Extradition

European standards – Revised edition

Explanatory notes

on the Council of Europe convention and protocols

and minimum standards

protecting persons subject to

extradition proceedings

The Council of Europe's Committee of Experts on the Operation of European Conventions on Co-operation in Criminal Matters (PC-OC) is grateful to Raquel Tavares (expert) for her invaluable work in updating this compendium. The opinions expressed in this work are the responsibility of the expert and do not necessarily reflect the views of the PC-OC or the official policy of the Council of Europe.

Table of Contents

Original foreword by Eugenio Salvaggio……8

Foreword to the second edition……11

Introduction……13

Abbreviations……15

PART I – THE EUROPEAN CONVENTION ON EXTRADITION AND ITS PROTOCOLS: EXPLANATORY NOTES, COMMENTS AND RECOMMENDATIONS ON IMPLEMENTATION……17

Chapter 1 - ***The European Convention on Extradition, as amended by its Additional Protocols 1, 2 and 4***……17

The European Convention on Extradition: ETS no. 24 (ECE) – ***Preamble***

The Additional Protocol to the European Convention on Extradition: ETS no. 86 (AP1) – ***Preamble***

The Second Additional Protocol to the European Convention on Extradition: ETS nº. 98 (AP2) – ***Preamble***

The Fourth Additional Protocol to the European Convention on Extradition: ETS no. 212 AP4) – ***Preamble***

Obligation to extradite (Article 1 ECE)

Extraditable offences (Article 2 ECE; Article 1 AP2)

Political offences (Article 3 ECE; Article 1 AP1)

Military offences (Article 4 ECE)

Fiscal offences (Article 5 ECE; Article 2 AP2)

Extradition of nationals (Article 6 ECE)

Place of commission (Article 7 ECE)

Pending proceedings for the same offences (Article 8 ECE)

Non bis in idem (Article 9 ECE; Article 2 AP1)

Lapse of time (Article 10 ECE, Article 1 AP4)

Capital punishment (Article 11 ECE)

***Judgements* in absentia** (Article 3 AP2)

Amnesty (Article 4 AP2)

The request and supporting documents (Article 12 ECE; Article 5 AP2; Article 2 AP4)

Supplementary information (Article 13 ECE)

Rule of speciality (Article 14 ECE; Article 3 AP4)

Re-extradition to a third state (Article 15 ECE; Article 4 AP4)

Provisional arrest (Article 16 ECE)

Conflicting requests (Article 17 ECE)

Surrender of the person to be extradited (Article 18 ECE)

Postponed or conditional surrender (Article 19 ECE)

Handing over of property (Article 20 ECE)

Transit (Article 21 ECE; Article 5 AP4)

Procedure (Article 22 ECE)

Channels and means of communication (Article 6 AP4)

Language to be used (Article 23 ECE)

Expenses (Article 24 ECE)

Definition of "detention order" (Article 25 ECE)

***Final Clauses* - European Convention on Extradition** (Articles 26-32 ECE; Article 4 AP4)

***Final Clauses* – Additional Protocol to the European Convention on Extradition** (Articles 3-9 AP1)

***Final Clauses* – Second Additional Protocol to the European Convention on Extradition** (Articles 6-12 AP2)

***Final Clauses* – Fourth Additional Protocol to the European Convention on Extradition** (articles 7-15 AP4)

Chapter 2 – ***The Third Additional Protocol to the European Convention on Extradition*** **–ETS No. 209 (AP3)**……**162**

Preamble

Obligation to extradite under the simplified procedure (Article 1 AP3)

Initiation of the procedure (Article 2 AP3)

Obligation to inform the person (Article 3 AP3)

Consent to extradition (Article 4 AP3)

Renunciation of entitlement to the rule of speciality (Article 5 AP3)

Notifications in case of provisional arrest (Article 6 AP3)

Notification of the decision (Article 7 AP3)

Means of communication (Article 8 AP3)

Surrender of the person to be extradited (Article 9 AP3)

Consent given after expiry of the deadline laid down in Article 6 (Article 10 AP3)

Transit (Article 11 AP3)

Relationship with the Convention and other international instruments (Article 12 AP3)

Friendly settlement (Article 13 AP3)

Final clauses (Articles 14-19 AP3)

PART II – THE RIGHTS OF INDIVIDUALS IN EXTRADITION PROCEEDINGS……187

Chapter 1: Rights of the individual during extradition……193

1.1 The right to liberty and security
- 1.1.1. The lawfulness of detention
- 1.1.2 Length of the detention pending extradition
- 1.1.3 Judicial review of detention
- 1.1.4 Restrictive measures alternative to detention
- 1.1.5. Mutual recognition of decisions on extradition

1.2 Right to information and access to the file

1.3 Right to interpretation and translation

1.4. Right of access to a lawyer

1.5 Right to be heard

1.6 Right to an expedient procedure

1.7 Presumption of innocence

1.8 The rights of foreign prisoners

1.9 The right to an effective remedy

1.10 Specific rights for children

1.11 Whistleblowers

Chapter 2: Procedural aspects of extradition……265

2.1 Interim measures and preliminary ruling

2.2 Extraditable offences

2.3 Causes for refusal of extradition

2.4 Issuance and execution of requests

2.5 Simplified extradition procedure

2.6 Competing requests

2.7 The rule of speciality

2.8 The *non bis in idem* principle

2.9 Re-extradition to a third State

2.10 The principle of double criminality

2.11 The *aut dedere aut judicare* principle

2.12 The nationality of the individual

2.13 Amnesty and pardon

2.14 Temporary surrender

2.15 Postponement of extradition

2.16 The post-surrender phase

Chapter 3: Human rights guarantees as grounds for refusal of extradition……..**336**

3.1 Prohibition of discrimination

3.2 Capital punishment and extrajudicial killings

3.3 Risk of torture or ill-treatment

3.4 Life sentences

3.5 Judgements *in absentia*

3.6 Flagrant denial of justice

3.7 Flagrant denial of the right to liberty

3.8 Right to respect for private and family life

3.9 Children

3.10 The role of assurances

Chapter 4: Extradition *versus* other transnational procedures……**455**

4.1 Extradition and surrender

4.2 Extradition and asylum

4.3 Disguised extradition and its connection with deportation or expulsion procedures

4.4 “Extraordinary renditions” of terrorism suspects

Part III – Recommendations and Guidelines……..**481**

1. Resolution (75) 12 of the Committee of Ministers to member states on the practical application of the European Convention on Extradition
2. Resolution (78) 43 of the Committee of Ministers to member states on reservations made to certain provisions of the European Convention on Extradition
3. Recommendation No. R (80) 7 of the Committee of Ministers to member states concerning the practical application of the European Convention on Extradition
4. Recommendation No. R (80) 9 of the Committee of Ministers to member states concerning extradition to states not party to the European Convention on Human Rights
5. Recommendation No. R (86) 13 of the Committee of Ministers to member states concerning the practical application of the European Convention on Extradition
6. Recommendation No. R (96) 9 of the Committee of Ministers to member states concerning the practical application of the European Convention on Extradition

7. Resolution (75) 11 of the Committee of Ministers on the criteria governing proceedings held in the absence of the accused
8. Resolution 2315 (2019) of the Parliamentary Assembly of the Council of Europe, on Interpol reform and extradition proceedings: building trust by fighting abuse
9. PC-OC Guidelines on the provision of information regarding the detention or other measures of restriction imposed in extradition proceedings
10. PC-OC Guidelines and model request for extradition
11. Guidance on good practices regarding the post-surrender phase in extradition proceedings
12. Guidelines on Extradition to Third States (European Commission)

Part IV – Additional resources……**526**

Original foreword

It is an honour and a pleasure for me to write the foreword to this publication, which assembles the relevant Council of Europe legal documents on extradition: the 1957 convention and its protocols with their explanatory reports, as well as the resolutions and recommendations on extradition adopted by the Committee of Ministers. This publication also includes abstracts from the discussions on extradition held by the Committee of Experts on the Operation of European Conventions on co-operation in criminal matters (PC-OC). The inclusion of the latter constitutes added value to this publication, which will no doubt serve as a useful tool for practitioners in the field of judicial co-operation.

The PC-OC deals with the functioning of the Council of Europe's conventions in the criminal field with a view to facilitating their application through enhanced co-operation. This committee held its first meeting in November 1981 and celebrated its 50th meeting in June 2005. The Committee of Ministers entrusted it to "a. examine the functioning of a certain number of conventions in the criminal field; b. follow and monitor the evolution and progress made in other fora (United Nations and the European area) also with a view to propose measures so as to ensure general uniformity; and c. examine the criminal aspects of the European Convention on Human Rights in relation to the application of the said conventions".

A long time has passed since 1981 and judicial co-operation in general has changed a great deal. New forms of criminality (for example, organised crime) and new crimes (for example, cybercrime) have appeared. New technologies, more frequent and rapid movement of persons and goods across borders and globalisation in social and economic fields have contributed to the development of transnational criminality. This obliges us to consider judicial co-operation not merely as assistance from one state to another but as a crucial aspect of a common fight and a common challenge to be faced.

Since the establishment of the PC-OC, the committee has found itself in a privileged position to observe these major changes, to subsequently interpret the existing instruments and tools in a flexible manner and to ensure they remain applicable in present circumstances while respecting the rule of law. It has also elaborated new solutions which are contained in the protocols to the conventions (recently: the Additional Protocol to the Convention on the Transfer of Sentenced Persons, ETS No. 167, 1997, and the Second Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters, ETS No. 182, 2001).

In the accomplishment of such a task, the PC-OC has benefited from the contributions of national experts in the field of international judicial co-operation. It is not difficult to imagine the liveliness of the discussions on concrete questions related to the application of the conventions which had mostly been brought to the committee's attention by an interested state party to a convention. It is important to note that the impact of these discussions frequently went beyond the issue raised. All national experts present at the meeting would indeed take back home the sense and the result of these discussions and apply them in solving problems domestically or preventing other questions being raised.

It would have been a pity to leave all these discussions and arguments solely to the collective memories of the individuals who took part in those meetings. This is why it has

been decided to collect together the main topics discussed with the results of these discussions and to publish them under the first part of this publication. Even where a definite decision had been taken it would be impossible to find in these "explanatory notes" something that could be taken as "the" conclusion of the PC-OC. Although some states would have preferred to have such conclusions in this compilation, most national experts were against such an idea as it might lead practitioners to feel themselves bound by those findings. The PC-OC felt, however, that such a compilation would be important in the day-to-day practice of practitioners, judicial authorities and researchers.

The publication of this compendium would not have been possible without the extraordinary and most valuable efforts of the Secretariat of the Council of Europe.

Additional publications of the same type are being prepared, presenting in a similar format the results of discussions dealing with the application of other criminal conventions, such as the Convention on the Transfer of Sentenced Persons (ETS No. 112, 1983) or the Convention on Mutual Assistance in Criminal Matters (ETS No. 30, 1959). This is particularly interesting considering the wide application of these conventions, to which, respectively, 61 and 46 states are party.

As said above, judicial co-operation has changed a great deal in recent times, although extradition seems to be the area where the least amount of change has occurred. This is not surprising if one bears in mind that extradition is the oldest form of international co-operation (according to Professor Bassiouni extradition dates from the 13th century BC). Pressures to make judicial co-operation, and extradition in particular, more effective are still strong and growing worldwide. The need to put in place efficient tools to address recent and major challenges to societies and individuals (terrorism, trafficking in human beings, etc.) and to adapt the Council of Europe's legal instruments to changes in the international legal framework (*inter alia*, supranational jurisdictions and outcomes at European Union level, for example the European Arrest Warrant) calls for modernisation of specific aspects in the area of extradition and judicial co-operation in general. The aim is to increase the effectiveness of co-operation and at the same time to ensure respect of individual and fundamental rights at the highest possible level.

There is no doubt that in order to achieve such a goal one needs courage and imagination. But there is something we should never forget: we might have the best laws and provisions in the world, but their application depends on us.

Finally, I wish to thank the Director General of Legal Affairs at the Council of Europe, Mr Guy De Vel, for his continuous support and trust in the PC-OC and its work.

For my part, I feel obliged to express my gratitude to the colleagues and friends of the PC-OC: having met them and having had the possibility to work with them, it is something I shall always be proud of. I have received from them – from each of them – much more than I might possibly have given.

Eugenio Selvaggi

Chairperson of the PC-OC

2006

Foreword to the second edition

When one opens the revised edition of "Extradition: European standards" and reads "o*riginally released in 2007, the update of the publication entitled "Extradition – European Standards" has been on the agenda of PC-OC since November 2018"* one can conclude why only in the PC-OC environment of experts on international cooperation in criminal matters, the need for such a work could be identified and a document such as the one that is now in front of practitioners as well as theorists and scholars, was so vividly welcomed.

Like Eugenio Selvaggi wrote back in 2007, the nature, aims and work of the PC-OC, now approaching its 88th Plenary Meeting, explain why here, where interpretation of legal instruments, demonstration of practical cases and discussion of concrete problems are present in each and every meeting, experts need to bring together this much information, besides the exercise of updating instruments, or of developing practical tools, or of discussing obstacles and solutions to concrete cases.

Since 2007 many things have changed. And yet the PC-OC keeps on walking close to real life challenges. Signs of it are clearly identified as stones placed to facilitate the walk of those that must find a proper path for international cooperation in criminal matters with a special insight regarding extradition.

All work done at the Committee, since 2007, seems like a puzzle where all pieces come together and make sense.

From one side new sets of rules in the field of extradition have been negotiated and approved in the form of the Third and Fourth Additional Protocols to the 1957 Convention, now reflected in the European Standards, having in mind that Protocols I, II and IV amend the 1957 Convention and the Additional Protocol III establishes the rules for a procedure of simplified extradition, a modern solution required by the practice.

