

Article 9 – *Non bis in idem*

Extradition shall not be granted if final judgment has been passed by the competent authorities of the requested Party upon the person claimed in respect of the offence or offences for which extradition is requested. Extradition may be refused if the competent authorities of the requested Party have decided either not to institute or to terminate proceedings in respect of the same offence or offences.

Article 10 – Lapse of time

Extradition shall not be granted when the person claimed has, according to the law of either the requesting or the requested Party, become immune by reason of lapse of time from prosecution or punishment.

Article 11 – Capital punishment

If the offence for which extradition is requested is punishable by death under the law of the requesting Party, and if in respect of such offence the death-penalty is not provided for by the law of the requested Party or is not normally carried out, extradition may be refused unless the requesting Party gives such assurance as the requested Party considers sufficient that the death-penalty will not be carried out.

Article 12 – The request and supporting documents

- 1 The request shall be in writing and shall be communicated through the diplomatic channel. Other means of communication may be arranged by direct agreement between two or more Parties.
- 2 The request shall be supported by:
 - a the original or an authenticated copy of the conviction and sentence or detention order immediately enforceable or of the warrant of arrest or other order having the same effect and issued in accordance with the procedure laid down in the law of the requesting Party;
 - b a statement of the offences for which extradition is requested. The time and place of their commission, their legal descriptions and a reference to the relevant legal provisions shall be set out as accurately as possible; and
 - c a copy of the relevant enactments or, where this is not possible, a statement of the relevant law and as accurate a description as possible of the person claimed, together with any other information which will help to establish his identity and nationality.

Article 13 – Supplementary information

If the information communicated by the requesting Party is found to be insufficient to allow the requested Party to make a decision in pursuance of this Convention, the latter Party shall request the necessary supplementary information and may fix a time-limit for the receipt thereof.

Article 14 – Rule of speciality

- 1 A person who has been extradited shall not be proceeded against, sentenced or detained with a view to the carrying out of a sentence or detention order for any offence committed prior to his surrender other than that for which he was extradited, nor shall he be for any other reason restricted in his personal freedom, except in the following cases:
 - a when the Party which surrendered him consents. A request for consent shall be submitted, accompanied by the documents mentioned in Article 12 and a legal record of any statement made by the extradited person in respect of the offence concerned. Consent shall be given when the offence for which it is requested is itself subject to extradition in accordance with the provisions of this Convention;

- b when that person, having had an opportunity to leave the territory of the Party to which he has been surrendered, has not done so within 45 days of his final discharge, or has returned to that territory after leaving it.
- 2 The requesting Party may, however, take any measures necessary to remove the person from its territory, or any measures necessary under its law, including proceedings by default, to prevent any legal effects of lapse of time.
- 3 When the description of the offence charged is altered in the course of proceedings, the extradited person shall only be proceeded against or sentenced in so far as the offence under its new description is shown by its constituent elements to be an offence which would allow extradition.

Article 15 – Re-extradition to a third state

Except as provided for in Article 14, paragraph 1.b, the requesting Party shall not, without the consent of the requested Party, surrender to another Party or to a third State a person surrendered to the requesting Party and sought by the said other Party or third State in respect of offences committed before his surrender. The requested Party may request the production of the documents mentioned in Article 12, paragraph 2.

Article 16 – Provisional arrest

- 1 In case of urgency the competent authorities of the requesting Party may request the provisional arrest of the person sought. The competent authorities of the requested Party shall decide the matter in accordance with its law.
- 2 The request for provisional arrest shall state that one of the documents mentioned in Article 12, paragraph 2.a, exists and that it is intended to send a request for extradition. It shall also state for what offence extradition will be requested and when and where such offence was committed and shall so far as possible give a description of the person sought.
- 3 A request for provisional arrest shall be sent to the competent authorities of the requested Party either through the diplomatic channel or direct by post or telegraph or through the International Criminal Police Organisation (Interpol) or by any other means affording evidence in writing or accepted by the requested Party. The requesting authority shall be informed without delay of the result of its request.
- 4 Provisional arrest may be terminated if, within a period of 18 days after arrest, the requested Party has not received the request for extradition and the documents mentioned in Article 12. It shall not, in any event, exceed 40 days from the date of such arrest. The possibility of provisional release at any time is not excluded, but the requested Party shall take any measures which it considers necessary to prevent the escape of the person sought.
- 5 Release shall not prejudice re-arrest and extradition if a request for extradition is received subsequently.

Article 17 – Conflicting requests

If extradition is requested concurrently by more than one State, either for the same offence or for different offences, the requested Party shall make its decision having regard to all the circumstances and especially the relative seriousness and place of commission of the offences, the respective dates of the requests, the nationality of the person claimed and the possibility of subsequent extradition to another State.

Article 18 – Surrender of the person to be extradited

- 1 The requested Party shall inform the requesting Party by the means mentioned in Article 12, paragraph 1, of its decision with regard to the extradition.
- 2 Reasons shall be given for any complete or partial rejection.
- 3 If the request is agreed to, the requesting Party shall be informed of the place and date of surrender and of the length of time for which the person claimed was detained with a view to surrender.
- 4 Subject to the provisions of paragraph 5 of this article, if the person claimed has not been taken over on the appointed date, he may be released after the expiry of 15 days and shall in any case be released after the expiry of 30 days. The requested Party may refuse to extradite him for the same offence.
- 5 If circumstances beyond its control prevent a Party from surrendering or taking over the person to be extradited, it shall notify the other Party. The two Parties shall agree a new date for surrender and the provisions of paragraph 4 of this article shall apply.

Article 19 – Postponed or conditional surrender

- 1 The requested Party may, after making its decision on the request for extradition, postpone the surrender of the person claimed in order that he may be proceeded against by that Party or, if he has already been convicted, in order that he may serve his sentence in the territory of that Party for an offence other than that for which extradition is requested.
- 2 The requested Party may, instead of postponing surrender, temporarily surrender the person claimed to the requesting Party in accordance with conditions to be determined by mutual agreement between the Parties.

Article 20 – Handing over of property

- 1 The requested Party shall, in so far as its law permits and at the request of the requesting Party, seize and hand over property:
 - a which may be required as evidence, or
 - b which has been acquired as a result of the offence and which, at the time of

the arrest, is found in the possession of the person claimed or is discovered subsequently.

- 2 The property mentioned in paragraph 1 of this article shall be handed over even if extradition, having been agreed to, cannot be carried out owing to the death or escape of the person claimed.
- 3 When the said property is liable to seizure or confiscation in the territory of the requested Party, the latter may, in connection with pending criminal proceedings, temporarily retain it or hand it over on condition that it is returned.
- 4 Any rights which the requested Party or third parties may have acquired in the said property shall be preserved. Where these rights exist, the property shall be returned without charge to the requested Party as soon as possible after the trial.

Article 21 – Transit

- 1 Transit through the territory of one of the Contracting Parties shall be granted on submission of a request by the means mentioned in Article 12, paragraph 1, provided that the offence concerned is not considered by the Party requested to grant transit as an offence of a political or purely military character having regard to Articles 3 and 4 of this Convention.
- 2 Transit of a national, within the meaning of Article 6, of a country requested to grant transit may be refused.
- 3 Subject to the provisions of paragraph 4 of this article, it shall be necessary to produce the documents mentioned in Article 12, paragraph 2.
- 4 If air transport is used, the following provisions shall apply:
 - a when it is not intended to land, the requesting Party shall notify the Party over whose territory the flight is to be made and shall certify that one of the documents mentioned in Article 12, paragraph 2.a exists. In the case of an unscheduled landing, such notification shall have the effect of a request for provisional arrest as provided for in Article 16, and the requesting Party shall submit a formal request for transit;
 - b when it is intended to land, the requesting Party shall submit a formal request for transit.
- 5 A Party may, however, at the time of signature or of the deposit of its instrument of ratification of, or accession to, this Convention, declare that it will only grant transit of a person on some or all of the conditions on which it grants extradition. In that event, reciprocity may be applied.
- 6 The transit of the extradited person shall not be carried out through any territory where there is reason to believe that his life or his freedom may be threatened by reason of his race, religion, nationality or political opinion.

Article 22 – Procedure

Except where this Convention otherwise provides, the procedure with regard to extradition and provisional arrest shall be governed solely by the law of the requested Party.

Article 23 – Language to be used

The documents to be produced shall be in the language of the requesting or requested Party. The requested Party may require a translation into one of the official languages of the Council of Europe to be chosen by it.