In parallel, the guidelines and the model form of request for extradition were developed in order to make more accessible the information on each counterparts' system and to simplify the interpretation of requests by adopting a common language in terms of drafting requests. They find their place in the updated Extradition: European Standards.

The constant work around the index and summaries of the case-law of the European Court of Human Rights expresses the extreme relevance of the European Convention on Human Rights, especially on extradition, and its impact in the work of practitioners. Naturally, they were a precious tool for the chapter on human rights in extradition proceedings of the Standards that are now introduced.

And a major step forward, the Policy Paper on the accession by non-Member States to the Council of Europe Conventions on Cooperation in Criminal Matters that already opened the door of the Council of Europe Convention on extradition to Chile, as the first non-member State to have been submitted to the exercise conceived to ascertain a reliable State respectful of human rights. The Standards will be a valuable tool for non-member States that aim at becoming Parties to the 1957 Convention and its Protocols by showing, in a kind of compendium, the rules of the game when it comes to how the Council of Europe deals with extradition and its rules.

A work such as this one would not have been possible without the constant inspiration and support of the Secretariat that guides the Committee through many meetings, assists the experts in the writing of documents and is able to show the results of the discussions held by keeping an updated and user-friendly website. It's a generous, sometimes invisible, work that it is more than fair to highlight.

The intervention of the expert Raquel Tavares that came from the human rights side but managed to dive into the many documents, the endless case law, the multiple Recommendations and combine all of them in a very complete kind of manual was outstanding and priceless.

Finally I quote our dear Eugenio Selvaggi, because he did say so well what I want to say now: that *I express my gratitude to the colleagues and friends of the PC-OC: having met them and having had the possibility to work with them, it is something I shall always be proud of. I have received from them – from each of them – much more than I might possibly have given*.

Joana Ferreira

Chairperson of the PC-OC (2021-2023)

2025

Introduction

According to the definition agreed by PC-OC, "extradition" *consists in assisting other jurisdictions (that are limited by national borders) to prosecute suspects or person charged or to enforce sentences when the person sought is convicted. The assistance consists of physically surrendering the person sought to the requesting state. Extradition is normally established on a legal basis, i.e. an international instrument, but in some jurisdictions reciprocity may be in itself sufficient to allow extradition.*[1]

Originally released in 2007, the update of the publication entitled "Extradition – European Standards" has been in the agenda of PC-OC since November 2018, as a follow-up to its second special session on extradition, held earlier in June that year[2]. However, it was not until November 2022 that an expert was specifically mandated to undertake this task[3].

The elaboration of this publication follows, as closely as possible, the proposals in this regard presented by Mr. Erik Verbert to PC-OC in 2019 and contained in document **PC-OC (2019) 10.** In particular, the publication is divided into 4 major parts, the first devoted to the European Convention on Extradition and its Additional Protocols. As suggested, the text of the original Convention and the three protocols which amend and/or supplement it is integrated, taking into account the consolidated version prepared by Mr Miroslav Kubíček and presented to the Committee at its 60th session, in May 2011[4].

Part I has two chapters: the first on the Convention and the First, Second and Fourth Additional Protocols; the second on the Third Addicional Protocol, which establishes the simplified extradition procedure and is autonomous from the main treaty. Each Article is therefore presented together with the text of any provision introduced by the Additional Protocols which may have altered or supplemented its provisions. Wholly new Articles have been placed as suggested by Mr. Kubíček. Users should first and foremost consult the official database of the CoE to know which Protocols a given State is a party to, and from here they may easily find the text version in force for the State in question. Only the preambles and final provisions of each treaty are presented separately, since they are specific to each instrument and stand on their own.

After the text of each Article and respective amendments, is placed the text of the relevant provisions of the Explanatory Reports, followed by comments made in each PC-OC session and drawn from its reports and related sources, and then by recommendations made by official bodies (at the CoE and EU level). The text of all such recommendations is reproduced in full in Part III. Overall, this work entailed reading all the materials currently online in the **section on Extradition** of the website of **PC-OC**, as well as all session reports and decisions, and any document presented or discussed and pertaining to extradition issues. The sub-sections on **CoE standards**, **Tools for Implementation** and **Country Information** will surely be particularly useful for practitioners.

Part II is divided in four major chapters: The rights of individuals during extradition, Procedural aspects of extradition, Human rights guarantees and grounds for refusal of extradition and Extradition versus other transnational procedures. Each of them contains sections on more

[1] **PC-OC (2021)04rev**, *Guidelines and model request for extradition*, Strasbourg, 6 May 2021, §1.
[2] See **PC-OC (2018) 11**, *List of decisions taken at the 75th meeting of PC-OC*, Strasbourg, 16 November 2018, p. 4.
[3] **PC-OC (2022) 05**, *List of decisions taken at the 82nd meeting of the PC-OC*, Strasbourg, 17 November 2022, p. 4.
[4] **PC-OC (2011)7 rev2**: *Consolidated document reflecting the applicable provisions of the European Convention on Extradition, the first two additional protocols thereto and the draft Fourth Additional Protocol*, Strasbourg, 25 April 2011.

specific issues, containing explanations of the norms currently in force (not only under the European Convention on Extradition, but also human rights treaties (with particular reference to the European Convention on Human Rights) and other multilateral instruments of regional and universal character.

It also includes a detailed description of the vast body of jurisprudence developed on the matter by the European Court of Human Rights. For this, the document with **Updated Case Law by the European Court of Human Rights of Relevance for the Application of the European Conventions on International Co-Operation in Criminal Matters**, also available at the PC-OC's website, has been an invaluable tool, as well as direct consultation of the **HUDOC** database. Norms and case law emanating from European Union, and in each section an effort was made to include references to comparable norms on the matter in discussion applicable in the context of the execution of European Arrest Warrants (EAW). The publication concludes with a short part on "Additional resources".

Throughout the text, direct links are made to each of the documents referred, and particular webpages, so that users can easily access and consult direct sources of information.

We believe that the work now before you will be a useful tool for all those working in international cooperation in criminal matters, in particular when deciding on extradition and EAW-related matters. Any comments or suggestions for improvement will be very much welcomed.

Abbreviations

AP1	Additional Protocol to the European Convention on Extradition
AP2	Second Additional Protocol to the European Convention on Extradition
AP3	Third Additional Protocol to the European Convention on Extradition
AP4	Fourth Additional Protocol to the European Convention on Extradition
CAT	Committee against Torture
CDPC	European Committee on Crime Problems
CFREU	Charter of Fundamental Rights of the European Union
CISA	Convention Implementing the Schengen Agreement
CJEU	Court of Justice of the European Union
CoE	Council of Europe
CPT	European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment
CRC	United Nations Convention on the Rights of the Child
EAW	European Arrest Warrant
EAW FD	Council Framework Decision 2002/584/JHA on the European arrest warrant
EC	European Commission
ECBA	European Criminal Bar Association
ECE	European Convention on Extradition
ECHR	European Convention on Human Rights
ECJ	European Court of Justice
EComHR	European Commission of Human Rights
ECtHR	European Court of Human Rights
EFTA	European Free Trade Association
EJN	European Justice Network
EPR	European Prison Rules
ERJO	European Rules for Juvenile Offenders
ETS	European Treaty Series

EU	European Union
GC	Grand Chamber
HRC	Human Rights Committee
ICCPR	International Covenant on Civil and Political Rights
INTERPOL	International Criminal Police Organisation
MLA	Mutual Legal Assistance
PC-OC	Committee of Experts on the Operation of European Conventions in the Penal Field
PC-OC Mod	Working Group of the Committee of Experts on the Operation of European Conventions in the Penal Field
PC-TJ	Expert Committee on the Transnational Criminal Justice
PP	Preambular paragraph
SIS	Schengen Information System
TFEU	Treaty on the Functioning of the European Union
TEU	Treaty of the European Union
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNCAT	United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
UNHCR	United Nations High Commissioner for Refugees

PART I: THE EUROPEAN CONVENTION ON EXTRADITION AND ITS PROTOCOLS: EXPLANATORY NOTES, COMMENTS AND RECOMMENDATIONS CONCERNING IS IMPLEMENTATION

CHAPTER 1 - The European Convention on Extradition (ETS no. 24), as amended by its Additional Protocols 1 (ETS no. 86), 2 (ETS nº. 98) and 4 (ETS no. 212)

European Convention on Extradition (ETS No. 24)

Opened for signature: 13 December 1957

Entered into force: 18 April 1960

List of Contracting Parties: https://www.coe.int/en/web/conventions/full-list?module=signatures-by-treaty&treatynum=024

Declarations and reservations: https://www.coe.int/en/web/conventions/full-list?module=declarations-by-treaty&numSte=024&codeNature=0

Full text of the Convention: https://rm.coe.int/1680064587

Full text of the Explanatory Report: https://rm.coe.int/16800c92bc

Preamble

Convention

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:

Explanatory Report

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

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 16 (1951) 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'."

The Committee of Experts, meeting at Strasbourg from 5 to 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.

The Assembly in the meantime continued its own work and adopted 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 its 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."

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 non-signatory 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.

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.

On 23 September 1955, the joint meeting between a Sub-Committee of Experts and the competent Assembly sub-committee, 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.

The present report includes:

"(a) General considerations regarding activities carried out;

(b) Commentaries on the articles of the European multilateral Convention on Extradition and a brief summary of the questions which were not dealt with in the Convention but were discussed by the experts who drafted it."

General considerations

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.

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.

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.

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.

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(a)*
>
> 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'."

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.

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.

Additional Protocol to the European Convention on Extradition (ETS No. 86)

Opened for signature: 15 October 1975

Entered into force: 20 August 1979

List of Contracting Parties: https://www.coe.int/en/web/conventions/full-list?module=signatures-by-treaty&treatynum=086

Declarations and reservations: https://www.coe.int/en/web/conventions/full-list?module=declarations-by-treaty&numSte=086&codeNature=0

Full text of the Protocol: https://rm.coe.int/1680076da5

Full text of the Explanatory Report: https://rm.coe.int/16800c96cb

Preamble

First Additional Protocol

The member States of the Council of Europe, signatory to this Protocol,

Having regard to the provisions of the European Convention on Extradition opened for signature in Paris on 13 December 1957 (hereinafter referred to as "the Convention") and in particular Articles 3 and 9 thereof;

Considering that it is desirable to supplement these Articles with a view to strengthening the protection of humanity and of individuals,

Have agreed as follows:

Explanatory report

I. The Additional Protocol to the European Convention on Extradition, drawn up within the Council of Europe by a committee of governmental experts under the authority of the European Committee on Crime Problems, was opened to signature by the member states of the Council on 15 October 1975.

II. The text of the explanatory report prepared on the basis of that committee's discussions and submitted to the Committee of Ministers of the Council of Europe does not constitute an instrument providing an authoritative interpretation of the text of the Additional Protocol although it may facilitate the understanding of the Additional Protocol's provisions.

Background

The European Convention on Extradition is the oldest of the conventions relating to penal matters prepared within the Council of Europe. It entered into force on 18 April 1960 and, at the time of the preparation of this report (15 October 1975), had been ratified by Austria, Cyprus, Denmark, Greece, Ireland, Italy, the Netherlands, Norway, Sweden, Switzerland and Turkey and acceded to by Finland, Israel and Liechtenstein.

The approaching tenth anniversary of the entry into force of the convention led the Council of Europe to organise from 9 to 11 June 1969 a meeting of those responsible at national level for the application of the convention. The participants were of the opinion that the text of the convention no longer corresponded entirely to present-day requirements for inter-state co-operation in the field of criminal law but they admitted that a revision of the convention would be premature. They recommended that a number of questions should be examined at national level for the purpose of implementing the convention or at bilateral level for the purpose of the conclusion of additional agreements.

Setting up of sub-committee and terms of reference

At the meeting of the Bureau of the European Committee on Crime Problems

(ECCP), held on 2 July 1971, following the XXth Plenary Session of that committee from 24 to 28 May 1971, the conclusions of the June 1969 meeting were reexamined and it was decided to set up a sub-committee with the following terms of reference:

> a. to carry out a detailed examination of the conclusions drafted at the June 1969 meeting on the problems of the application of the European Convention on Extradition;
>
> b. to propose, having regard to the different characters of those conclusions (whether or not calling for unilateral action by a Contracting State and whether or not necessitating authentic interpretation or revision of the convention) and taking into account the variety of Contracting States (some being member states of the Council of Europe and others not), all legal means appropriate to the implementation of these conclusions such as: authentic interpretation, unilateral action, recommendations to governments (members of the Council of Europe) and model bilateral agreements between Contracting States, etc.

Dr R. Linke (Austria) was appointed Chairman of the sub-committee and Secretariat duties were carried out by the Division of Crime Problems in the Directorate of Legal Affairs of the Council of Europe.

Working methods of the sub-committee

During meetings held in November 1972 and February 1973 the sub-committee examined each of the conclusions of the June 1969 meeting and the reservations made by Contracting Parties to the European Convention on Extradition. In the light of suggestions put forward and papers submitted by its members and the Secretariat, it formulated proposals to implement the conclusions of the June 1969 meeting and proposals aimed at reducing or eliminating the reservations.

These proposals were briefly examined by the ECCP at its XXIInd Plenary Session in May 1973 and revised in the light of observations made on that occasion at a meeting of the sub-committee held in November 1973.

Examination by an enlarged sub-committee

At its XXIInd Plenary Session, the ECCP had agreed that, from the legal point of view, participation of all Contracting Parties to the European Convention on Extradition was vital to the success of any attempt to interpret and supplement the convention. Accordingly the proposals of the sub-committee were submitted to a meeting of an enlarged sub-committee in March 1974 to which were invited representatives of all the member states of the Council of Europe and of all Contracting Parties to the convention which were not member states.

Examination by the ECCP

The proposals of the sub-committee, as amended by the above-mentioned enlarged sub-committee, were submitted to the XXIIIrd Plenary Session of the ECCP in May 1974. At that stage the proposals of the sub-committee were contained in several texts in different forms each bearing on specific aspects of the application of the European Convention on Extradition; one of these texts was a draft of the Protocol which is the object of this report. The Plenary Session decided that all the texts in question should be transmitted to the Committee of Ministers.

Approval by the Committee of Ministers

The Committee of Ministers of the Council of Europe approved the text of the draft Protocol at its meeting in May 1975 (245th meeting of the Ministers' Deputies).

Opening to signature

The Additional Protocol to the European Convention on Extradition was opened to signature on 15 October 1975 during the 249th meeting of the Ministers' Deputies.

General observations

The June 1969 meeting of those responsible at national level for the application of the European Convention on Extradition formulated conclusions on numerous topics. The Protocol bears on two of these topics, namely, the meaning of "political offence" and the operation of the principle *ne bis in idem*. The desirability of affording states that had made reservations to the convention an opportunity to withdraw or restrict them was constantly in mind during the preparation of the Protocol and it is hoped that the Protocol will assist in this aim.

It should be noted that the Protocol supplements the original Articles 3 and 9 of the Extradition Convention (concerning, respectively, political offences and *ne bis in idem*) but does not modify the existing texts of those articles.

During the preparation of the Protocol, a number of states expressed hesitations about the provisions of Chapter I. They took the view that it was not right to lay down in advance that certain

offences could never be considered "political offences" for the purposes of extradition and that this question should be left to the appropriate national authority in the light of the facts of each individual case. In order to accommodate, in particular, this view whilst at the same time enabling states who wish to do so to become Contracting Parties to the instrument as a whole, Article 6 of the Protocol provides that a Contracting Party may declare that it does not accept one or the other of Chapters I or II.

The commentary which follows is in three parts corresponding to the chapters of the Protocol, namely:

I. Political offence

II. *Ne bis in idem*

III. Final clauses

In addition to a detailed analysis of articles, the commentary contains remarks of a general nature on the subject matter of each chapter.

Second Additional Protocol to the European Convention on Extradition (ETS No. 098)

Opened for signature: 17 March 1978

Entered into force: 5 June 1983

List of Contracting Parties: https://www.coe.int/en/web/conventions/full-list?module=signatures-by-treaty&treatynum=098

Declarations and reservations: https://www.coe.int/en/web/conventions/full-list?module=declarations-by-treaty&numSte=098&codeNature=0

Full text of the Protocol: https://rm.coe.int/1680077974

Full text of the Explanatory Report: https://rm.coe.int/16800c96ee

Preamble

Second Additional Protocol

The member States of the Council of Europe, signatory to this Protocol,

Desirous of facilitating the application of the European Convention on Extradition opened for signature in Paris on 13 December 1957 (hereinafter referred to as "the Convention") in the field of fiscal offences;

Considering it also desirable to supplement the Convention in certain other respects,

Have agreed as follows:

Explanatory Report

I. The Second Additional Protocol to the European Convention on Extradition, drawn up within the Council of Europe by a committee of governmental experts under the authority of the European Committee on Crime Problems (ECCP), was opened to signature by the member states of the Council on 17 March 1978.

II. The text of the explanatory report prepared on the basis of that committee's discussions and submitted to the Committee of Ministers of the Council of Europe does not constitute an instrument providing an authoritative interpretation of the text of the Second Additional Protocol although it may facilitate the understanding of the Additional Protocol's provisions.

Introduction

As did the Additional Protocol to the European Convention on Extradition, which was opened for signature on 15 October 1975,[5] the preparation of the Second Additional Protocol has its origin in a meeting which the Council of Europe organised in June 1969 for the persons responsible at national level for the application of the Convention. The participants in that meeting discussed the various problems arising in connection with the implementation of the Convention and made a number of proposals aimed at improving its functioning.[6]

At its 20th Plenary Session in 1971, the European Committee on Crime Problems (ECCP) examined the conclusions of the 1969 meeting and set up a subcommittee (Sub-committee No. XXXI of the ECCP) which was instructed to carry out a detailed examination of the problems dealt with and to propose the appropriate means for implementing the conclusions reached at the 1969 meeting.

Mr R. Linke (Austria) was appointed Chairman of the subcommittee. The secretariat was provided by the Division of Crime Problems of the Directorate of Legal Affairs of the Council of Europe.

The sub-committee first elaborated the Additional Protocol which was opened for signature on 15 October 1975. It then examined a number of other questions relating to the practical application of the Convention. During its meetings held from 24 to 27 September 1974, from 22 to 25 April 1975 and from 15 to 19 March 1976, it prepared, inter alia, the Protocol which is the subject of this report.

For the purpose of examining the draft texts, the ECCP decided, at its 25th Plenary Session in 1976, to enlarge the composition of the subcommittee so as to comprise experts from all member states as well as from the Contracting Parties which are not members of the Council of Europe.

The enlarged sub-committee met from 6 to 10 September 1976 and from 7 to 11 March 1977.

The draft Additional Protocol as amended by the enlarged subcommittee was submitted to the 26th Plenary Session of the ECCP in May 1977 which decided to transmit it to the Committee of Ministers.

The Committee of Ministers of the Council of Europe adopted the text of the Second Additional Protocol at the 279th meeting of the Ministers' Deputies in November 1977 and decided to open it for signature.

General observations

When preparing the Protocol the sub-committee was faced with a basic choice: either to elaborate separate instruments for each of the subjects to be dealt with, or to include different subjects in one and the same Protocol. Following the method already adopted for the Additional Protocol to the Extradition Convention of 15 October 1975, the subcommittee decided in favour of the latter approach. Consequently, the Protocol contains provisions on a number of different topics; they relate to:

– the extension of accessory extradition to offences carrying only a pecuniary sanction (Chapter I);

– the extension of the Convention to fiscal offences (Chapter II);

[5] ETS No. 86.
[6] . Cf. the publication *Legal aspects of extradition among European States*, Council of Europe, Strasbourg 1970.

– judgments *in absentia* (Chapter III);

– amnesty (Chapter IV); and

– the communication of requests for extradition (Chapter V).

It is to be noted that the provisions on fiscal offences and on requests for extradition (Chapters II and V) modify the existing texts of the relevant articles of the Convention, whereas the provisions on accessory extradition, on judgments *in absentia* and on amnesty (Chapters I, III and IV) complement the original articles.

Fourth Additional Protocol to the European Convention on Extradition (ETS No. 212)

Opened for signature: 20 September 2020

Entered into force: 1 June 2014

List of Contracting Parties: https://www.coe.int/en/web/conventions/full-list?module=signatures-by-treaty&treatynum=212

Declarations and reservations: https://www.coe.int/en/web/conventions/full-list?module=declarations-by-treaty&numSte=212&codeNature=0

Full text of the Protocol: https://rm.coe.int/1680084830

Full text of the Explanatory Report: https://rm.coe.int/16800d383c

Preamble

Fourth Additional Protocol

The member States of the Council of Europe, signatory to this Protocol,

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

Desirous of strengthening their individual and collective ability to respond to crime;

Having regard to the provisions of the European Convention on Extradition (ETS No. 24) opened for signature in Paris on 13 December 1957 (hereinafter referred to as "the Convention"), as well as the three Additional Protocols thereto (ETS Nos. 86 and 98, CETS No. 209), done at Strasbourg on 15 October 1975, on 17 March 1978 and on 10 November 2010, respectively;

Considering it desirable to modernise a number of provisions of the Convention and supplement it in certain respects, taking into account the evolution of international cooperation in criminal matters since the entry into force of the Convention and the Additional Protocols thereto;

Have agreed as follows:

Explanatory report

I. The Fourth Additional Protocol to the European Convention on Extradition, drawn up within the Council of Europe by the Committee of Experts on the Operation of European Conventions on Co-operation in Criminal Matters (PC-OC), under the authority of the European Committee on Crime Problems (CDPC), was opened for signature by the member States of the Council of Europe, in Vienna, on 20 September 2012, on the occasion of the 31st Council of Europe Conference of Ministers of Justice which took place in Vienna (Austria) on 19-21 September 2012.

II. The text of this explanatory report, prepared on the basis of that Committee's discussions and submitted to the Committee of Ministers of the Council of Europe, does not constitute an instrument providing an authoritative interpretation of the text of the Additional Protocol although it may facilitate the understanding of its provisions.

Introduction

Under the authority of the European Committee on Crime Problems (CDPC), the Committee of Experts on the Operation of European Conventions on Co-operation in Criminal Matters (PC-OC) is entrusted, in particular, with examining the functioning and implementation of Council of Europe conventions and agreements in the field of international co-operation in criminal matters, with a view to adapting them and improving their practical application where necessary.

The need for the modernisation of the legal instruments of the Council of Europe in the criminal justice field, including the European Convention on Extradition (hereinafter referred to as "the Convention"), in order to enhance international co-operation, has been highlighted on several occasions. In particular, the "New Start" report (PC-S-NS (2002) 7), presented to the CDPC by the Reflection Group on developments in international co-operation in criminal matters and approved by the CDPC in June 2002, pointed to the necessity of realising a European area of shared justice. The Warsaw declaration and the Plan of Action adopted by the Third Summit of Council of Europe Heads of State and Government of the member States of the Council of Europe (Warsaw, 16-17 May 2005) underlined the commitment, at the highest political level, to making full use of the Council of Europe's standard-setting potential and to promoting implementation and further development of the Organisation's legal instruments and mechanisms of legal co-operation.

At the High-Level Conference of the Ministries of Justice and of the Interior entitled "Improving European Co-operation in the Criminal Justice Field" held in Moscow (Russian Federation) on 9 and 10 November 2006, the Council of Europe was encouraged to continue its efforts to improve the operation of the main conventions regulating international cooperation in criminal matters, in particular those regarding extradition, in order to identify the difficulties encountered and to consider the need for any new instruments.

At its 52nd meeting (October 2006), the PC-OC put forward a number of proposals relating to the modernisation of the European Convention on Extradition, as amended by the two additional protocols thereto of 1975 and 1978. The Convention, which dates from 1957, is indeed one of the oldest European conventions in the criminal law field and has a direct impact on individuals' rights and freedoms, to which the CDPC asked the PC-OC to pay particular attention.

In this context, the PC-OC suggested, on the one hand, to complement the Convention in order to provide a treaty basis for simplified extradition procedures, and, on the other hand, to amend a number of provisions of the Convention in order to adapt it to modern needs. These provisions concerned, inter alia, the issues of lapse of time, rule of speciality and channels and means of communication.

The CDPC, at its 56th plenary session (June 2007), decided to mandate the PC-OC, to draft the necessary legal instruments for this purpose. Having studied various options, the PC-OC agreed to draw up two additional protocols to the Convention, a Third Additional Protocol providing for simplified extradition procedures by complementing the Convention, and a Fourth Additional Protocol amending and supplementing certain provisions of the Convention. The present Fourth Additional Protocol was finalised by the PC-OC at its 60th meeting (17 to 19 May 2011) and submitted to the CDPC for approval.

The drafts of the Fourth Additional Protocol and the Explanatory Report thereto were examined and approved by the CDPC at its 60th plenary session (14 to 17 June 2011) and submitted to the Committee of Ministers.

At the 1145th meeting of their Deputies on 13 June 2012, the Committee of Ministers adopted the text of the Fourth Additional Protocol and decided to open it for signature, in Vienna on 20 September 2012.

Comments

PC-OC began concrete discussions on the need to modernize the **ECE** in 2005, namely in view of the increasingly transnational nature of crime, which calls for effective and rapid cooperation, as well as of changes in such *fora* as the EU and the International Criminal Court. Its Bureau considered various proposals in that regard, deciding that future work should address, inter alia, the possibility to insert time limits into the convention, namely when dealing with extradition requests and surrenders, the question of language and translation of requests, correspondence and documents, the opportunity to promote the use of electronic media in implementing extradition procedures, and the need, for some aspects, of developing a non-binding instrument, in addition to a new Convention[7].

They agreed to consider these proposals as a basis for future work, while keeping in mind "the developments in the EU, notable on the European Arrest Warrant, which, although not directly transposable in the Council of Europe Member States (as far as mutual recognition is concerned), brings novelties which should be considered in the Council of Europe", "the interest in criminal legislation among European States getting closer" and "the future outcome of the PC-TJ works."[8]

At its 51st meeting, in March 2006, the following concrete elements of judicial cooperation that would need to be revised have been identified and discussed: dispute settlement mechanisms; prevention of disputes; interpretation of Conventions; diplomatic assurances; principle "aut dedere aut judicare", *ne bis in idem* principle, double criminality rule; time limits; individual rights and guarantees and other additional issues such as simplified extradition; compensation for a person extradited and then acquitted; status of limitation; and trials *in absentia*. In view of this objective, PC-OC adopted a proposal for revised terms of reference foreseeing the setting up pf a Working Group to be composed by a maximum of 9 of its members, and transmitted this proposal to the CDPC[9]. At its 58th meeting (in May 2010) the Secretariat was instructed to prepare a draft Fourth Additional Protocol to the ECE[10] incorporating the draft provisions under discussion, which was presented to, and examined by, PC-OC at its following session[11].

Before agreeing on the final version of the draft Fourth Additional Protocol, PC-OC examined its text from the perspective of gender equality and considered, but decided not to retain, provisions on: a simplified amendment procedure; a regular review mechanism for reservations and declarations to the Convention its Additional Protocols; the possibility of CoE Member States to accede to this protocol without having signed it previously. Other proposals, presented by the Russian Federation, to amend Articles 1, 2 and 3 of the Convention, have not been incorporated either[12].