Article 24 – Expenses

- 1 Expenses incurred in the territory of the requested Party by reason of extradition shall be borne by that Party.
- 2 Expenses incurred by reason of transit through the territory of a Party requested to grant transit shall be borne by the requesting Party.
- 3 In the event of extradition from a non-metropolitan territory of the requested Party, the expenses occasioned by travel between that territory and the metropolitan territory of the requesting Party shall be borne by the latter. The same rule shall apply to expenses occasioned by travel between the non-metropolitan territory of the requested Party and its metropolitan territory.

Article 25 – Definition of “detention order”

For the purposes of this Convention, the expression “detention order” means any order involving deprivation of liberty which has been made by a criminal court in addition to or instead of a prison sentence.

Article 26 – Reservations

- 1 Any Contracting Party may, when signing this Convention or when depositing its instrument of ratification or accession, make a reservation in respect of any provision or provisions of the Convention.
- 2 Any Contracting Party which has made a reservation shall withdraw it as soon as circumstances permit. Such withdrawal shall be made by notification to the Secretary General of the Council of Europe.
- 3 A Contracting Party which has made a reservation in respect of a provision of the Convention may not claim application of the said provision by another Party save in so far as it has itself accepted the provision.

Article 27 – Territorial application

- 1 This Convention shall apply to the metropolitan territories of the Contracting Parties.

- 2 In respect of France, it shall also apply to Algeria and to the overseas Departments and, in respect of the United Kingdom of Great Britain and Northern Ireland, to the Channel Islands and to the Isle of Man.
- 3 The Federal Republic of Germany may extend the application of this Convention to the *Land* of Berlin by notice addressed to the Secretary General of the Council of Europe, who shall notify the other Parties of such declaration.
- 4 By direct arrangement between two or more Contracting Parties, the application of this Convention may be extended, subject to the conditions laid down in the arrangement, to any territory of such Parties, other than the territories mentioned in paragraphs 1, 2 and 3 of this article, for whose international relations any such Party is responsible.

Article 28 – Relations between this Convention and bilateral Agreements

- 1 This Convention shall, in respect of those countries to which it applies, supersede the provisions of any bilateral treaties, conventions or agreements governing extradition between any two Contracting Parties.
- 2 The Contracting Parties may conclude between themselves bilateral or multilateral agreements only in order to supplement the provisions of this Convention or to facilitate the application of the principles contained therein.
- 3 Where, as between two or more Contracting Parties, extradition takes place on the basis of a uniform law, the Parties shall be free to regulate their mutual relations in respect of extradition exclusively in accordance with such a system notwithstanding the provisions of this Convention. The same principle shall apply as between two or more Contracting Parties each of which has in force a law providing for the execution in its territory of warrants of arrest issued in the territory of the other Party or Parties. Contracting Parties which exclude or may in the future exclude the application of this Convention as between themselves in accordance with this paragraph shall notify the Secretary General of the Council of Europe accordingly. The Secretary General shall inform the other Contracting Parties of any notification received in accordance with this paragraph.

Article 29 – Signature, ratification and entry into force

- 1 This Convention shall be open to signature by the members of the Council of Europe. It shall be ratified. The instruments of ratification shall be deposited with the Secretary General of the Council.
- 2 The Convention shall come into force 90 days after the date of deposit of the third instrument of ratification.
- 3 As regards any signatory ratifying subsequently the Convention shall come into force 90 days after the date of the deposit of its instrument of ratification.

Article 30 – Accession

- 1 The Committee of Ministers of the Council of Europe may invite any State not a member of the Council to accede to this Convention, provided that the resolution containing such invitation receives the unanimous agreement of the members of the Council who have ratified the Convention.
- 2 Accession shall be by deposit with the Secretary General of the Council of an instrument of accession, which shall take effect 90 days after the date of its deposit.

Article 31 – Denunciation

Any Contracting Party may denounce this Convention in so far as it is concerned by giving notice to the Secretary General of the Council of Europe. Denunciation shall take effect six months after the date when the Secretary General of the Council received such notification.

Article 32 – Notifications

The Secretary General of the Council of Europe shall notify the members of the Council and the government of any State which has acceded to this Convention of:

- a the deposit of any instrument of ratification or accession;
- b the date of entry into force of this Convention;
- c any declaration made in accordance with the provisions of Article 6, paragraph 1, and of Article 21, paragraph 5;
- d any reservation made in accordance with Article 26, paragraph 1;
- e the withdrawal of any reservation in accordance with Article 26, paragraph 2;
- f any notification of denunciation received in accordance with the provisions of Article 31 and by the date on which such denunciation will take effect.

In witness whereof the undersigned, being duly authorised thereto, have signed this Convention.

Done at Paris, this 13th day of December 1957, in English and French, both texts being equally authentic, in a single copy which shall remain deposited in the archives of the Council of Europe. The Secretary General of the Council of Europe shall transmit certified copies to the signatory governments.

Explanatory notes on the Convention

INTRODUCTION

1. On 8 December 1951, during its 37th Session, the Consultative Assembly of the Council of Europe adopted Recommendation (51) 16, “on the preparatory measures to be taken to achieve the conclusion of a European Convention on Extradition”.

2. The Committee of Ministers of the Council of Europe, after studying this recommendation and the governments’ replies on the desirability of concluding a European Convention on Extradition and its possible form and content, instructed the Secretary General in its Resolution (53) 4 to convene a Committee of Government Experts to examine Recommendation (51) 16 with special reference to:

“the possibility of establishing certain extradition principles acceptable to all Members of the Council, the question as to whether these principles should be implemented by the establishment of a multilateral convention on extradition or whether they should simply serve as a basis for bilateral conventions ‘being reserved’.”

3. The Committee of Experts, meeting at Strasbourg from 5-9 October 1953, under the chairmanship of Mr. William Fay (Ireland), found that there was a considerable measure of agreement on the principles which should govern extradition, and therefore concluded that it should be possible to embody these principles in an appropriate instrument of a multilateral or bilateral character.

4. The Assembly in the meantime continued its own work and adopted a new Recommendation 66 (1954), suggesting to the Committee of Ministers:

1. that it should instruct the Committee of Governmental Experts on Extradition to continue their work with a view to the conclusion of a European Convention on Extradition and to the inclusion therein of the Articles drafted by the Committee on Legal and Administrative Questions and approved by the Assembly, which are appended to this recommendation;

2. that, in view of the resolution adopted by the Committee of Ministers during their 9th Session in August 1951, for the signature of partial agreements, this work should continue, even if it were to appear subsequently that certain Member States find themselves unable to become parties to such a convention;

3. that, should the Committee of Experts find it necessary to make important changes of substance in these Articles, such proposed changes should be discussed at joint meetings to be convened between the appropriate sub-committee of the Assembly's Committee on Legal and Administrative Questions, on the one hand, and the Committee of Governmental Experts or a sub-committee thereof, on the other hand, for the purpose of reaching a solution acceptable to both sides;
 4. that the text of the proposed European Convention should be communicated to the Assembly for an opinion before being finally approved by the Committee of Ministers.
5. On the basis of the first report by the Committee of Experts, the Committee of Ministers in Resolution (54) 24 instructed it to examine the Assembly Recommendation 66 (1954) with a view to:
- (a) drafting a model *bilateral* convention for the use of such Members as may not be bound together under a multilateral convention on extradition and,
 - (b) drafting a *multilateral* convention on extradition, it being understood that such convention should afford nonsignatory Members an opportunity of subsequently acceding thereto, if they so desire.

In this resolution the Committee of Ministers also agreed to a discussion being held on the conclusions of the Committee of Experts between members of the committee and the competent sub-committee of the Assembly Committee on Legal and Administrative Questions.

6. The Committee of Experts held two more sessions from 31 January to 9 February 1955, and from 15 to 25 February 1956, at Strasbourg, under the chairmanship of Mr. Mamopoulos (Greece). Mr. William Fay, who presided at the first session, having been appointed Irish ambassador to France, did not take part in the last two sessions.

7. On 23 September 1955, the joint meeting between a Sub-Committee of Experts and the competent Assembly subcommittee, to which the Ministers had agreed in Resolution (54) 24, was convened to discuss the preliminary draft multilateral convention drawn up by the experts at their 2nd Session. The suggestions put forward at the joint meeting were studied by the Committee of Experts at their 3rd Session.

During its 52nd meeting (September 1957) the Committee of Ministers, meeting at deputy level, decided to open the European Convention on Extradition for signature by the member States.

GENERAL CONSIDERATIONS

9. The delegations discussed at length whether they preferred a model bilateral convention or a multilateral European convention on extradition.

During the drafting of the convention it became apparent that two different attitudes were being taken to certain principles which should govern extradition. These different points of view, which it proved impossible to reconcile, are of great importance, particularly from the point of view of doctrine. Of the two attitudes one follows the traditional view that the chief aim is to repress crime and that therefore extradition should be facilitated; the other introduces humanitarian considerations and so tends to restrict the application of extradition laws.

10. Certain experts expressed their preference for bilateral conventions on extradition. They took the view that the matter was one which lent itself better to an agreement limited to the relations between two countries, since it required that particular interests of a geographical, political and legal nature should be taken into consideration.

11. Other experts saw no objection to the drafting of a multilateral convention, but considered that it should only lay down the broad principles governing extradition and some regulations of a procedural nature. A multilateral convention of this kind could provide the general basis for extradition and all matters which it did not cover could be settled in bilateral agreements.

12. Other experts, however, were in favour of drafting a European multilateral convention containing detailed provisions. Such a convention, it was thought, would be of great interest to member countries since it would lay down common rules on extradition which States could still supplement or elaborate in bilateral agreements. This convention would also have the advantage that it would to some extent co-ordinate and standardise the regulations governing extradition in member countries and would fully conform with the provisions of Article 1 of the Statute of the Council of Europe. A multilateral convention should be so drafted, as indeed was clearly laid down by the Committee of Ministers in the resolution quoted above, that those States which were unable to sign it at once might accede to it subsequently. The committee also considered the possibility of allowing reservations to be made, in order to facilitate acceptance of the convention by those member countries whose law made certain clauses difficult to accept.

13. An expert from the Scandinavian countries, on the basis of the preparatory work now being carried out among the Scandinavian countries on new extradition regulations, explained the new theory on this subject, referred to above, which on certain points differs appreciably from the orthodox principles still faithfully followed by a large majority of the other States. At this stage in their work the attitude of the Scandinavian countries is that, while they agree on certain general regulations governing extradition procedure, the requested State should retain the right in the last resort to decide, according to the circumstances, whether extradition should be granted or whether, on the other hand, the person claimed should be proceeded against in its own territory. The orthodox extradition conventions between these countries would then be replaced by a uniform law in each of them defining the conditions in which extradition would normally occur and giving special consideration to the need to protect the rights of the individual. The new regulations would be based on mutual confidence and on the desire of the various States to co-operate closely in combating crime. It has been possible to draft these

regulations because of the great similarity between the penal codes of Scandinavian countries in their definition of offences and in the scale of penalties inflicted. He wished Member States of the Council of Europe to introduce a similar system which seemed to him perfectly possible owing to the identity of their basic conceptions of criminal law.

As these suggestions did not, however, receive the approval of the majority of the experts, the Scandinavian experts expressed their willingness to consider the conclusion of extradition conventions of the traditional type, i.e. those entailing an obligation to extradite in specific cases, on condition that such conventions allowed certain exceptional circumstances to be taken into consideration, so that in a given case extradition might be refused for imperative reasons of a humanitarian nature. These considerations also led them to propose that the requested State should have the right to ask for additional proof, if it considered that such additional proof was needed to establish that the offence had probably been committed by the person claimed. This attitude on the part of the Scandinavian experts in no way implies that they fail to recognise the importance of extradition as a means of suppressing crime, but experience has shown that a certain flexibility is desirable in the principles governing extradition.

One of these experts would therefore have liked the following provisions to appear both in the model Bilateral Convention and in the Multilateral Convention:

(a) *“Article 6 (bis)*

If the arrest and delivery of the person claimed are likely to cause him consequences of an exceptional gravity and thereby cause concern on humanitarian grounds particularly by reason of his age or State of health, extradition may be refused.”

(b) *“Article 12, paragraph 3*

When the request for extradition concerns a person proceeded against or convicted by default, the requested Party may request the requesting Party to produce evidence showing that the offence has probably been committed by the person claimed. Where this evidence appears to be insufficient, extradition may be refused.”

14. Although these provisions were not acceptable to the committee, it was decided to mention them in a footnote to the Articles in question and to insert them in the comments on these Articles. It was also agreed that a reservation to this effect might be formulated in the Multilateral Convention in order that the largest possible number of States could accede to it.

15. The committee then proceeded with the work of drafting the Convention. The draft drawn up by the Assembly proved of great help and many of the Articles of the experts' draft Convention were based on this text.

COMMENTARIES ON THE ARTICLES OF THE CONVENTION

Article 1 (Obligation to extradite)

This Article was taken from the Bilateral Convention concluded between France and the Federal Republic of Germany on 23 November 1951. In it the Contracting Parties undertake in principle to apply the clauses of the Convention. Thus the Article has a general bearing on the Convention as a whole.

The term “competent authorities” in the English text corresponds to *autorités judiciaires* in the French text. These expressions cover the judiciary and the Office of the Public Prosecutor but exclude the police authorities.

Note 1: More recent Resolutions, Recommendations and discussions within the PC-OC take further into consideration humanitarian issues and the rights of the individual concerned. In the case of a minor aged under 18 at the time of the request for extradition and ordinarily resident in the requested State, the competent authorities of the requesting and the requested States shall take into consideration the interests of the minor and, where they think that extradition is likely to impair his social rehabilitation, shall endeavour to reach an agreement on the most appropriate measures (Res (75) 12).

Note 2: Extradition should not be requested where the hardship which might thereby be caused to the person concerned and to his family is manifestly disproportionate to the seriousness of the offence and where the penalty likely to be passed will not exceed the minimum period of detention laid down in Article 2, para 1, or will not involve deprivation of liberty (Rec. R(80)7).

Note 3: The PC-OC discussed a reservation to this article to the effect that the State concerned will not grant the extradition of persons "demanded in connection with an offence punishable by a life-long sentence or detention order". In 1991, some Member States and non-Member States Party to the Convention declared that this reservation was incompatible with the meaning of the European Convention on Extradition. The expert from the State concerned forwarded a written Statement on the subject which States that i.a. in the framework of the Schengen agreement, the authorities of that State had accepted a solution which consists in according extradition to persons sentenced to life where the requesting country provides assurance that it shall enforce the statutory measures available to it in the benefit of the person sought. (meet25¹ §§ 6-11; Art. 5, Schengen Agreement)

¹ This reference indicates the ordinal number of the meeting of the PC-OC, as applicable.

Note 4: The PC-OC supported the principle that, whatever the circumstances, a refugee - whether he is recognised as such in the requested State or in a third State - should not be extradited to a State that does not offer proper guarantees that it will not return the person to the country of persecution. However, it is up to each State to decide on the ways and means to seek such guarantees and judge the nature of guarantees given to it. In some instances, such guarantees are not given unless the requested State undertakes to re-admit the person once the sentence has been served. (meet25, §32)

Article 2 (Extraditable offences)

Paragraph 1 specifies what offences are in principle extraditable; they must be offences which are punishable under the law both of the requested Party and of the requesting Party.

This paragraph lays down the principle of compulsory extradition. The requested Party has no discretionary power to grant or refuse extradition. This rule is qualified, however, by subsequent provisions which lay down certain exceptions.

The penalty has been fixed at “a maximum period of *at least one year*”. This has been possible because the countries which preferred a maximum of *more* than one year can exclude offences punishable by a penalty of one year’s imprisonment in accordance with ‘the provisions of paragraphs 3, 4 and 5 of this Article, if extradition for these offences is not authorised under their laws. They may also formulate a reservation on this point under the terms of Article 26. Thus the reduction in the scale of penalties widens the scope of extradition.

The second part of this paragraph covers the case of a person who has already been convicted. In such a case the sentence must be of a certain duration, on the understanding that the condition laid down in the first part of the Article that the offence must be punishable by a certain penalty in both the requested and requesting country must also be fulfilled. Extradition is thus further limited, but this is justifiable if it is desired to exclude certain minor offences. This part of the Article covers the extradition of a person who is convicted by the Court and has not put in a defence.

Some experts considered it necessary to insert the words “or by capital punishment” in this paragraph, in order to show explicitly that a more severe punishment, in particular, the death penalty, is not excluded from its provisions, while others thought these words superfluous.

Paragraph 2 will enable the Parties concerned to grant extradition for an offence punishable by less than one year's imprisonment if extradition for such an offence is requested at the same time as extradition for another offence punishable by at least one year's imprisonment. The question is here one of "accessory" extradition which may be granted for a minor offence without thereby infringing the speciality rules. In this connection a delegation pointed out that the reasons for nonextradition in respect of certain minor offences (excessive hardship for the accused, difficulties and expense of extradition procedure) are no longer valid when the person claimed has to be extradited for a serious offence. In this case the person in question ought not to escape prosecution for lesser offences which he has also committed. Moreover, accessory extradition would enable the courts of the requesting country to take into consideration all the offences of which the extradited person was accused, so that a comprehensive judgment could be passed on him. The penalty thus inflicted would, in several countries, be less than the sum of the penalties which might be imposed for each offence separately. Owing to its permissive character this provision was accepted by all the experts.