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[7] See **PC-OC-BU (2005)03**, *Meeting report of the PC-OC Bureau*, Strasbourg, 28 October 2005, chapter 5; **PC-OC (2006)12**, *Summary report of the 51st meeting of the PC-OC*, Strasbourg, 6 October 2006, §§16, 33.
[8] **PC-OC-BU (2005)03**, chapter 5.
[9] **PC-OC (2006)12**, §§18-47.
[10] **PC-OC (2010)11**, *List of decisions taken at the 58th meeting of the PC-OC*, Strasbourg, 6 May 2010, p. 2.
[11] **PC-OC (2010)21**, *Summary Report of the 59th meeting of the PC-OC*, Strasbourg, 5 November 2010 §§4-8.
[12] **PC-OC (2011) 3**, *List of decisions taken at the 60th meeting of the PC-OC*, Strasbourg, 1 May 2011, pp. 1-2.

Article 1: Obligation to extradite

Convention

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.

Explanatory report

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 judiciairies*" in the French text. These expressions cover the judiciary and the Office of the Public Prosecutor but exclude the police authorities.

Comments

More recent resolutions, recommendations and discussions within the PC-OC take further into consideration humanitarian issues and the rights of the individual concerned.

1. Extradition to countries that allow the use of life sentences

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 **ECE**. The expert from the State concerned forwarded a written statement on the subject which states that, inter alia, 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.[13]

The positions and practices of States parties to the **ECE** have evolved considerably since then, including on the basis of case law issued by the ECHR. For updated information in this regard, see Chapter 3.4 (Life sentences).

2. Extradition of a refugee: conditions

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.[14]

3. The principle of proportionality

[13] PC-OC, *report of the 25th meeting* (13-15 January 1993), §§ 6-11; and Article 5, Schengen Agreement.
[14] PC-OC, *report of the 25th meeting*, § 32.

This is a general principle applicable in all matters of international cooperation in criminal matters and requires that the requesting or issuing State (notably its judicial authorities) considers whether the measure sought – in this case, extradition – is necessary and proportionate for the purpose of the criminal proceedings concerned.

In this respect, the authorities should have particular regard to the seriousness of the offence, the length of the envisaged or applied sentence, the existence of an alternative approach that would be less onerous for both the person affected by the measure and the executing authority, and the cost/benefit analysis of the execution of the measure (see Recommendation 2, below).

For more information, see Chapter 4.2 (Extradition and asylum).

Recommendations

1. *Children*

In relation to this Article and in the case of children (in accordance with Article 1 of the Convention on the Rights of the Child, all persons below 18 years of age), **Resolution (75) 12 of the Committee of Ministers on the practical application of the European Convention on Extradition** recommends to Contracting Parties:

> *That, 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;*

The **UN Convention on the Rights of the Child** establishes that, in these as in all other actions concerning children, all intervening bodies and institutions, including courts of law, administrative authorities, shall take the best interests of the child as a primary consideration (article 3, (1)). In its General Comment no. 14 (2013) on the right of the child to have his, or her best interests taken as a primary consideration, the Committee on the Rights of the Child explicitly states that this entails, for each State Party, namely:

> *(a)The obligation to ensure that the child's best interests are appropriately integrated and consistently applied in every action taken by a public institution, especially in all implementation measures, administrative and judicial proceedings which directly or indirectly impact on children;*
>
> *(b)The obligation to ensure that all judicial and administrative decisions as well as policies and legislation concerning children demonstrate that the child's best interests have been a primary consideration. This includes describing how the best interests have been examined and assessed, and what weight has been ascribed to them in the decision.*

2. *Opportunity of asking for extradition: the principle of proportionality*

When deciding on whether to request extradition, the requesting state should take into consideration the hardship which might be caused by the extradition procedure to the person concerned and to his family, where this procedure is manifestly disproportionate to the seriousness of the offence and where the penalty likely to be passed will not significantly exceed the minimum period of detention laid down in Article 2, paragraph 1, of the convention, or will not involve deprivation of liberty.

In the case of enforcement of a sentence or detention order, the requesting state should apply the same principle of proportionality, particularly where the remainder of the sanction to be served does not exceed a period of four months (**Recommendation No. R (80) 7 concerning the practical application of the European Convention on Extradition**).

3. Extradition to States not party to the European Convention on Human Rights

The Committee of Ministers recommends to member states:

> "1. not to grant extradition where a request for extradition emanates from a state not party to the European Convention on Human Rights and where there are substantial grounds for believing that the request has been made for the purpose of prosecuting or punishing the person concerned on account of his race, religion, nationality or political opinion, or that his position may be prejudiced for any of these reasons;
>
> 2. to comply with any interim measure which the European Commission on 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 the matter (**Recommendation No. R (80) 9 concerning extradition to states not party to the European Convention on Human Rights**).

Article 2: Extraditable offences

Convention

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.

Article 1 (Chapter I) of the Second Additional Protocol establishes that paragraph 2 shall be supplemented by the following provision:

> This right shall also apply to offences which are subject only to pecuniary sanctions.

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.

Explanatory reports

Convention

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 non-extradition 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.

*The explanatory report to the **Second Additional Protocol** further states, in relation to the last part of paragraph 2, that:*

The law of some states draws a distinction between criminal offences properly so-called and certain other types of offences. While criminal offences are punishable by criminal penalties, the other offences are dealt with by pecuniary sanctions which are not regarded as criminal penalties. In the Federal Republic of Germany, for instance, there are offences against public order (*Ordnungswidrigkeiten*) which are dealt with by a fi ne by the administrative authorities, but are subject to appeal to the ordinary criminal courts.

Under the Convention, minor criminal offences which carry only a fi ne as well as the other types of offences mentioned in paragraph 9 cannot give rise to accessory extradition in accordance with

Article 2.2 since they do not fulfil the specified conditions regarding the nature of the sanction. Nonetheless, these offences may cause considerable social harm (for example a violation of regulations relating to the protection of the environment). It was therefore thought desirable to include them all in the category of offences for which accessory extradition can be granted, particularly since the seriousness of the offence which is normally a condition of extradition does not give rise to concern in the case of accessory extradition.

Chapter I extends the scope of application of accessory extradition permissible under Article 2.2 to these offences. The requesting state is thus given the possibility of obtaining extradition also for an offence which is subject to a criminal fine or to any other pecuniary sanction.

As regards the principle of double criminality, all these offences must fulfil the general condition laid down in Article 2.1, i.e. they must be subject to a sanction under the laws of both the requested and the requesting states. However, it is not necessary for them to be punishable by the same kind of sanction in both states. The same principle is laid down, for instance, in Article 11.2 of the Swiss-German Agreement of 13 November 1969 supplementing the European Convention on Extradition.

As the offences covered by Chapter I are offences within the meaning of Article 14.1 of the Convention, the rule of speciality laid down in that provision applies to accessory extradition for such offences.

As regards the documents to be submitted in support of the request for accessory extradition in respect of these offences, Article 12 of the Convention applies, it being understood that the requesting state may present, instead of a warrant of arrest, any other document showing that a charge has been brought against the person concerned.

Convention

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.

Comments

The principle of double criminality

The requirement that, to be extraditable, an offence must be "punishable under the laws of the requesting Party and of the requested Party" (Article 2 (1) **ECE**) is often referred to as the principle of "dual criminality" and appears as a requirement in most modern extradition treaties, although such phrase does not appear in the Convention nor is its exact meaning clarified therein. And the fact is that there are important divergences of views in this regard, on the part of both academics and State legislators and practitioners, as to its exact meaning and application.

The principle of double criminality has been discussed by PC-OC since 2000, firstly in the context of the Convention on the transfer of sentenced persons – during which it considered that the term "law" in Article 3 (1) (e) of this Convention should be interpreted to include all sources of law (eg. statute, common law, customary law), in the meaning usually given to the word "droit", that is used in the French version of the Convention, as opposed to "loi". Also, the PC-OC considered that if only after the actual transfer of the person does it become apparent that the dual criminality requirement has not been fulfilled, the remedy cannot be to free the person, but rather to annul the transfer and return the person[15].

Double criminality was again discussed (this time, from a global perspective) in 2004, on the basis of an opinion prepared by Professor Dr. Otto Lagodny (University of Salzburg). Reference was made, inter alia, to the EAW, which does not require the need for double criminality for a series of crimes, among EU member States. Regarding extradition, most participants were of the opinion that the condition of dual criminality is a principle that cannot be removed in the immediate future[16].

On debates held in 2006 concerning the modernisation of CoE Conventions in the criminal field, PC-OC experts considered that future discussions on the principle of double criminality should assess the extent to which its application raises problems in practice, problems raised and solutions which could be proposed[17]. Among such problems, the most pressing seemed to be the interpretation of such principle *in abstracto* or *in concreto*, since "if there is a wide divergence in the application of this basic concept, it forms an obstacle to the operation of a unified and effective framework for international law enforcement" and "creates the possibility of misunderstanding and tension among state parties to the Convention when the state parties, viewing things through the prism of the standards and legal concepts of their own national systems, may consider that the other jurisdiction is wrongly and unjustifiably either demanding or denying extradition".[18]

As pointed out by Mr. Yitzchak Blum within discussions on this matter held during PC-OC's first special session on extradition, in 2014:

> One of the earliest articles drawing this distinction was written in 1973 by a noted Romanian-Israeli professor S.Z. Feller. Yet, while formulating this distinction, Feller himself was not entirely consistent in applying it. Thus, in his 1973 article, Professor Feller took the position that a proper application of the DC principle would require that DC exist at the time the offence was committed. However, the same professor wrote, in 1980, a comprehensive book on extradition, in which changed his approach, stating that the reference point to determine DC is the time when a request for extradition is received. It appears that the impetus for this change in outlook may have been the experience of an actual high profile case, during the intervening period between the writings, in which a suspect in a terror case was not extradited to Israel on DC grounds.[19]

Basically, an *in abstracto* interpretation focuses on the type of crime involved and limits consideration of whether such principle is fulfilled to the question of whether the behaviour is punishable (with at least one year of imprisonment), regardless of its legal qualification (*nomen juris*) or the existence of possible reasons excluding punishability. For example, tax fraud or drink

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[15] **PC-OC (2012) 02**: *Note on dual criminality,* in concreto *or* in abstracto, Strasbourg, 25 January 2012, p. 4.
[16] Ibid., p. 3.
[17] **PC-OC (2006) 12**: *Summary report of the 51st meeting of the PC-OC*, Strasbourg, 6 October 2006, §44.
[18] **PC-OC (2014)04_en**, *Discussion paper on the application of the double criminality principle*, Prepared by Mr Yitzchak Blum (Israel), Strasbourg, 7 May 2014, pp.2-3.
[19] **PC-OC (2014)07**, *Special session on extradition - 66th plenary meeting of the PC-OC: Workshop reports*, Strasbourg, 17 September 2014, p.2.

driving are prohibited in all Parties but different jurisdictions may introduce different legal thresholds (in relation to the amount of money at stake or alcohol taken) that such acts should reach to qualify as criminal offences. When applying an *in abstracto* interpretation, the threshold is not a constituent element of the crime: "tax fraud is tax fraud and drink driving is drink driving".[20]

An *in concreto* interpretation means that the concrete behaviour underlying the request must fulfil all requirements of punishability under the law of the requested state. The alleged behaviour should not only fulfil the definition of a crime but there should also be no justification (selfdefence), excuse (insanity) or other reasons excluding punishability (eg. need of private complaint, failure to meet a specific threshold)[21].

Yet, as indicated by Yitzchak Blum (Israel) in his discussion paper on the application of the dual criminality which served as a basis for discussions of this issue at the first special session of the PC-OC on extradition in 2014, "there may be wide variation within each of these types. Thus, one view of the *in concreto* interpretation would say that if you consider all the circumstances of the actions committed by the wanted person, these should include facts and circumstances that might constitute defenses to liability under an *in concreto* interpretation (i.e., self-defense, diminished capacity, even statute of limitations.) Others might consider that the issue of possible defenses to liability in the requested state is irrelevant even to an *in concreto* analysis. Some jurisdictions applying an *in abstracto* analysis might conceivably focus on the general type of offense, others might require a congruence of all essential elements of the crime.

Although it is often suggested that one or another interpretation allows for a more liberal application than the other, this is essentially a matter of perspective. As noted, a wholly *in abstracto* interpretation would usually not deny extradition on the basis of factors (e.g. defenses) extraneous to the definition of the crime under the requested State's legislation, while an *in concreto* analysis might. On the other hand, an *in concreto* interpretation can be more flexible in that it may depend less on the particular legal denomination of the criminal offense and more on the fact that the underlying conduct is considered criminal."[22]

This issue of whether the principle of dual criminality should be regarded *in concreto* or in *abstracto* had been discussed by PC-OC in November 2011, during its 61st meeting, on the basis of a reflexion paper[23] prepared by Mr. Eugenio Selvaggi (Italy), who clearly favoured an *in abstracto* interpretation. Again in 2014, in his contribution to furthering this discussion within a debate held during the first special session on extradition, Eugenio Selvaggi continued to favour an *in abstracto* application of the principle of dual criminality, considering "widely acceptable" that the requirement of private complaint, as an element extraneous to the crime itself, would not bear on the granting of extradition requests. The same should, in his view, apply to such issues as the assessment of facts, exculpatory factors and criminal liability, matters to be examined by the competent authority of the requesting State. He also considered that thresholds established by national legislation should not be considered as impediments to extradition, stating it was "quite unreasonable that driving while being drunk could be an extraditable offence depending on whether national legislations provide for different thresholds". He was, however, less adamant about other constitutive elements of a crime, such as the requirement that theft not be committed against one's parents [24].