Paragraph 3 lays down the first exception to the rule of extradition by allowing the Parties to exclude from the field of application of the Convention offences for which extradition is not authorised by their law, although they come within the provisions of Article 1 above. Paragraph 3 is primarily intended for countries which have adopted the system of listing extraditable offences, but it also concerns countries which have not adopted this system and whose laws do not authorise extradition for certain offences or classes of offences.

Under *Paragraph 4* a Party wishing to invoke paragraph 3 is required to transmit to the Secretariat General of the Council of Europe either a list of the offences for which extradition is allowed or a list of the offences for which it is forbidden. The Party in question will transmit one or other of these lists according to the system adopted in its municipal law.

Paragraph 5 provides that a Party which wishes to make any other offences non-extraditable must inform the Secretary General of the Council accordingly. Other offences may accordingly be declared non-extraditable. But the declaration will only be valid vis-à-vis another Party if it has been transmitted to the Secretary General.

Paragraph 6 may be considered as an indirect invitation to reduce the number of non-extraditable offences.

Paragraph 7 allows any Party to apply the rule of reciprocity in respect of any offences excluded from the field of application of this Convention under the terms of this Article.

The provisions of paragraphs 3, 4 and 5 are based on the provisions of Articles 6 and 14 of the European Convention on Establishment relating to the restrictions on the exercise of rights and occupations.

Article 3 (Political offences)

Paragraph 1 forbids extradition for political offences or offences connected with political offences. It allows the requested Party to decide whether the offence is political or not. As this provision was not accepted by all the delegations, owing to its mandatory character, the committee decided that a reservation with regard to it could be made under the terms of Article 26.

Paragraph 2 allows the requested Party to refuse extradition for an ordinary criminal offence if it considers that the request for extradition was made for the purpose of prosecuting or punishing a person on account of his race, religion, nationality or political opinion. The requested Party can adopt the same attitude if it considers that the position of the person claimed might be prejudiced for political reasons.

Note 1: This is particularly important where there are substantial grounds for these beliefs and the request for extradition emanates from a State not party to the ECHR. States should also comply with any interim measure which the European Commission of Human Rights might indicate under Rule 36 of its Rules of Procedure, as for instance, a request to stay extradition proceedings pending a decision on this matter (Rec R (80) 9).

Paragraph 3 lays down that an attempt on the life of a Head of State or a member of his family shall not be considered a political offence. In such a case extradition would be compulsory. As some experts did not accept this paragraph it was recognised that all governments should have the right to make a reservation on this matter under the provisions of Article 26.

It was made clear that the heads of German *Länder* were not to be considered as “Heads of State” within the meaning of paragraph 3.

No reference is made in the text to an attempt on the life of a member of the government, as offences of this kind are not normally mentioned in extradition conventions. They are, of course, covered by paragraph 1 of this Article, under which the requested Party must refuse extradition if it considers that the offence committed is a political offence, but must grant it if it considers that the offence is not political and that the conditions of Article 2 of the Convention are fulfilled.

Paragraph 4 lays down that this Article shall not affect any obligations which the Parties may have undertaken or may undertake under any other international convention. The reference here is in particular to the four Red Cross Conventions signed at Geneva in 1949, and to the Convention on the Suppression of Genocide.

Article 4 (Military offences)

It forbids extradition for purely military offences, but extradition must be granted for an ordinary criminal offence committed by a member of the armed services if the conditions of the Convention are fulfilled.

Article 5 (Fiscal offences)

The text of this Article authorises Parties to extradite for fiscal offences if they so decide among themselves. A previous arrangement is therefore necessary between the Parties. It was impossible to give this Article a more mandatory form which would make it binding upon the Parties, as it appeared from the discussion that there was a considerable difference between the laws of the various countries concerned in respect of such offences. Such extradition must, however, be subject to the conditions laid down in the Convention. The offence concerned must therefore be one punishable both by the law of the requested Party and by the law of the requesting Party in accordance with Article 2. This draft of Article 5 is inspired by Article 6 of the Franco-German Convention on Extradition.

It is left to the Parties to determine the meaning to be attributed to the word “decided”, which could refer just as well to an agreement requiring ratification as to a mere exchange of letters, or any other act that could be considered a joint decision.

Article 6 (Extradition of nationals)

Paragraph 1 allows the extradition of nationals if this is not contrary to the laws of the requested country. But even in this case the requested country is not obliged to extradite its nationals; it has the option of granting or refusing their extradition.

It was noted that in several States the extradition of nationals is forbidden, whereas in other States the extradition of nationals is permissive.

The committee agreed that, at the time of signature or deposit of the instrument of ratification, the Parties might make a special declaration defining what they meant by the term “national”. It was also decided that nationality would be determined at the time of decision.

If one Party proposes that the extradition of nationals should be subject to reciprocity, it may in the opinion of the committee make a reservation to this effect under the terms of Article 26.

Under *paragraph 2* of Article 6, if the requested Party does not extradite a person claimed on the ground that he is a national, it is obliged at the demand of the requesting Party to submit the matter to the competent authority, in order that the person concerned may not go unpunished. Legal proceedings need not necessarily be taken, but the requested Party is obliged to submit the matter to the competent authorities. Proceedings would be taken only if the competent authorities considered that they were appropriate.

An expert, taking into consideration the desirability, in the interests of justice, of proceeding against unextradited nationals, proposed that Article 6, paragraph 2, should be drafted as follows:

“If the extradition of these persons is so refused, the requested Party shall proceed against them in accordance with the procedure which would be followed if the offence had been committed on its own territory.”

This proposal was supported by two other experts, but was not adopted by the committee.

It was suggested that the principle laid down in paragraph 2 should be extended to cover other cases in which extradition was not granted.

However, several experts thought this unnecessary because if one State informs another State that a person on its territory has committed certain offences, the latter State will ipso facto make enquiries to discover whether there are grounds for proceeding against that person.

An expert proposed the adoption of an Article 6 (a), worded as follows:
“If the arrest and surrender of the person claimed are likely to cause him consequences of an exceptional gravity and thereby cause concern on humanitarian grounds particularly by reason of his age or State of health, extradition may be refused.”

This proposal was inspired by humanitarian considerations, but was not adopted by the committee. It was decided that a reservation could be made on this subject under the terms of Article 26; this reservation, being somewhat general in nature, could perhaps be made with reference to Article 1 of the Convention.

Note 1: The PC-OC discussed the question of provisional surrender of nationals for the purposes of investigation and/or trial and whether a scheme could be set up to transfer persons temporarily for the purposes of investigation and trial subject to the person being returned; the sentence, if any, would be executed in the country of origin. Such a scheme could be linked either to the Extradition Convention or to the Mutual Assistance Convention (meet35, §§ 105-106).

Article 7 (Place of commission)

Paragraph 1 permits a Party to refuse extradition for an act committed in whole or in part within its territory or in a place considered as its territory. Under this paragraph it is for the requested Party to determine in accordance with its law whether the act was committed in whole or in part within its territory or in a place considered as its territory. Thus, for example, offences committed on a ship or aircraft of the nationality of the requested Party may be considered as offences committed on the territory of that Party.

Note 1: This provision should not however be invoked in the case where proceedings and judgment in the territory of the requesting State are warranted in order to arrive at the truth, or by the possibility of applying an appropriate sanction or of effecting the social rehabilitation of the person concerned (Res (75) 12).

Paragraph 2 was inserted in order to take into account the law of countries which do not allow extradition for an offence committed outside the territory of the requesting Party. This paragraph provides that extradition must be granted if the offence has been committed outside the territory of the requesting Party, unless the laws of the requested Party do not authorise prosecution for an offence of the same kind committed outside its territory, or do not authorise extradition for the offence which is the subject of the request.

Under the terms of Article 26, a reservation may be made in respect of this paragraph, making it subject to reciprocity.

Article 8 (Pending proceedings for the same offences)

Under this Article, which in general relates to offences committed outside the territory of the requested Party, extradition may be refused if the person claimed is already being proceeded against by the requested Party for the offences for which extradition is requested.

An expert said that when a Party had just received a request for extradition it could still itself proceed against the person claimed if it was permitted by its laws to take proceedings for the offence in question. It could then refuse extradition, but must start proceedings before taking the decision to refuse extradition. All the delegations adopted this interpretation of the Article.

The proceedings referred to in this Article are to be taken in the broadest sense as covering summons, arrest and all other judicial proceedings.

Article 9 (Non bis in idem)

The first sentence of this Article, which is mandatory, covers the case of a person on whom final judgment has been passed, i.e. who has been acquitted, pardoned, or convicted. Extradition should therefore be refused because it is no longer possible to re-open the case, the judgment in question having acquired the authority of *res judicata*.

The word “final” used in this Article indicates that all means of appeal have been exhausted. It was understood that judgment by default is not to be considered a final judgment, nor is judgment *ultra vires*.

The second sentence, which is permissive, covers the case of a person in regard to whom a decision has been taken precluding proceedings or terminating them, particularly the case in which it has been decided that there are no grounds for prosecution (*ordonnance de non-lieu*). In these circumstances extradition can be refused, but, if new facts or other matters affecting the verdict come to light, this provision cannot be applied, and the person must be extradited unless the requested Party proceeds against him under the terms of Article 8.

Note 1: If new proceedings are instituted by the requesting State against the individual in respect of whom the requested State had terminated proceedings for the offence for which he was extradited, any period passed in remand in custody in the requested State shall be taken into consideration when deciding the penalty involving deprivation of liberty or detention which he has to serve in the requesting State (Res (75) 12). The case of a person proceeded against and finally acquitted or convicted was not provided for by the Committee of Experts, on the grounds that all the Member States of the Council have adopted the principle of *non bis in idem* in their domestic law.

Note 2: The PC-OC raised the question of the incidence of the "non bis in idem" principle in instances where extradition is requested for illegal exportation of narcotic substances and the requested person has already been tried in the requested State for symmetrical facts amounting to illegal importation of narcotic substances. (meet34, §§ 51-52)

Article 10 (Lapse of time)

Under its terms, which are mandatory, extradition is refused when, under the law either of the requested Party or the requesting Party, immunity from prosecution or punishment has been acquired owing to lapse of time. The law of both the States concerned is taken into consideration.

Most experts considered that it is not for the requested Party to determine whether immunity by reason of lapse of time had been acquired in the territory of the requesting Party, but it should request a decision on this question directly from the requesting Party itself.

Note 1: Where, according to the law of the requested State, prosecution or punishment may be time-barred, the competent authorities of that State shall take into consideration any acts of interruption and any events suspending time-limitation occurring in the requesting State in so far as acts or events of the same nature have an identical effect in the requested State (Res (75) 12).

Article 11 (Capital punishment)

Under this Article extradition may be refused if the law of the requesting Party lays down the death penalty for the offence committed by the person whose extradition is requested and if the death penalty is not provided for under the laws of the requested Party. The requested Party may, however, grant extradition if the requesting Party gives such assurance as may be considered satisfactory that the death penalty will not be carried out. The assurance given may vary according to the country concerned and even according to the particular case. It may, for example, be a formal undertaking not to carry out the death penalty, an undertaking to recommend to the Head of the State that the death penalty be commuted, a simple Statement that it is intended to make such a recommendation or an undertaking to return the person extradited if he is condemned to death. It is in any case for the requested Party to decide whether the assurances given are satisfactory.

Note 1: This point has been of particular importance in cases involving extradition to the United States. In the jurisprudence of the Court of Human Rights in the Soering Case, it was further clarified that in cases where the person concerned could risk the death penalty, the Convention on Human Rights would take precedence over the obligation to extradite in an extradition Convention. The jurisprudence of the Italian Constitutional Court in the case of Venezia (ITA-1996-2-005) went further, stating that it is contrary to the Italian Constitution for Italy to help execute penalties which cannot be imposed for any offence in Italy (i.e. the death penalty and punishments contrary to humane precepts) and that as the prohibition of the death penalty in Italy is unconditional, a person may not be extradited to a State where they may be susceptible to the death penalty, even when "adequate assurances" are provided by the requesting state that this will not be the case.

Article 12 (The request and supporting documents)

Paragraph 1 of this Article concerns the means by which the request for extradition is submitted. It lays down that the request shall be communicated through diplomatic channels. It provides, however, that other means of communication may be arranged by direct agreement between Parties, thus in effect permitting communication directly between the Ministry of Justice in the requesting and requested countries or through the Consulates.

Paragraph 2 specifies at sub-paragraphs (a), (b) and (c) the documents which the requesting Party is required to produce in support of its request, and the information which it must supply. Some of the experts thought that the warrant of arrest or any other order having the same effect should be issued by an authority of a judicial nature. This point arises from Article 1, in which the Parties undertake to extradite persons against whom the *competent authorities* of the requesting Party are proceeding or who are wanted by them.

Note 1: It was reported to the PC-OC that some States required extra documents to those specified in this article, which practice is not conducive to effective co-operation between States (meet25 §§ 12-14).

Note 2: The domestic legislation of at least one contracting Party requires that, whichever copy is produced, that copy must be signed by a judge, magistrate or officer of the State where it was issued (meet25, §30).

Note 3: The PC-OC discussed the problems associated with translation of the documents required, in particular sentences which can be extremely long and may contain a lot of extraneous material. It was observed that there was some divergence between the French and English texts of Art. 12.2.a which makes the exact requirements of this provision unclear. The time involved in translating whole sentences could in some cases exceed the time limit in Art. 16.4 thus defeating an extradition request; in response to this problem, experts suggested a "simplified translation" which would include all the salient details of the case in the form of a warrant of arrest for judicial authorities to consider when reaching a decision on extradition. Some States, however stated that they would require the full translation of the entire sentence. It was therefore decided that a requesting State should consult with the requested State so that where acceptable the "simplified translation" procedure could be used to avoid delays (meet36, §§ 53-67).

It was observed that the description of the person claimed is not generally given in the request itself but is attached as a separate document.

During the discussion on Article 12 it was found that most of the States represented on the Committee of Experts do not extradite a person claimed until after a decision by a judicial authority.

Article 13 (Supplementary information)

This Article does not call for any special comment.

Article 14 (Rule of speciality)

Paragraph 1 of this Article establishes the principle that an extradited person may not be proceeded against or sentenced or detained for an offence other than that which furnished the grounds for his extradition. Sub-paragraphs (a) and (b) of this paragraph set out the following exceptions to this principle:

Sub-paragraph (a): If the requested Party consents, extradition may be extended to other offences. To obtain such consent, the requesting Party must submit a request accompanied by the same documents as are required, under Article 12, in support of a request for extradition, and by an official record of the Statements of the extradited person, drawn up by a judicial authority. In some countries the Statement of the extradited person concerning a new offence with which he is charged is part of the legal proceedings and so might be considered to violate the principle of speciality. It would seem essential, however, that the extradited person should be given the opportunity of making a Statement concerning a new charge before any decision is taken on the extension of his extradition in respect of any new offence. Since sub-paragraph (a) expressly lays down that an official record should be made of the Statements of the extradited person, the committee were of the unanimous opinion that there was no objection to such Statements being taken.

The third sentence of this sub-paragraph lays down that, if it follows from the request made and the documents produced by the requesting Party that the offence for which extension of the extradition is requested comes within the field of application of the Convention, the requested Party is obliged to agree to such extension.

It was agreed that the phrase “when the Party which surrendered him consents” in sub-paragraph (a) could also apply to the provisions of Article 2, paragraph 2, which provides for extradition to be extended in respect of offences which do not fulfil the condition with regard to the amount of punishment which may be inflicted. In this case, however, the extension is permissive while it is obligatory in respect of the other offences covered by the third sentence of this sub-paragraph.

Sub-paragraph (b) lays down that the rule of speciality shall not apply if the person extradited has not left, having had the opportunity to do so, the territory of the Party to which he was delivered within 45 days after his final discharge or if he has returned to that territory after leaving it.

The words "had the opportunity" in sub-paragraph (b) have been substituted for "been free" originally used, because of their more general and therefore less restrictive sense. In effect the person must not only have been free to leave the territory, but must also have had the opportunity to do so (this covers illness or lack of money).

Moreover, the provision contains two conditions that the person has been finally discharged and has had the opportunity to leave the territory.

Note 1: The PC-OC discussed the meaning of the term "final discharge". Under the law of at least one Member State, this term refers to the situations where it is clear, by way of a final decision, that the person does not any longer risk detention, or further detention, by the enforcement of the sentence for the crimes for which extradition has been granted. Lawyers in that State tend to think that as soon as the person concerned is released from custody and no restrictions on travelling are imposed on him, the term "final discharge" applies. Many experts disagreed with this interpretation and stated that the term "final discharge" applies only to the situation where the person is sure of his legal situation with respect to the proceedings on account of which extradition was carried out (meet28, §§31-33)

Note 2: Paragraph 32 of the Explanatory Report to the Additional Protocol to the Convention on the Transfer of Sentenced Persons reads as follows: "The expression "final discharge" (in French: "élargissement définitif) means that the person's freedom to leave the country is no longer subject to any restriction deriving directly or indirectly from the sentence. Consequently, where, for instance, the person is conditionally released, that person is finally discharged if the conditions linked to release do not prevent him or her from leaving the country; conversely, that person is not finally discharged where the conditions linked to release do prevent him or her from leaving the country."