In the discussions held in November 2011, some Parties, such as Germany and the Russian Federation, indicated that the wording of the principle of double criminality leads them to adopt an interpretation *in concreto*. Other Parties, such as Belgium, Denmark, Italy and Sweden indicated that they apply an interpretation *in abstracto*. These justified their position by a teleological approach to the double criminality principle. It was argued that a request for extradition is not a request for transfer of jurisdiction, nor a request for a trial but a request to

[20] **PC-OC (2012) 02,** p. 2.
[21] *Ibid*.
[22] **PC-OC (2014)04_en**.
[23] See **PC-OC (2011)19,** *Dual criminality in abstracto or in concreto?*: Discussion paper by Mr. Eugenio Selvaggi (Italy), Strasbourg, 25 October 2011.
[24] *Ibid*., p. 2.

assist the appropriate jurisdiction (that of the requesting State) in rendering its justice. An *in abstracto* interpretation would therefore be the most effective way of serving this aim.[25]

The PC-OC agreed that the double criminality principle should apply ***at the moment when the decision to extradite is taken***. "Other moments, including when the alleged offence took place, are therefore not considered as relevant"[26] Despite this early agreement among experts, the topic was later discussed by PC-OC-Mod, which has prepared a short questionnaire on the issue and sent it to delegations. Replies received reveal a divergence of views and, despite a clear majority of States considering the moment when the decision to extradite is taken, many others considered the moment when the offence was committed and even when the request is received, while a few considered the matter at two such moments or at all three[27]. PC-OC thus considered it was necessary to discuss the issue further and put it on the agenda of its special session on extradition during its 66th meeting[28].

On this occasion, divergences seemed to persist on both points. Germany continued to apply the principle of dual criminality ***in concreto***, accompanied by Cyprus (except as it regards Commonwealth countries, in relation to which it applies an *in abstracto* interpretation), the Czech Republic and France. The jurisprudence of Swedish courts continued to favour an ***in abstracto*** interpretation, except when extradition is denied and principle *aut dedere aut judicare* applied, in which case they move to an *in concreto* interpretation. An *in abstracto* interpretation was also favoured by the USA, Switzerland, Israel, Georgia and Ukraine (the latter two with some degree of flexibility, depending on the case or on the other State involved in the extradition procedure – eg. Georgia stated that, in relation to Russia, it interpreted the principle *in concreto* since this was also the interpretation of Russian authorities). In addition to this, other issues have been discussed: Eugenio Selvaggi, for example, raised the question of whether "double incrimination" meant the same *nomen iuris*, the same facts or a substantially similar offence[29].

Also as it concerns the point in time to consider in order to assess whether the double criminality requirement has been fulfilled, no consensus seemed to emerge: the USA declared to consider the moment when the extradition request is received; Germany, Switzerland and Sweden the time when the decision on extradition is taken; France, Cyprus and Israel the moment when the offence was committed (although the Cypriot expert disagreed with the case law of his national courts on the matter and the Israeli reported that a change in relevant legislation was being considered); and the Czech Republic, Georgia and Ukraine all three such moments[30].

PC-OC found that such diverging approaches on the double criminality principle caused obstacles to extradition requests and that it was important to continue discussions thereon[31].

Statute of limitation

Also in 2006, PC-OC discussed whether the status of limitation should it be applied according to the legislation in the requesting State, as set forth in the 1996 Dublin Convention[32].

See under Article 1: 3. Extradition to states not party to the European Convention on Human Rights.

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[25] **PC-OC (2012) 02,** p. 2.
[26] *Ibid*.
[27] See **PC-OC(2013)12 Bil rev3**, *Compilation of replies to the questionnaire on the reference moment to be applied when considering double criminality as regards extradition requests*, Strasbourg, 25 November 2014, p. 4.
[28] **PC-OC (2013)14,** *List of decisions taken at the 65th meeting of the PC-OC*, Strasbourg, 28 November 2013, p.3.
[29] **PC-OC (2014)05_en**, Special Session on Extradition, Workshop 2: *Discussion paper on the refusal of extradition requests and possible solutions*, prepared by Mr Eugenio Selvaggi (Italy), Strasbourg, 7 May 2014, p. 3.
[30] **PC-OC (2014)07**, pp. 2-3.
[31] **PC-OC (2014)14**, List of decisions taken at the 67th meeting of the PC-OC, Strasbourg, 20 November 2014, p. 4.
[32] **PC-OC (2012) 02**, §32.

Article 3: Political offences

Convention

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.

Additional Protocol to the Convention (Chapter I: Political offences – Article 1)

For the application of Article 3 of the Convention, political offences shall not be considered to include the following:

a. the crimes against humanity specified in the Convention on the Prevention and Punishment of the Crime of Genocide adopted on 9 December 1948 by the General Assembly of the United Nations;

b. the violations specified in Article 50 of the 1949 Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Article 51 of the 1949 Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked members of Armed Forces at Sea, Article 130 of the 1949 Geneva Convention relative to the Treatment of Prisoners of War and Article 147 of the 1949 Geneva Convention relative to the Protection of Civilian Persons in Time of War;

c. any comparable violations of the laws of war having effect at the time when this Protocol enters into force and of customs of war existing at that time, which are not already provided for in the above-mentioned provisions of the Geneva Conventions.

Explanatory reports

Convention

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.

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.

Additional Protocol (Chapter I – Political Offences: General remarks)

Article 3 of the convention provides that 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. It further excludes from the ambit of political offences the taking or attempted taking of the life of a head of state or a member of his family and contains a saving clause for obligations which Contracting Parties may have undertaken or may undertake under any other international convention of a multilateral character.

The convention thus already contained certain limitations on the extent to which an individual could avail himself of the concept of political offence as a defence to a request for extradition. The June 1969 meeting had concluded that there were other circumstances in which, notwithstanding the motive underlying the offence, it would not be justifiable, in view of the nature of the offence, that the individual should be able to evade extradition; it considered that such circumstances existed when the offence in question took the form of genocide, a war crime or a crime against humanity. This suggestion was in line with what was considered to be a current trend towards defining political offences and regarding certain crimes as so abominable that no immunity could be granted. It has to be borne in mind in this context that, if extradition is refused, the offender may escape punishment since the state where he is may lack jurisdiction over the offence in question.

In the meantime there had been prepared within the Council of Europe the European Convention on the Non-applicability of Statutory Limitation to Crimes against Humanity and War Crimes which sets out certain obligations in the matter of limitation on the prosecution and punishment of the same types of crime as those referred to by the June 1969 meeting. This new convention contained a list of the offences to which it related and it was decided, in view of the similarity of the subject matter, to adopt subject to some changes of detail referred to in paragraph 16 below the same list for the Protocol to the European Convention on Extradition. It was noted, in this context, that the majority of the member states of the Council of Europe were parties to the international conventions cited in the aforesaid list and, indeed, the above-mentioned saving clause in Article 3 of the Convention on Extradition was drafted with these conventions particularly in mind.

The effect of Chapter I of the Protocol is accordingly to add to the list of offences which, for the purposes of Article 3 of the Convention on Extradition, shall not be considered political offences, the following:

> a. the crimes against humanity specified in the 1948 United Nations Convention on the Prevention and Punishment of the Crime of Genocide;
>
> b. certain violations of the 1949 Geneva Conventions as the same are more particularly detailed in Article 1 of the Protocol; and

c. any comparable violations of the laws or customs of war having effect or existing when the Protocol enters into force.

Additional Protocol (Article 1):

Article 3 of the European Convention on Extradition prohibits extradition 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. The effect of this chapter is to prevent the requested party from so regarding an offence if it constitutes or is connected with one of the crimes or violations listed in paragraphs *a.*, *b.* and *c.* of Article 1. In such a case the requested state would be under an obligation to extradite the offender, provided, of course, that the remaining conditions of the Extradition Convention were satisfied.
The effect of this chapter is limited to the specific context of Article 3 of the Extradition Convention; it has no bearing on the interpretation of any other treaty binding a Contracting Party nor on the interpretation of the expression "political offence" in any other context.

As mentioned above, the content of paragraphs *a.*, *b.* and *c.* is based on Article 1 of the European Convention on the Non-applicability of Statutory Limitation to Crimes against Humanity and War Crimes. When that convention was drafted, it was recognised that its scope *ratione materiae* had to be very precisely defined and it was asked whether there would be advantage in making an exhaustive list of the gravest war crimes; the conclusion was reached that there was no purpose in establishing a new list of concepts or offences which might not accord with those already recognised in international law and that the best course was to define the offences by reference to what was already established in international law. It was also considered that the crimes listed in the United Nations Convention on the Prevention and Punishment of the Crime of Genocide were all of sufficient gravity to justify a departure from the rule of statutory limitation and that the desire to keep to an already existing definition in international law could best be met by making reference to this Genocide Convention. These considerations also guided, *mutatis mutandis*, the draftsmen of the Protocol to the Extradition Convention.

However, the Protocol differs from the Statutory Limitation Convention in two respects:

"a. the latter convention stipulates that the violation of the Geneva Conventions or of the laws or customs of war in question must be of "a particularly grave character" before the provisions of the convention will apply. It was considered neither necessary nor justifiable for the Protocol to include such a stipulation; the gravity of the offence might be relevant to the applicability or non-applicability of statutory limitation but not to the political or non-political character of an offence which depends on whether or not it constitutes a specified crime;

b. the latter convention provides that Contracting States may, by declaration, add to the list of offences which are not subject to statutory limitation certain other violations of a rule or custom of international law established in the future. A similar provision does not appear in the Protocol since it was thought that, in the context of extradition, a list of names was preferable to a system of declarations which could lead to confusion."

For ease of reference, relevant extracts from the Genocide and the Geneva Conventions are set out at the end of this report. Article 1.*c.* of the Protocol refers to violations of comparable provisions of international law of war not specifically dealt with in the 1949 Geneva Conventions mentioned in Article 1.*b.* It appeared that those Geneva Conventions were exclusively concerned with the protection of certain categories of people and were, thus, silent as regards violations of certain aspects of the law of war (as set out, for instance, in the 1899 and 1907 Hague Conventions) not covered by the 1949 International Red Cross Conventions. It is not intended that the notion of war crimes should be interpreted as confined to violations of the rules applicable to a declared war but rather that it should include violations of the humanitarian law in armed conflict and occupation, unless, of course, the international instrument concerned is restricted to a declared war.

Comments

Convention

The prohibition of extradition in the case of a political offence is absolute and cannot be rebutted through the provision of diplomatic or other assurances[33].

Concerning the introduction of safeguards in the INTERPOL system to protect individuals against requests for red notices or diffusions introduced for political reasons, see Article 6 of **AP4**.

Additional Protocol

From 16 to 19 October 2017, a Conference was held in Doorn (the Netherlands) regarding a proposal to create a new multilateral treaty for MLA, extradition and domestic prosecution of the most serious international crimes (genocide, crimes against humanity and war crimes). The meeting gathered 103 participants from more than 40 Co-sponsoring States which, together with renowned experts, voiced their support for this initiative. The core group of sponsoring States (Argentina, Belgium, Mongolia, the Netherlands, Senegal and Slovenia) then began working on a preliminary draft text[34].

Recommendations

Having regard paragraph 2 of this Article, the Committee of Ministers of the CoE, in its **Recommendation No. R (80) 9, concerning extradition to States not party to the European Convention on Human Rights**, recommended that the governments of CoE member states:

- *not to grant extradition where a request for extradition emanates from a state not party to the European Convention on Human Rights and where there are substantial grounds for believing that the request has been made for the purpose of prosecuting or punishing the person concerned on account of his race, religion, nationality or political opinion, or that his position may be prejudiced for any of these reasons;*
- *to 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 the matter.*

The **EU Guidelines on Extradition to Third States** contain guidance on ***unfounded or abusive, including politically motivated red notices, arrest warrants and extradition requests.*** In addition to the automated screening and detection system of red notices in place within ***Interpol***, which allows misused cases to be filtered out, and of a special Task Force, composed of lawyers and police officers from different Interpol Member States, which has been established to assess all incoming requests for publications of notices and diffusions, Interpol red notices can be removed on a number of grounds by making submissions to the independent Commission for the Control of Files (CCF) claiming that they breach Interpol's Constitution and its Rules on the Process of Data. Member States can advise the individual concerned by an abusive red notice, in particular by a politically motivated red notice, to exercise their rights before the CCF and alert them beforehand, or ask for the notices or diffusions to be deleted.

Furthermore, as the State of nationality often possesses information of substantial importance to decide whether an extradition request is unfounded or abusive, in particular in cases of reasonable suspicion that a request for extradition is abusive, politically motivated or otherwise

[33] See, for instance, "Introductory speech on the 60th anniversary of the European Convention on extradition: Lessons learnt and challenges for the future, Mr Vincent Glerum, Counsellor at the Tribunal of Amsterdam, in **PC-OC (2018)05**, Special session to celebrate the 60th anniversary of the European Convention on Extradition - 20 June 2018, Presentations and summaries of the panel discussions Strasbourg, 10 August 2018 [hereinafter, "**PC-OC (2018)05**, Introductory speech (…), Mr Vincent Glerum"], p. 16.
[34] PC-OC (2017) 10, *List of decisions taken at the 73rd meeting of the PC-OC under the Chairmanship of Mr Erik Verbert (Belgium)*, Strasbourg, 20-22 November 2017 [hereinafter, "PC-OC (2017) 10, *List of decisions* (…)"], p. 2.

unfounded (unlawful), the focal point of a State that has received an extradition request from a third State regarding a national of another State, should always inform the focal point of the State of nationality. This will allow an exchange of relevant information so that an informed decision on whether the request for extradition is politically motivated or otherwise unfounded, may be taken.