Paragraph 2 authorises the requesting Party to take the measures necessary to interrupt any legal effects of the lapse of time. The experts recognised that such authorisation was necessary since a State would not be prevented from taking such measures even if the accused had not been extradited. Under this paragraph, the requesting Parties may, for example, sentence an extradited person by default for an offence other than that which furnished the grounds for his extradition. In that case, however, the person extradited may not be detained for such an offence without the consent of the requested Party.

Paragraph 3 deals with cases in which the description of the offence is altered in the course of proceedings. For example, a person extradited for murder is tried for homicide. The committee decided that such alterations shall only be permitted in so far as the offence under its new description is shown by its constituent elements to be an offence for which extradition would be allowed.

Article 15 (Re-extradition to a third State)

This Article provides that the requesting Party may deliver the extradited person to a third State only if the requested Party agrees or if the extradited person has not, having had an opportunity to do so, left the territory of the requesting Party within a certain period after his final discharge or has returned to that territory after leaving it.

Note 1: Re-extradition should be seen as a possibility envisaged by the Convention by way of an exception to the rule of speciality, a request for re-extradition may be refused without any statement of reasons. Re-extradition is subject to the interests of protecting the rights of the person and should neither be sought nor consented upon without the person concerned having been given the opportunity to put forward his/her views, in particular re. the rule of speciality. To this end a record of the hearing of the person would facilitate the process of re-extradition and should be produced pursuant to a request for re-extradition at the latest upon request of the requested Party (meet25, §§ 17-22).

Note 2: Where extradition is requested concurrently by more than one State, the requested State, subject to the provisions of its national law, should communicate to the State to which the person is being surrendered whether or not it consents to re-extradition to a given State and in respect of which offences it so consents (Rec R (96) 9).

Note 3: The PC-OC advised the following approach where a person proceeded against is extradited by a Contracting State (X), to another Contracting State (Y) in which that person is then placed in detention on remand and shortly thereafter, a third State (Z) - to which State Y is bound by a bilateral treaty - transmits to State Y a request for the provisional arrest of that person with a view to extradition. State Y should inform State X of the request for arrest with a view to extradition received from State Z and applies for the consent of State X to the placing of the person concerned in detention on remand for the purpose of extradition. Once this consent has been given and the formal request for extradition has been submitted by State Z to State Y (within the time-limit laid down in the bilateral treaty, even where this time-limit is longer than the one laid down in the Convention), State Y requests the agreement of State X concerning both the imprisonment of the person with a view to extradition and his re-extradition to the third State Z. Where the facts pertaining to a request for re-extradition occurred prior to the first extradition the consent of State X is not required prior to issuing a warrant of arrest, but that warrant shall not be carried out without prior consent of State X (meet25, §§ 15-16).

Article 16 (Provisional arrest)

Paragraph 1 permits the requesting Party to request provisional arrest and it is for the requested Party alone to decide on this request; the requested Party will make this decision in accordance with its own law. It is understood, however, that the requesting Party is the sole judge of the “urgency” justifying the request for provisional arrest.

Paragraph 2 concerns the information which must be given with a request for provisional arrest.

Note 1: These requirements were identified in discussions of the PC-OC : a brief description of the offence and the nationality of the person concerned are needed for a requested State to appraise the nature of the case with reference to the law of extradition (meet25, §§ 23-24).

Paragraph 3 lays down regulations for the transmission of the request. The end of this paragraph provides that the requesting authority shall be informed without delay of the result of its request.

Note 2: The PC-OC discussed the legal basis of Interpol "red notices" used as requests under this paragraph. It was clear that some Member States do not consider "red notices" to be a request for provisional arrest. Interpol hoped to recommend the recognition of red notices as the basis for provisional arrest. Issues of human rights were brought up concerning the use of red notices where there is not sufficient flow of information concerning cases between the member States concerned and Interpol (meet35, §§ 67-76; meet36, §§ 78-79). Many experts expressed the opinion that the official bilateral channels should always be used because formalities must be respected; they did however recognise that Interpol's go-between role was indispensable in practical terms (meet34, §§ 45-48).

Paragraph 4 deals with release from provisional arrest. Two time-limits are provided for – an option limit of 18 days on the expiry of which the person arrested may be set free, and an obligatory limit of 40 days on the expiry of which the person shall be released if the requested Party has not received a proper request for extradition within that period. This paragraph also provides that provisional release is permitted even before the expiry of the time-limit. In that case, however, the requested Party should take such measures of supervision as it thinks necessary to prevent the escape of the person in question.

Note 3: The PC-OC made reference to the difficulties in complying with these time-limits when documents need to be translated, combined with the respect of the individual detainee's rights (meet35, §§ 60-66; meet36, §§ 58-59) (see also note to art.12.2 a above) (cf. Guide to Extradition Procedures)

Under *paragraph 5* the release of the person concerned will not prejudice his re-arrest and extradition if the request for extradition is received subsequently.

With regard to the law governing the procedure and decisions in respect of provisional arrest, the committee recognised that only the law of the requested Party is applicable. This question was dealt with in Article 22.

Note 4: Provisional arrest should only be requested where there are strong reasons to suggest that it would be otherwise impossible to execute the request for extradition (as was underlined by an expert at the 25th meeting of the PC-OC) and in any case should be as short as possible, the time of detention exceeding 18 days only in cases of necessity in particular where the requesting authority indicates difficulties in submitting the documents within that period (Rec R (80)7).

Note 5: Time spent in custody pending extradition should be treated in the same manner as time spent in custody pending trial in subsequent sentencing (Res (75) 12) (the requested party must therefore provide information on the length of time that the person was detained with a view to surrender when that person is surrendered - meet25, § 33) and in application for compensation for unjustified detention.

Note 6: Where the requested State considers the duration of detention pending extradition to be disproportionate to the likely penalty to be incurred on conviction or sentence to be enforced, it should ask the requesting State whether the request is to be maintained and the latter should inform of its decision without delay (Rec R (86) 13).

Note 7: The PC-OC discussed the problems arising from the fact that Art. 16 only covers "urgent" action and not "immediate" action, allowing a criminal potentially to escape before a formal request can be processed. It was suggested that a procedure allowing for immediate informal request for "provisional arrest" pending a request under Art. 16 could be envisaged. Some experts felt that police rather than legal co-operation can be of great assistance in such cases and the provision for hot pursuit contained in Art. 41 of the 1990 Schengen Convention was mentioned in this respect. Some experts pointed out that other provisional measures may be taken in such cases so that in practical terms the "requested" State may prevent the person from escaping pending receipt of the request for provisional arrest. (meet30, §§ 52-58).

Note 8: In at least one country, custody pending trial of certain categories of persons (e.g. elderly persons and pregnant women) may be carried out by way of house arrest. Provisional arrest of people who, once extradited, would be subject to house arrest is sometimes refused on the grounds that provisional arrest in the requested State is a more severe measure than house arrest in the requesting State. Although provisional arrest depends on the discretion of States and extradition is an obligation under the Convention, the compatibility with the Convention of a refusal of provisional arrest may be questioned where it actually frustrates, either the extradition of the person wanted, or the purpose for which extradition is sought (meet30, §§ 59-60).

Note 9: see the discussions at the PC-OC's 25th meeting described above under Article 15 regarding requests for arrest concerning re-extradition.

Article 17 (Conflicting requests)

This Article covers the case where extradition is requested by more than one State at a time. The requested Party must then take into account the several factors set out in this Article when giving its decision.

Note 1: Subject to the provisions of its national law, the requested State should communicate to the State to which the person is being surrendered whether or not it consents to proceedings being brought against that person for offences in respect of which one or more of the concurrent extradition requests were made (Rec R (96)9).

Article 18 (Surrender of the person to be extradited)

This Article is based on Article 14 of the Franco-German Extradition Convention.

Paragraphs 1, 2, 3 and 5 do not call for special comment.

Note 1: Paragraph 3 was mentioned as being a provision in respect of which States often use Interpol as an intermediary to pass on information concerning the surrender (meet35, § 67).

Paragraph 4 concerns the case in which the person claimed is not taken over by the requesting Party on the date indicated by the requested Party. In that case, unless circumstances outside their control have prevented one or other of the Parties from surrendering or taking over the person claimed, he may be released after 15 days and has to be released after 30 days. His extradition for the same offence may then be refused.

An expert drew the attention of the committee to the fact that according to the law of his country the authorities, after one month from the date of notification to the requesting Party of the extradition order, may no longer extradite the individual for the same offence.

Note 2: The time spent in detention by an individual solely for the purpose of extradition in the territory of a State of transit, should be taken into account when deciding on the penalty involving deprivation of liberty or detention which he has to serve for the offence for which he was extradited (Res (75) 12).

Article 19 (Postponed or conditional surrender)

Paragraph 1 of this Article lays down that the surrender of the person claimed may be postponed in order that he may be proceeded against by the requested Party or serve his sentence for another offence.

Under the terms of *paragraph 2*, the requested Party may, instead of postponing surrender, temporarily surrender the person claimed to the requesting Party in accordance with conditions to be determined by mutual agreement.

Note 1: The PC-OC discussed the question of provisional surrender of (a) nationals and (b) persons who risk a life sentence, for the purposes of investigation and/or trial and whether a scheme could be set up to transfer persons temporarily for the purposes of investigation and trial subject to being returned; the sentence, if any, would be executed in the country of origin. Such a scheme could be linked either to the Extradition Convention or to the Mutual Assistance Convention (meet35, §§ 105-106).

Article 20 (Handing over of property)

Paragraph 1 provides that the requested Party shall seize and deliver to the requesting Party property which may be required as evidence or which may have been acquired as a result of the offence. The requested Party is only required to satisfy a request of this kind so far as its law permits. The committee also decided that property, acquired as a result of an offence, which is discovered after the arrest of the person claimed shall also be delivered to the requesting Party.

Note 1: In using paragraph 3 to temporarily retain or to impose the condition that property be returned, the requested State should have regard to the interests of the victim. Any demands for customs duty or other fiscal or customs claim connected to the execution of this article should not be enforced except where the owner of the property concerned who is also the victim is himself liable for payment thereof (Res (75) 12).

Note 2: Where a request under this article is included in a request under art. 12, the requested State should take measures to facilitate the handing over of property sought in the extradition proceedings (Rec R(96)9).

Note 3: In the 31st meeting of the PC-OC, one expert pointed out that this provision is frequently disregarded in extradition proceedings, obliging the requesting State to submit a further request under the European Convention on Mutual Assistance in Criminal Matters. He suggested that it may be helpful, in order to avoid this, to clarify in practical terms the reservation "...in so far as its law permits..." contained in paragraph 1 of this article (meet31, §§ 11)

Article 21 (Transit)

The majority of the delegations were of the opinion that extradition by transit should be subject to less severe conditions than the extradition itself. Some of the experts, however, did not agree with this and requested that the same conditions should be imposed in both cases, or at least that severer conditions than those provided for in this Article should be imposed for transit. In deference to this point of view a permissive clause has been inserted in *paragraph 5*. A Party which wishes to invoke this clause must make a declaration to that effect at the time of signature or ratification of the Convention. In that case the reciprocity rule may be applied.

Under the terms of *paragraph 1*, transit must be granted provided that the offence concerned is not considered as being of a political or purely military character and is punishable by the law of the country in transit. This paragraph does not exclude the transit of a national of the country of transit.

Paragraph 2, however, entitles a Party to refuse the transit of its nationals.

Paragraph 3 lays down that only the documents referred to in Article 12, paragraph 2, need be produced in support of a request for transit.

Paragraph 4 deals with transit by air.

Note 1: The PC-OC discussed paragraph 4. It was clear that paragraph 4(a) was superfluous as it has not been applied for many years due to the impracticality of informing all the numerous States over which air transit will take place as against the calculated risk of the person being legally free to refuse to continue the journey in the rare case of an unscheduled landing. It was noted that often no formal request for transit in accordance with paragraph 4(b) is submitted where there are scheduled stops during the delivery of an extradited person by air. At least one State declared itself willing to accept such requests by telefax and, in urgent cases, to grant transit through Interpol. The Committee underlined that the attention of national authorities should be drawn to the requirements in this Article (meet25, §§ 25-28).

A full discussion took place on whether the transport of a person on board a ship or aircraft of the nationality of a country other than the requesting or requested Parties was to be considered as transit through the territory of that country. Several experts thought that it should be so considered. Others observed that the strict application of such a rule would raise difficulties, in particular when the ship called in at the ports of third States or merely went through their territorial waters; would it in such cases be necessary to request such third States to allow transit ? The reply to this question would vary according to whether the ship in question belonged to a private person, a private company or a State. In view of these difficulties, the committee decided not to deal with this question in the Convention but to leave it to be settled in practice.

The committee considered that it was for the requesting Party alone to make the necessary arrangements for transit and to settle all questions connected with it in agreement with the authorities of the country of transit. It was understood that the requesting Party would inform the requested Party as soon as the transit could be effected. The latter Party was not obliged to demand any guarantees in that respect. The requested Party would decide when and where to deliver the person claimed in accordance with Article 18, paragraph 3. It would have fulfilled its obligations by the delivery of the person claimed either at the frontier or at the port of embarkation of the ship or aircraft used to transport the person.

An expert raised the case of a person taken over by the requesting Party on the territory of the requested Party with the intention of transporting him by air through a third country. In such a case, the requesting Party was alone responsible for the transit. The requested Party could not therefore demand guarantees concerning the arrangements for the transit even if an aircraft of the requested Party was used.

Note 2: In Rec R (80)7, certain points regarding transit were clarified in order to expedite the execution of requests, as follows:

- (a)** Requests to a transit State should be issued at the same time as an extradition request is issued to the requested State;
- (b)** Under normal circumstances transit arrangements should conform to the wishes of the requesting State although where difficulties arise, consultation with the requested State may take place;
- (c)** A contracting transit State should avoid any delay in the procedure. In the case of summary extradition where the person concerned would be on the territory of the transit State for only a short time, the transit State should consider whether transit can be authorised without the production of all the documents mentioned in Art. 12;
- (d)** Transit by air should be used as widely as possible and, as a general rule, the person to be surrendered should be escorted.

Article 22 (Procedure)

This Article provides that the procedure and the decision regarding provisional arrest and extradition shall be governed exclusively by the law of the requested Party.

Note 1: Res (75) 12 adds that the procedure shall ensure for the person concerned a right to be heard by a judicial authority and to be assisted by a lawyer of his own choosing. Contracting States shall submit the control of custody and conditions to be applied to the execution of extradition requests to a judicial authority.

Note 2: Rec (80)7 goes further stating that irrespective of the administrative or judicial nature of the extradition proceedings, the person concerned should be fully informed in a language which he understands, should be heard on the arguments which he invokes against his extradition and should have the possibility of assistance in the extradition procedure, where necessary for free.

Article 23 (Language to be used)

This Article provides that the documents to be produced in support of a request for extradition shall be in the language of the requesting Party or that of the requested Party. The requested Party may, however, demand a translation in one of the official languages of the Council of Europe.

It was understood that the actual request for extradition should be drafted in one of the languages generally used in the diplomatic correspondence between the two Parties.

Note 1: The PC-OC discussed the practicalities of this provision and enunciated some practical rules which should be followed: (a) always be pragmatic; (b) consult your counterpart in the requested party as to his or her practical requirements as to languages; (c) for written communications use forms as far as possible; (d) for documents or written material designed to be submitted to a judicial authority, if it has to be translated it should be into the language of the requested State or where this is not practical into a language widely understood in the requested State or into a language required under the applicable treaty if none of the above is viable (meet35, §§ 47-59; meet34, §§ 58-68)

Article 24 (Expenses)

Paragraph 1 provides that reimbursement of the expenses incurred by the requested Party on its own territory cannot be claimed from the requesting Party.

Under *paragraphs 2 and 3* the transit and transport expenses of a person claimed from non-metropolitan territory between that territory and the metropolitan territory of the requested Party or of the requesting Party, shall be borne by the latter.

Article 25 (Definition of “detention order”)

This Article gives a definition of the expression “detention order” contained in Articles 1, 2, 12 and 14 of this Convention. This provision is inspired by Article 21 of the Franco-German Extradition Convention. (See comments on Article 1 of the present Convention.)

Article 26 (Reservations)

The main question at issue was whether the Convention should contain some general formula permitting reservations to be made with regard to any of the provisions of the Convention or whether the Convention should specify the provisions to which reservations could be made. As most of the experts were in favour of a general formula, this has been set out in *paragraph 1*.