Moreover, any focal point should in cases of reasonable suspicion that an extradition request is unfounded or abusive, in particular politically motivated, promptly and proactively inform and consult other focal points, as well as Eurojust, Europol and Interpol[35].

Directive (EU) 2016/680 on the protection of natural persons with regard to the processing of personal data by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and on the free movement of such data, is applicable[36]

Article 4: Military offences

Convention

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

Explanatory report

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

Convention

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 2 (Chapter II) of the Second Additional Protocol replaces the above provision with the following:

1. For offences in connection with taxes, duties, customs and exchange extradition shall take place between the Contracting Parties in accordance with the provisions of the Convention if the offence, under the law of the requested Party, corresponds to an offence of the same nature.

2. Extradition may not be refused on the ground that the law of the requested Party does not impose the same kind of tax or duty or does not contain a tax, duty, custom or exchange regulation of the same kind as the law of the requesting Party.

Explanatory reports

Convention

[35] EC, **EU Guidelines on Extradition to Third States**, p. pp. 20-21.
[36] EC, **EU Guidelines on Extradition to Third States**, p. 21.

The explanatory report to the Convention specifies that 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.

*The explanatory report to the **Second Additional Protocol** explains the following in relation to this article:*

Article 5 of the Convention provides that extradition for fiscal offences, i.e. offences in connection with taxes, duties, customs and exchange, shall be granted only if the Contracting Parties have so decided in respect of any such offence or category of offences. A previous arrangement between the Parties is therefore necessary.

Chapter II of the Protocol gives Article 5 of the Convention a more mandatory form: extradition shall take place irrespective of any arrangements between the Contracting Parties whenever the fiscal offence, under the law of the requesting state, corresponds, under the law of the requested state, to an offence of the same nature.

This new rule reflects a tendency towards no longer allowing fiscal offences to fall outside the scope of application of extradition arrangements. It was for a long time thought that fiscal offences should not be treated as ordinary offences as they were akin to military or political offences which traditionally did not give rise to extradition. States hesitated to grant extradition when the victim of the offence was not a private person but another state, because it was thought that it was not the task of one state to protect the finances of another.

However, recently the approach to criminal policy has undergone considerable changes. It is now recognised that greater attention has to be given to economic offences in view of the damage they cause to society. It is also felt that there is now a need for closer international co-operation in this field, and that it is no longer justifiable to distinguish, in the field of extradition, between "ordinary" and fiscal offences.

For the purpose of extradition, Chapter II therefore puts fiscal and "ordinary" offences on the same footing.

Under the Convention (Article 2), extradition is subject to the conditions of dual criminal liability: the offence in respect of which extradition is sought must be a punishable offence of the same kind within the competence of the courts in both the requesting and the requested state.

As regards fiscal offences, the laws of member states differ in respect of the constituent elements of the various offences connected with taxes, duties, customs and exchange. To avoid difficulties of interpretation in respect of "fiscal" offences within the meaning of Chapter II, the text, rather than adopt the term "fiscal offence" which has no common meaning, reproduces the words appearing in Article 5 of the Convention ("taxes, duties, customs and exchange"); furthermore it is provided in paragraph 1 that extradition shall take place "if the offence, under the law of the requested Party, corresponds to an offence of the same nature": extradition is to be granted not only where an act is punishable as the same fiscal offence in the requesting and the requested Party, but also where an act of the same nature as that underlying the request for extradition would be punishable in the requested Party.

For example, a person who intentionally evades a tax or duty in the requesting state by giving untrue information in a document which serves as a basis for a decision concerning the amount

of that tax or duty may be extradited if the same kind of deliberate misleading of tax authorities is punishable under the law of the requested state, even if the law of that state does not correspond entirely with the law of the requesting state.

It follows from the absence of a definition of the term "fiscal offence" that the requested state has wide discretion in evaluating the eventual nature of the offence.

The fact that the law of the requested Party does not impose the same kind of tax or duty as the law of the requesting Party is irrelevant by virtue of paragraph 2. Extradition may not be refused on that ground. Here again, the basic idea is that the essential constituent elements of the offence shall be decisive.

Extradition in respect of fiscal offences is granted "in accordance with the provisions of the Convention". It is therefore subject to the conditions laid down in the Convention, including those concerning the level of penalties for the offence in question (Article 2 of the Convention).

Article 6: Extradition of nationals

Convention

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.

Explanatory report

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.

Comments

Extradition of nationals and re-transfer for the purposes of execution of the sentence

Back in 1997, 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 temporarily transfer persons 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 Convention on Extradition or to the **Convention on Mutual Assistance in Criminal Matters**.[37]

Again in the discussions related to the modernisation of CoE Conventions in the criminal field, some experts mentioned, in connection to the application of the principle *aut dedere aut judicare*, the EAW and the "Dutch clause" by which a State can accept to surrender a national provided that, if sentenced, he or she would be transferred back in order serve the sentence in his or her country of nationality. It was felt that the question of the legal basis for such re-transfers could be considered in further discussions, as well as the possibility of a wider application of such clause and possible ways to ensure the application of the principle *aut dedere aut judicare*[38]. The opportunity to elaborate a non-binding instrument on the co-operation by the requesting State to the requested State in cases where the latter refuses extradition and initiates prosecution against the person sought was also discussed. The Committee instructed its limited Group of experts to envisage concrete suggestions regarding that matter, notably as it relates to the transmission of evidence by the requesting State in cases of a prosecution initiated in the requested State and

[37] PC-OC, *report of the 35th meeting* (22-24 September 1997), §§105-106.
[38] **PC-OC (2006) 12**, *Summary report of the 51st meeting of the PC-OC*, Strasbourg, 6 October 2006, §§40-41.

the links with the application of the European Convention on the Transfer of Proceedings in Criminal Matters (ETS 73)[39].

It should be borne in mind that, in taking such individual decisions, national authorities will observe the interests of a good administration of justice, which include not only legal considerations - respect of the law, relevant international legal instrument and fundamental principles of law (such as the *ne bis in idem* principle) - but also practical considerations (such as avoiding unnecessary costs). While guidance on the legal considerations could be found in the explanatory reports to the applicable conventions, as well as in the various recommendations of the Committee of Ministers related thereto (with particular reference to Recommendation R(79) 12 concerning the application of the European Convention on the Transfer of Proceedings in Criminal Matters (ETS No. 73)), guidance on practical considerations, indicating good practices for authorities so as to accelerate and facilitate procedures, avoiding unnecessary efforts or costs, was still lacking[40].

In this regard, a draft questionnaire on jurisdiction and transfer of proceedings has been prepared and presented to PC-OC in 2011[41]. In their replies, many delegations reported practical difficulties in transferring proceedings on the basis of, inter alia, Article 6 (2) of the **ECE**. The PC-OC considered these replies and the follow-up to be given to them, and decided to endorse the proposal made by its Working Group to develop practical guidelines in respect of transfer of proceedings. PC-OC-Mod has been instructed to prepare the draft guidelines[42], which aim at facilitating the practical aspects of the application of legal instruments and their above mentioned specific provisions by proposing a step by step check-list of procedures for both the requesting and the requested States.

The **Guidelines on practical measures to improve co-operation in respect of transfer of proceedings, including a model request form**, were adopted by PC-OC at its 63rd meeting, in November 2012. For the respective contents, see "Recommendations, below.

On 6 September 2016, the CJEU passed its landmark judgement on case **Pretruhhin**, concerning an extradition request issued for the purpose of prosecution, in the context of a drug-trafficking offence, by the Russian authorities to the Latvian authorities, in relation to a national of Estonia. The CJEU decided, inter alia, that the combined provisions of Articles 18 and 21 of TFEU require a EU Member State which receives an extradition request from a third State with which it has concluded an extradition agreement, in relation to a national of another EU Member State, to first inform the Member State of the person's nationality in order to give the respective authorities the opportunity to issue an EAW, provided that this Member State has jurisdiction, pursuant to its national law, to prosecute that person for offences committed outside its national territory[43].

In November 2017, PC-OC discussed the possible consequences of this judgement on the fulfilment of the obligations set forth the **ECE**, in particular whether this requirement would also apply to simplified extradition procedures where the person concerned consents to his or her extradition or when the extradition request concerns EU citizens from countries that allow extradition of their nationals. Experts from non-EU countries also mentioned that the **Petruhhin** mechanism might entail the application of the reciprocity principle, in which case the application of the **ECE** would be weakened[44].

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[39] **PC-OC (2006) 16**, *Summary report of the 52nd meeting of the PC-OC*, Strasbourg, 20 November 2006, p. 14.
[40] **PC-OC INF 78**: *Guidelines on practical measures to improve co-operation in respect of transfer of proceedings, including a model request form*, adopted by the PC-OC during its 63rd plenary meeting, Strasbourg, 10 December 2012, p. 2.
[41] **PC-OC (2011) 13**, *List of decisions taken at the 60th meeting of the PC-OC*, Strasbourg, 19 May 2011, p. 2.
[42] **PC-OC (2011) 27**, *List of decisions taken at the 61st meeting of the PC-OC*, Strasbourg, 24 November 2011, p. 1.
[43] CJEU, Case **C-182/15, *Petruhhin***,, Judgement [GC] of 6 September 2016.
[44] **PC-OC (2017)10**, *List of decisions taken at the 73rd meeting of the PC-OC*, Strasbourg, 22 November 2017, pp. 6-7.

A study undertaken jointly by Eurojust and the EJN and published in November 2020 reveals that "only in a very few cases has the CJEU's case-law regarding EU citizens to third countries resulted in the requested Member State giving priority to a prosecution in the Member State of nationality", the consultation procedure constituting, in the eyes of many practitioners, a costly and time-consuming bureaucratic formality. However, it also shows that the consultation mechanism can actually be beneficial in cases in which parallel criminal proceedings are ongoing in the Member State of nationality for the offence mentioned in the extradition request[45],

The same study (aptly named "The **Petruhhin report**") confirmed that often the authorities struggle with practical and legal difficulties to implement the relevant CJEU's case law, particularly in relation to the following[46]:

- Authorities to be approached and channels to be used.
- Information to be provided.
- Documents to be translated and who should bear the costs.
- Time limits necessary for assessment and decision-making.
- Kind of assessment expected from the Member State of nationality.
- Judicial cooperation instrument to be used, particularly if thresholds for issuing a national arrest warrant and/or an EAW are not met, or if it concerns an extradition request for the purpose of the execution of a custodial sentence.
- Country best placed to prosecute, regardless of jurisdiction;
- Tension between obligations stemming from EU law and bilateral and multilateral extradition treaties (e.g. information to be provided to the Member State of nationality, legal grounds to refuse extradition).

The consequences of the **Petruhhin judgement** have been discussed at length by the PC-OC, namely in 2018, this time in light of a later judgement in case **Raugevicius**[47], issued on 13 November 2018 and dealing with the request for extradition ***for the purpose of enforcing a custodial sentence.*** The CJEU considered that, if the requested Member State prohibits the extradition of its own nationals for the same purpose and makes provisions for the possibility that such a sentence pronounced abroad may be ***served in its territory,*** the requested citizen must receive the ***same treatment***, provided that he or she resides permanently in the territory of the requested State. PC-OC members agreed that this jurisprudence is limited to cases where the EU citizen has permanent residence in the EU member State. The Committee underlined that impunity needed to be avoided and agreed that the rulings by the CJEU still left several unanswered questions regarding the legal obligations of EU member States receiving extradition requests from non-EU member States concerning nationals of other EU member states for the purpose of the execution of a sentence as well as for prosecution.[48]

In 2022, under the agenda item entitled "Exchange of experiences on extradition proceedings (including with non-European states)", one of the issues considered was the possibility which exists in certain States Parties to the **ECE** to use Article 6 (2) as a legal basis to enforce a final sentence in case of refusal, whereas most States Parties appeared to require a different legal basis in such cases.[49]

See also below, chapter on the principle *aut dedere aut judicare* and chapter 2.9 ("The nationality of the individual").

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[45] Eurojust/EJN, ***Joint report of Eurojust and the European Judicial Network on the extradition of EU citizens to third countries*** [hereinafter, "***Petruhhin report***"], November 2020, p. 21.
[46] *Ibid*., p. 22.
[47] CJEU, Case **C-247/17, *Raugevicius***, Judgement [GC] of 13 November 2018.
[48] **PC-OC (2018) 11**, *List of decisions taken at the 75th meeting of the PC-OC*, Strasbourg, 16 November 2018, p. 5; see also **PC-OC (2019) 06**, *List of decisions taken at the 76th meeting of the PC-OC*, Strasbourg, 29 May 2019, p. 5 and **PC-OC (2019) 12**, List of decisions taken at the 77th meeting of the PC-OC, Strasbourg, 15 November 2019, p. 5.
[49] **PC-OC (2022)04**, *List of decisions taken at the 81st meeting of the PC-OC*, Strasbourg, 20 May 2022, p. 4.