The committee, however, considered that only essential and justifiable reservations could be made. It agreed with the opinion expressed by members of the competent Assembly sub-committee that only reservations based on the fundamental principles of a country’s judicial system should be made.

Paragraph 2 may be considered a request to the States to withdraw their reservations as soon as circumstances permit.

Note 1: Res (78) 43 asks contracting States to withdraw reservations where possible bearing in mind the contribution of the Additional Protocols.

Paragraph 3 allows a Party to apply the reciprocity rule with regard to the Party which has made a reservation.

When depositing its instruments of ratification the French Government made a declaration excluding from the field of application of the Convention Algeria which has become independent.

Article 27 (Territorial application)

Paragraph 1 provides that the Convention shall apply to the metropolitan territory of the Parties. This clause is identical with Article 30, paragraph 1, of the European Convention on Establishment, signed in Paris on 13 December 1955.

Paragraph 2 indicates the territory in which the Convention applies so far as France and the United Kingdom are concerned.^{2 *}

Paragraph 3 allows for the extension of the Convention to the Land of Berlin. This provision was taken from Section VIII of the Protocol to the Convention referred to above.

Paragraph 4 deals with the extension of the present Convention to the territories for whose international relations a Party is responsible. This extension can only be made by direct arrangement between the Parties.

Article 28 (Relations between this Convention and bilateral agreements)

The question arises whether, in cases which are covered both by the Multilateral Convention and by a bilateral agreement, a requesting State is free to invoke whichever of the two it wishes, or whether a bilateral agreement has priority over the Multilateral Convention. This point is of particular importance in the case of a political offence for which extradition might be permitted under a bilateral agreement while it was excluded under the Multilateral Convention.

After a long discussion, the committee came to the conclusion that the Multilateral Convention should take precedence over any other agreement previously concluded. In the opinion of the experts the adoption of a rule to this effect was justified by the general and multilateral nature of this Convention which could be considered as governing the whole field of extradition between the Contracting Parties. Furthermore, the adoption of a rule to the contrary would have enabled Parties wishing to conclude a bilateral agreement to include in it provisions contradicting those of the Multilateral Convention, and thus depriving the latter of its substance. In view of these considerations, the rule was adopted and set out in *paragraph 1* of this Article.

With regard to agreements which might be concluded between the Parties at a later date, *paragraph 2* of this Article to a certain extent limits their freedom by providing that they may conclude bilateral and multilateral agreements to *supplement* the provisions of the present Convention, or to *facilitate the application of the principles* contained in it. This new rule is the natural consequence of the principle, formulated in paragraph 1, that the Multilateral Convention shall take precedence over bilateral agreements.

^{2 *} The reference to Algeria no longer has any purpose following her acquiring independence, which event occurred after the drawing-up of the Convention.”

Paragraph 3 allows Parties which have an extradition system based on uniform laws, i.e. the Scandinavian countries, or Parties with a system based on reciprocity, i.e. Ireland and the United Kingdom, to regulate their mutual relations on the sole basis of that system. This provision had to be adopted because the countries do not regulate their relations in the matter of extradition on the basis of international agreements, but did so or do so by agreeing to adopt uniform or reciprocal domestic laws.

Article 29 (Signature, ratification and entry into force)

This Article, which provides that the Convention should “be open”, permits member countries of the Council to sign the Convention at any time. Thus States unable to approve it now will be able to sign it later.

Three ratifications were considered sufficient to bring the Convention into force.

The committee considered that Parties should be given 90 days after the deposit of their instruments of ratification to take the practical measures necessary for putting the provisions of the Convention into effect.

Article 30 (Accession)

Under this Article accession is made subject to an invitation being extended by the Committee of Ministers. The invitation will take the form of a resolution adopted in accordance with the statutory provisions of the Council of Europe. It is provided, however, that such a resolution is validly adopted only if the representatives of all the Contracting Parties on the Committee of Ministers vote in favour of it.

Article 31 (Denunciation)

Similar provisions are contained in the other conventions concluded in the Council of Europe. The committee decided that denunciation would take effect six months after its receipt.

Article 32 (Notification)

This Article lists the matters which the Secretary General must bring to the notice of the Contracting Parties.

SUMMARY OF QUESTIONS WHICH WERE NOT DEALT WITH IN THE CONVENTION BUT WERE DISCUSSED BY THE EXPERTS WHO DRAFTED IT

1. Amnesty

The question was raised whether extradition should be refused:

1. If an amnesty has been declared in the requesting country:
2. If an amnesty has been declared in the requested country for offences of the type of that for which extradition is requested.

The experts were of the opinion that the first possibility need not be considered as it seemed very unlikely. Furthermore, a request for extradition in such a case would have no basis in law and would therefore have to be refused.

As regards the second possibility, the experts thought that an amnesty generally took local or national considerations into account and should not be extended to persons whom it was not originally intended to cover. Extradition should therefore be granted.

2. Offences committed before the entry into force of the Convention

Certain experts considered excluding from the field of application of the Convention offences committed more than a certain time before its signature. The committee was not in favour of a clause of this kind, since it was the unanimous opinion of the experts that, unless otherwise provided for, a bilateral convention was applicable without any time-limit as to offences committed before its entry into force, provided that the request for provisional arrest or extradition reached the requested Party after the Convention had come into force between the two Parties.

3. Settlement of disputes

The experts considered whether the text of the Convention should include a provision concerning the settlement of disputes. Several proposals were made on this subject. The committee rejected them, however, on the grounds that such provisions are only rarely found in conventions on extradition. In practice any differences which arise over the application or interpretation of such conventions are satisfactorily settled through diplomatic channels.

Certain experts observed that, if there was no special provision made in a convention, any differences of interpretation could be settled by invoking other agreements. Several Member States of the Council had concluded bilateral treaties on arbitration and conciliation; States Party to the 1928 General Act of Geneva could invoke that Act; and those States which had accepted the permissive clause of Article 36, paragraph 2, of the Statute of the International Court of Justice could invoke that clause. States which were not bound together by any of these agreements could always agree to submit a dispute of this kind either to the International Court of Justice or to arbitration. If the European Convention on the Peaceful Settlement of Disputes were to enter into force, it would be applicable to disputes arising out of a convention on extradition.

For these reasons the committee decided not to include a clause on the settlement of disputes in the model Convention.

4. Mutual assistance in criminal proceedings

This question which is connected with the problem of extradition was referred to during the committee's discussions. The committee was generally in favour of concluding a special convention on mutual assistance in criminal proceedings. So far, no multilateral convention on this subject has been drawn up. Several delegations Stated that their countries had concluded bilateral treaties on the question and that model conventions had also been prepared.

The experts thought that this was a matter of great practical importance and should be dealt with in a multilateral convention between the member countries of the Council of Europe. They considered that such a convention would be acceptable to more of the Council's Members than the Convention on Extradition. The Committee of Experts therefore recommends to the Committee of Ministers that it should instruct a Committee of Experts to prepare a convention on mutual assistance in criminal proceedings³

Note 1: Choice between extradition and transfer - questions raised concerning the situation where a national of State A was sentenced and serves a sentence in State B and proceedings are pending in State A against the same person for an offence other than the offence for which he was sentenced in State B and State A seeks the presence of the person on its territory for investigation and trial.

- 1. Does State A have an option between (a) requesting the extradition of the person and (b) seeking that person's transfer under the Transfer Convention?**
- 2. Where State A seeks the transfer of the person, is it under an obligation to inform State B/ inform the person concerned/ inform both, that proceedings are pending?**
- 3. Where either State B or the person seeks transfer under the Convention, is State A under an obligation to inform State B/ inform the person concerned/ inform both, that proceedings are pending?**
- 4. What are the legal consequences when the person consents to his transfer while being unaware of the proceedings in State A?**

In response to these questions, some experts found that State A could not fulfil its aims legally under the Transfer Convention as the institution of proceedings is not envisaged by that Convention and it would amount to a disguised extradition. It would only be possible under the transfer procedure where all parties (including the person concerned) were aware of the situation and the legal consequences of the transfer and consented to the transfer on that basis.

³ It is recalled that the European Convention on Mutual Assistance in Criminal Matters was opened to signature by the Member States of the Council of Europe on 20 April 1959.

Some experts, however adopted a pragmatic approach allowing the use of transfer procedures instead of extradition procedures on the basis that transfer procedures are quicker and less burdensome than extradition procedures, that the person concerned is necessarily aware of his past behaviour in the administering State and therefore implicitly consents to present or future trial and proceedings for past behaviour when he consents to transfer and that the requirement in Art. 7 of the Convention concerns "legal" consequences only, not concrete consequences. (meet34, §§ 39-43).