Recommendations

1. The **Guidelines on practical measures to improve co-operation in respect of transfer of proceedings, including a model request form**, adopted by PC-OC in 2012 as referred above, contain guidance for both the requesting and the requested States. Central authorities responsible for the application of CoE conventions on international cooperation in criminal matters are encouraged to translate the guidelines and model request form into their official languages and make them available to practitioners, for example by posting them on their national website. The contents of these guidelines can be summarised as follows:

A. Requesting States are advised to, inter alia:

a) Consider the ***legal basis*** allowing for the transfer of proceedings, including the treaties ratified, declarations and applicable national legislation of the requested State;

b) Take into account the different ***alternatives*** to the transfer of proceedings such as:

i. the possibility to request extradition or, for EU member states, to issue an EAW;
ii. the possibility to make use of requests for mutual legal assistance in criminal matters (hearings of concerned persons, including by videoconference, summoning of persons or temporary transfer of witnesses to the requesting State, etc.).

c) Consider the ***proportionality*** of the case with regard to the procedure initiated as well as its ***appropriateness*** taking into account the need to avoid ***impunity***, the ***efficiency*** of proceedings and the ***specific requirements*** of the convention to be applied. Relevant factors to be considered in this regard include:

i. Nationality and place of residence of the suspect;
ii. Possibility that the suspect is undergoing or is to undergo a sentence involving deprivation of liberty in the requested State;
iii. Place where the offence occurred and/or where the most important items of evidence can be found;
iv. Possibility that proceedings are being taken against the suspect for the same or different offences in the requested State;
v. Practicability to deal with all the prosecutions in the jurisdiction of the requested State in cases where the offence(s) have occurred in several jurisdictions;
vi. Possibility of the suspect appearing in person in the proceedings in the requesting or the requested State;
vii. Willingness and ability of witnesses to travel and produce evidence in the jurisdiction of the requested State;
viii. Interests of victims and whether they would be prejudiced, for example in their possibilities to claim compensation;
ix. Likelihood that the enforcement of a sentence will improve the prospects for social rehabilitation of the sentenced person;
x. Likelihood that the requesting State could not itself enforce a sentence, if one were passed, even by having recourse to extradition, while the requested State could do so.

d) Undertake, if deemed necessary, an informal preliminary consultation (eg. by phone, e-mail, videoconference or meeting) with the prospective requested State(s) with the view to discuss:

i. the appropriateness and potential success of the request envisaged;

ii. ways to deal with differences in national legislation (e.g. extraterritorial jurisdiction, admissibility of evidence, mandatory or discretionary prosecution);
iii. timeframe and practicalities of the co-operation (contact persons, elements to be included in the request, translation requirements and costs etc.).

e) Decide as soon as possible whether or not to send a request. The request should include as far as possible all the evidence that can be collected in the requesting State.

f) Use, as appropriate, the model request form presented in the appendix to the guidelines.

h) Provide any supplementary information asked by the requested State.

B. Requested States are advised, in order to facilitate co-operation, to:

a) If the requesting State has asked for an informal preliminary consultation as mentioned above, provide clear indications on the legal and practical issues of importance to a successful and rapid follow-up to the request.
b) Once the request has been received and upon request from the requesting State, confirm receipt without delay and indicate the contact details of the person in charge of the request.
c) If a request received is unclear or incomplete, consult the requesting State without delay.
d) Facilitate consultation with the requesting State, for example by promoting direct contact between the authorities involved in a particular case.
e) Take all possible measures to ensure that a decision on the request for the transfer of proceedings is taken without undue delay. If unforeseen delays occur, inform the requesting State.
f) Inform the requesting State of any decision to accept or refuse the request.
g) If a decision has been taken to accept the request, keep the requesting State informed of the follow-up of the case by the competent authorities and send it a copy of the final decision[50].

2. EU member States should take particular account of the **Guidelines on Extradition to Third States**[51], published in June 2022 by the European Commission, which contain specific guidance applicable in cases when States apply the nationality exception, both for the purpose of prosecution and for the execution of a sentence. For the text of these guidelines, see Part III.

A. When is requested the extradition of a national of an EU member State (or of Iceland or Norway) other than the requested State, ***for the purpose of prosecution***, the national authorities of the requested State, when applying the nationality exception, should follow the following steps:

1) Launching of a consultation procedure with the State of nationality - notification of the pending extradition request at the earliest opportunity (when a person is provisionally arrested, if sufficient information is available from an Interpol red notice; and/or at a later stage when the requested State receives the extradition request).

- ***Type of information to be provided to the State(s) of nationality -*** as a minimum, authorities of the requested State should inform the focal point of the State of nationality of:
  - the existence of an extradition request concerning that person; and

[50] *Ibid*., pp. 3-4.
[51] EC, Commission Notice - **Guidelines on Extradition to Third States**, (2022/C 223/01), 8 June 2022.

- all the matters of fact and law communicated by the third State requesting extradition in the context of that extradition request;
- any changes in the situation of the requested person that might be relevant to the possibility of issuing an EAW in relation to that person.

❖ ***Relations with the requesting third State and confidentiality***

- Neither the requested State nor the State of nationality are obliged under EU law to submit an application for the transmission of the criminal investigation file to the third State that is requesting extradition;
- Authorities of the State of nationality are bound to respect the confidentiality of such matters where confidentiality has been sought by the requesting third State, and the latter should be kept duly informed on that point;
- However, the State of nationality can apply any cooperation and/or mutual assistance mechanism to obtain evidence from the requested State (e.g. issuing a European Investigation Order (EIO)).

❖ ***Relations with the requesting third State and confidentiality***

- After the notification, competent authorities of the State of nationality should assess whether it is appropriate to issue an EAW relating to the same offences as those of which the person concerned is accused in the extradition request, in so far as they have jurisdiction, pursuant to their national law, to prosecute that person for offences committed outside national territory.

2) Time limit to respond to a notification

- The requested State should set a reasonable time limit for the State(s) of nationality to submit a reply – it has a margin of appreciation to do so, in particular taking into consideration whether the requested person is in custody based on the extradition procedure and the complexity of the case;
- The established time limit should be indicated in the certificate;
- If necessary, the focal point or the issuing judicial authority of the State(s) of nationality could request an extension of the time limit – the focal point or the authority dealing with the extradition request in the requested State should decide upon the extension.

3) Refusal of an extradition request

Only in cases where a judicial authority of a State of nationality issues an EAW related to the same offence(s) or acts and informs the requested State accordingly, should the requested State refuse the extradition and surrender the person to the State of nationality;

4) Resumption of the extradition proceedings

In the absence of a reply within the imposed time limit from authorities of the State(s) of nationality or in the case of a negative reply within the time limit, the authorities of the requested State may, where appropriate, carry out the extradition without being obliged to wait for the State of nationality to reply and/or adopt a formal decision waiving the right to issue an EAW/ EU-IC/NO arrest warrant in respect of that person.

B. In case of a request for extradition ***for the purpose of executing a sentence,*** the less prejudicial measure to the exercise of the right to free movement is for the requested State to assume responsibility for the execution of the sentence in its territory instead of extraditing the national of another State to the third State, where such a possibility is also provided for its own nationals - ***steps to be taken by the competent authorities when the nationality exception applies:***

1) Actively seek the consent of the requesting State for such purpose, by using all the mechanisms for cooperation and assistance in criminal matters which are available to it in the context of its relations with such State;

2) If consent is not obtained, the requested State is not precluded from extraditing the Union citizen, in accordance with its obligations under an international convention, in so far as that extradition does not infringe the rights guaranteed by the **CFREU**[52].
3) Information exchange between the requested State and the State of nationality: Articles 18 and 21 TFUE do not require the requested State to inform the State of nationality of a pending extradition request for an execution of a sentence or detention order. However, the requested State is not prevented from contacting the State of nationality in order to obtain any relevant information it might find useful[53].

For the EU Guidelines applicable to all States regardless of the nationality exception, see Article 22.

Article 7: Place of commission

Convention

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.

Explanatory report

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.

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.

Recommendations

In its **resolution (75) 12, on the practical application of the European Convention on Extradition**, the Committee of Ministers recommends to Contracting Parties, in relation to this Article:

> *That the possibility granted to a requested state by Article 7, paragraph 1, of the convention of refusing extradition for an offence committed in whole or in part in its*

[52] In this particular regard, see CJEU, **Case C-237/21** (*Generalstaatsanwaltschaft München*), judgement of the Court [Grand Chamber] of 22 December 2022.
[53] EC, Commission Notice - **Guidelines on Extradition to Third States**, p. 18.

territory or in a place treated as its territory should not be invoked in the case where proceedings and judgement 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;

Article 8: Pending proceedings for the same offences

Convention

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.

Explanatory report

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*

Convention

[1.] 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 2 (Chapter II) of the Additional Protocol supplemented the above with the following paragraphs and introduced numbering thereof:

2. The extradition of a person against whom a final judgment has been rendered in a third State, Contracting Party to the Convention, for the offence or offences in respect of which the claim was made, shall not be granted:

a. if the afore-mentioned judgment resulted in his acquittal;

b. if the term of imprisonment or other measure to which he was sentenced:

i. has been completely enforced;

ii. has been wholly, or with respect to the part not enforced, the subject of a pardon or an amnesty;

c. if the court convicted the offender without imposing a sanction.

3. However, in the cases referred to in paragraph 2, extradition may be granted:

a. if the offence in respect of which judgment has been rendered was committed against a person, an institution or anything having public status in the requesting State;

b. if the person on whom judgment was passed had himself a public status in the requesting State;

c. if the offence in respect of which judgment was passed was committed completely or partly in the territory of the requesting State or in a place treated as its territory.

4. The provisions of paragraphs 2 and 3 shall not prevent the application of wider domestic provisions relating to the effect of *ne bis in idem* attached to foreign criminal judgments."

Explanatory reports

Convention

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 the 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.

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.

Additional Protocol (Chapter II: General remarks)

The expression *ne bis in idem* means that a person who has once been the subject of a final judgment in a criminal case cannot be prosecuted again on the basis of the same fact.[54]

At the national level this principle is generally recognised in the laws of member states, for a final judgment delivered in a particular state debars the authorities of that state from taking new proceedings against the same person on the basis of the same body of facts.

At the international level, however, the position is less clear. Thus no state in which a punishable act has been committed is debarred from taking proceedings in respect of an offence merely because it has already been the object of proceedings in another state. This position results not only from the fact that the right to take proceedings in respect of offences has traditionally been considered part of sovereignty but also from the fact that the state of the offence more often than not will be the state in which the commission of the act can best be proved; it would therefore seem unjustified for that state normally to be bound by decisions delivered in other states, where the absence of certain elements of evidence may have led to acquittal or the imposition of less severe penalties.

[54] This principle is described in the title to Article 9 of the Extradition Convention as *non bis in idem*; the Protocol adopts the version *ne bis in idem* merely because it appears in more recent European conventions, the two versions being in fact regarded as interchangeable.

Against this view may be set that which considers that the offender will be subjected to a manifestly inequitable treatment if he is again prosecuted and may even be subjected to the enforcement of several judgments for the same offence. Indeed, the European Commission of Human Rights has, as early as in 1964, drawn attention to this aspect of the *ne bis in idem* problem.

It was this latter view that led to the inclusion in Article 9 of the European Convention on Extradition of provisions to the effect that:

> *a.* 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; and
>
> *b.* 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.

The June 1969 meeting drew attention to the fact that these provisions were limited to the *ne bis in idem* effect of a final judgment in the requested state and recommended that they be enlarged to take account of, notably, final judgments passed in a third state.

The recognition of a foreign judgment clearly presupposes a certain degree of confidence in foreign justice. That such confidence existed among the member states of the Council of Europe had, since the preparation of the Extradition Convention, been evidenced by later instruments, namely, the European Conventions on the International Validity of Criminal Judgments and on the Transfer of Proceedings in Criminal Matters, both of which attribute, in certain circumstances, the *ne bis in idem* effect to judgments rendered in states other than those party to the request for the type of assistance involved.

When the recommendation of the June 1969 meeting was examined, the view was taken that any additional provision concerning the *ne bis in idem* effect of judgments rendered in third states should be in conformity with the provisions in the later conventions mentioned above. In any event a rule restricting extradition should not go beyond the limits imposed on proceedings by those two conventions since it would be unjustified to authorise, or even to oblige, the requested state to refuse extradition to a requesting state which was recognised to have a right to prosecute under the other European conventions establishing the principle *ne bis in idem*.

Accordingly the text of the Protocol follows very closely on this point the provisions of the two later conventions mentioned above. Subject to the more detailed commentary below, the effect of the Protocol is basically to add to the existing rule prohibiting extradition where there has been a prior final judgment in the requested state a further prohibition on extradition where there has been a prior final judgment in a third state party to the Convention on Extradition which satisfies certain conditions. This further prohibition does not apply where the offence in question had been committed in the requesting state or in the case of specified offences directed against the particular interests of the requesting state.

It will be noticed that a further effect of the Protocol is to differentiate between prior judgments rendered in the requested state and prior judgments rendered in a third Contracting State. The former have a *ne bis in idem* effect if they are “final”; for the latter to have such an effect, they must not only have been final but also fulfil the other conditions specified in Article 2, paragraph 2, of the Protocol. It was recognised that there might be a certain illogicality in these provisions and that the text of Article 9 of the convention (as amended by the Protocol) could be improved if the whole convention came to be re-negotiated, however, the subcommittee did not consider it within its terms of reference to attempt a wholesale revision of the convention. It wished to place on record that the combined effect of the Protocol and Article 9 of the convention was to attach greater importance to judgments in the requested state than to judgments in a third state since the former had a *ne bis in idem* effect even though, for example, they had not been enforced. Moreover, Article 9 provides a possibility of refusing extradition if there has been a decision not

to prosecute in the requested state whereas the Protocol does not deal at all with similar decisions in a third state.

Additional Protocol (Article 2)

Article 2 – Introduction

The introductory paragraph of this article, dealing solely with the insertion into Article 9 of the Extradition Convention of the additional substantive provisions, calls for no particular comment except to record that the *ne bis in idem* effect of a judgment in the requested state continues to be regulated solely by the original provisions of the said Article 9.

Article 2, paragraph 2

This new paragraph calls for the following comments:

a. as in the case of the original Article 9 of the convention, the word "final" used in this paragraph indicates that all means of appeal have been exhausted. It was understood that a judgment rendered in the accused's absence is not to be considered a final judgment, nor is a judgment ultra vires;

b. decisions taken in third states which are not in the form of a judgment and which preclude or terminate proceedings e.g. a decision that there are no grounds for prosecution ("ordonnance de non-lieu") do not exclude or limit extradition. Such decisions are often based on procedural reasons or influenced by the expediency principle of prosecution. It was for this reason that the Conventions on the International Validity of Criminal Judgments and on the Transfer of Proceedings in Criminal Matters, on which this paragraph is based, attribute a *ne bis in idem* effect only to "judgments";

c. only judgments rendered in a third state "Contracting Party to the convention" preclude extradition. It was thought that to take account, in this context, of judgments rendered in other third states would unnecessarily restrict extradition and was not required to ensure reasonable protection of the individual claimed. Moreover, as is already made clear in the explanatory report on the European Convention on the International Validity of Criminal Judgments, it is desirable "to give more substance to the principle of *ne bis in idem* at the European level than at the wider international level" since "the recognition of a foreign judgment presupposes a certain degree of confidence in foreign justice". (See, however, the commentary on paragraph 4 of this article at paragraph 29 below);

d. the mere fact that the judgment rendered in the third state has become final does not suffice to preclude extradition. The judgment must also meet the requirements specified in sub-paragraphs *a.*, *b.* or *c.*

Article 2, paragraph 2, sub-paragraph a

e. This sub-paragraph relates to acquittals. Not every judgment of acquittal would preclude extradition since it would remain possible in the two following cases:

i. if new facts come to the knowledge of the requesting state after the final judgment resulting in acquittal has been rendered in the third state and these facts are capable of being grounds for a re-trial. In such a case the third state judgment would not have been rendered "for the offence or offences in respect of which the claim was made" since the requesting state's claim would be based on facts which, *ex hypothesi*, were not before the court of the third state at the time of the acquittal

ii. if the judgment of the third state pronounced the acquittal purely for formal reasons, e.g. for lack of jurisdiction. Here again the third state judgment could not be considered as rendered "for the offence or offences in respect of which the claim was made".

In contradistinction to the case cited at *ii.* above an acquittal which is due to the fact that the particular act is not punishable under the penal legislation of the state of judgment would preclude extradition. In view of the fact that the rule of *ne bis in idem* will normally be relevant only if the judgment is delivered in the state in which the offence was committed, it will accord best with the general principle of dual criminal liability that an acquittal based on the fact that the act is not punishable in that state should also be covered by the provision of sub-paragraph *a*.

Article 2, paragraph 2, sub-paragraph b

f. This sub-paragraph relates to judgments imposing a term of imprisonment or other measure. The general application of the principle of *ne bis in idem* to such judgments would lead to the unacceptable result that the mere fact that a state happened to take criminal proceedings first would debar other states from prosecuting for the offence. The interest of states in the effective reduction of crime has to be weighed against the general consideration requiring that a person should not be prosecuted several times for the same act.

In the member states whose legislation contains special provisions on the subject, such weighing of conflicting considerations has normally led to the result that a foreign conviction is given the effect of *res judicata* only if the sanction has been served or has been remitted. That solution reasonably meets the legitimate interest of the convicted person not to be prosecuted several times for the same act, since – normally, in any case – new proceedings will be taken only where he has rendered himself liable thereto by evading the enforcement of the sanction in the state of the first judgment. On the other hand, as long as the enforcement of a judgment follows a normal course, new proceedings ought not to be instituted.

Sub-paragraph *b.* has been drafted accordingly. *Res judicata* effect is given to a judgment imposing a measure which has been completely enforced or has been wholly, or with respect to the part not enforced, the subject of a pardon or an amnesty.

Having regard to the drafting of the provision, the fact that only a minor part of a sentence, or possibly a measure imposed under the judgment, has not been served in the normal way will imply that extradition is not precluded. It has not been considered possible to distinguish whether the convicted person has evaded a larger or smaller part of the sentence, it must be stressed, however, that in accordance with the view underlying this provision, states should hesitate to request extradition where only a small part of the sentence has not been served. This applies irrespective of the question whether the other state would, in its determination of sentence, have to take account of the sentence already served; the mere fact that the person already sentenced might be subject to a new prosecution may imply an inequitable aggravation of his situation.

Article 2, paragraph 2, sub-paragraph c

g. This sub-paragraph relates to judgments where the court convicted the offender without imposing a sanction.

Article 2, paragraph 3

As in the case of the European Conventions on the International Validity of Criminal Judgments and on the Transfer of Proceedings in Criminal Matters, it was thought necessary to reserve special cases where it was in the special interest of the requesting state to be able to institute proceedings notwithstanding the prior judgment in a third state. Such is the purpose of this paragraph.

It should be noted that extradition in these special cases is optional rather than obligatory, this paragraph having been so drafted to avoid any conflict between its provisions and those of the saving clause for domestic law contained in paragraph 4 of Article 2 of the Protocol.

It was considered that a state might have a special interest in being able to take proceedings in two categories of case.

The first category (covered by sub-paragraphs *a.* and *b.* of paragraph 3) applies to cases where the offence is directed against either a person or an institution or anything having public status in that state, or where the offender had himself a public status in that state.

Consideration was given to whether a more general term could be adopted in that provision, such as "acts directed against the interests of a state", but the term was thought too comprehensive and vague. Such a term would, for example, include offences against a large number of the trade regulations provided for in special national legislation.

As examples of offences that will be covered by sub-paragraphs *a.* and *b.*, mention may be made of assaults on public servants ("a person having public status"), espionage ("an institution having public status"), counterfeiting ("anything having public status") and the taking of bribes ("had himself a public status").

The second category (covered by sub-paragraph *c.* of paragraph 3) applies to cases where the offence was committed completely or partly in the territory of the requesting state. This provision reflects the importance of the principle of territoriality which also underlies, for example, Article 7 of the Extradition Convention. Moreover, in most cases the courts of the state of the offence will be able to collect all the evidence more easily and proceedings in that state may also be of value in respect of a claim for compensation by a party injured by the offence.

Article 2, paragraph 4

During the preparation of the Protocol, attention was drawn to the fact that the domestic laws of some states were of broader application than the rules set out in paragraphs 2 and 3 of Article 2 of the Protocol in that there was an obligation either to recognise the *ne bis in idem* effect of a judgment rendered in a third state which was not a party to the Extradition Convention or to recognise the *ne bis in idem* effect of a judgment even if, for example, the sentence it imposed had not been enforced. For this reason a saving for wider provisions of domestic law features in paragraph 4 of Article 2. It should be noted that this saving applies to domestic laws on the effect of judgments in any third state, even though they are parties to the Extradition Convention. The overall result is to give the provisions of Chapter II of the Protocol the nature of minimum rules, each state being free to maintain or adopt rules which give a wider effect of *ne bis in idem* to foreign judgments.

Comments

In discussions concerning the modernisation of CoE criminal law conventions in 2006, participants felt that the application of the principle of *ne bis in idem* would require careful consideration, taking duly into account the work carried out by the EC on the same matter, in relation to the conflict of jurisdiction. Some experts considered that the feasibility to draft normative proposals on this matter would need further discussion. They stated that future work could consider the application of this principle to judicial decisions rendered in third States. Reference was also made to the possibilities offered by the Convention on the transfer of criminal proceedings (ETS 073) in this regard[55]. In addition, experts underlined the need to clarify some ambiguities in the languages of the instruments ("offences" against "faits"), referring to recent decisions by the Court of Justice in Luxembourg on the matter[56].

Recommendations

[55] **PC-OC (2006)12**, *Summary report of the 51st meeting of the PC-OC*, Strasbourg, 6 October 2006, §43.
[56] **PC-OC (2006)15**, *List of decisions adopted at the 52nd meeting of the PC-OC*, Strasbourg, 20 October 2006, p. 5.

In relation to ***Article 9,*** the Committee of Ministers, in its **Resolution (75) 12, on the practical application of the European Convention on Extradition**, recommended to Contracting Parties:

> *That, 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;*

Article 10: Lapse of time

Convention

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 1 of the Fourth Additional Protocol replaces the above provision with the following:

1. Extradition shall not be granted when the prosecution or punishment of the person claimed has become statute-barred according to the law of the requesting Party.

2. Extradition shall not be refused on the ground that the prosecution or punishment of the person claimed would be statute-barred according to the law of the requested Party.

3. Any State may, at the time of signature or when depositing its instrument of ratification, acceptance, approval or accession, declare that it reserves the right not to apply paragraph 2:

a. when the request for extradition is based on offences for which that State has jurisdiction under its own criminal law; and/or

b. if its domestic legislation explicitly prohibits extradition when the prosecution or punishment of the person claimed would be statute-barred according to its law.

4. When determining whether prosecution or punishment of the person sought would be statute-barred according to its law, any Party having made a reservation pursuant to paragraph 3 of this article shall take into consideration, in accordance with its law, any acts or events that have occurred in the requesting Party, in so far as acts or events of the same nature have the effect of interrupting or suspending time-limitation in the requested Party."

Explanatory reports

Convention

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.

Fourth Additional Protocol

This article is intended to replace the original Article 10 of the Convention which established lapse of time, under the law either of the requested Party or the requesting Party, as a mandatory ground for refusal. The current text takes account of changes that occurred as regards international co-

operation in criminal matters since the opening to signature of the Convention in 1957, and notably the relevant provision of the Convention of 23 October 1996 relating to extradition between the member states of the European Union (Article 8).

The modified Article draws a distinction concerning immunity by reason of lapse of time from prosecution or punishment, depending on whether it obtains according to the law of the requesting or the requested Party.

As regards the law of the requesting Party, lapse of time remains a mandatory ground for refusal in accordance with paragraph 1 of this article. The drafters considered excluding this as a ground for refusal, given that the requesting Party should, as a matter of course, not request the extradition of a person whose prosecution or punishment is statute-barred under its own law. However, they decided to keep this ground for refusal for the rare cases where a Party fails to withdraw an extradition request, despite this immunity.

Thus, the requested Party has an obligation to consider whether there is lapse of time under the law of the requesting Party before deciding on extradition. However, in order to allow the requested Party to fulfil this obligation, the requesting Party should provide the requested Party with a motivated statement specifying the reasons for which there is no lapse of time and including the relevant provisions of its law. In the rare cases that the requested Party has reasons to believe that immunity by reason of lapse of time might have been acquired, it should request information on this question from the requesting Party itself.

The requesting Party should provide this information together with the extradition request, without an explicit request to that effect from the requested Party being necessary (see also Article 12, paragraph 2, sub-paragraphs b and c of the Convention, as amended by the present protocol).

As regards the law of the requested Party, paragraph 2 of the modified Article 10 provides that lapse of time shall not serve as a ground for refusal in principle. This is in line with developments in international law[(1)], as well as European Union law[(2)], which have taken place since 1957.

Paragraph 3 qualifies the principle established under paragraph 2, by allowing the requested Party to invoke lapse of time under its own law as an optional ground for refusal in two hypotheses:

– the requested Party has jurisdiction on the relevant offences under its own criminal law;

– its domestic legislation explicitly prohibits extradition in case of lapse of time under its own law.

However, the possibility of doing so is conditional on a reservation to that effect having been made at the time of signature or when depositing the instrument of ratification, acceptance, approval or accession.

This reservation may concern either one of the two sub-paragraphs of paragraph 2, or both. The latter case would allow a Party to make a partial withdrawal of its reservation as regards the more far-reaching ground for refusal of sub-paragraph b, while maintaining the more limited ground for refusal of sub-paragraph a.

Paragraph 4, is intended to apply only in respect of Parties having made a reservation under paragraph 3. The principle reflected in this provision follows from the Resolution (75) 12 of the Committee of Ministers on the practical application of the European Convention on Extradition.

As reflected in the wording “in accordance with its law”, it is the law of the requested Party which determines if, and to what extent, acts and events in the requesting Party interrupt or suspend time-limitation in the requested Party.

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(1) For example, the UN Model Treaty on Extradition and its revised Manual.

(2) Notably, the Convention implementing the Schengen Agreement (19 June 1990) and the Convention of 23 October 1996 drawn up on the basis of Article K.3 of the Treaty on European Union, relating to extradition between the member states of the European Union.

Comments

In their discussions concerning the modernisation of CoE Conventions in the criminal field in October 2006, several PC-OC experts considered that the laws on lapse of time in the requesting State should prevail in decisions on extradition. It was however observed that this leads to legal or practical difficulties. The Committee also observed that the EAW foresees (Art 4.4[57]), as an optional ground for refusal, the situation where the prosecution or the punishment is statute barred according to the law of the requested State and where such State has jurisdiction over the acts according to its law[58].

At its 54th and 55th meetings, in April and November 2008, respectively, PC-OC agreed that, in the context of the modernisation of the ECE, lapse of time should be changed from a mandatory to an optional ground of refusal. Regarding the determination of the applicable law for calculating the lapse of time, while the majority of delegations having taken the floor favoured the limitation of lapse of time considerations to the law of the requesting State, some States were reluctant to support this option, which they considered too ambitious. The delegate from the Russian Federation proposed that the more progressive option of limiting lapse of time provisions to the law of the requesting State should be envisaged with the additional possibility of States Parties making reservations to this provision, a solution which should allow all States Parties to the Convention to ratify the future instrument. These reservations could in essence provide for the possibility of taking into account the law of the requested State (except for interruption) or providing for lapse of time under the law of the requested State in cases where that State has jurisdiction over the relevant offences in accordance with its law[59].

Article 10 was examined and revised on the basis of Article 8 of the Convention relating to extradition between the Member States of the European Union, which a number of delegations considered relevant in this respect[60]. At its 57th meeting, the PC-OC has agreed on the introduction of a number of changes to Article 10, notably the incorporation of the wording of Resolution (75) 12 of the Committee of Ministers concerning the effect of interrupting acts and events suspending time limitation. It decided to keep lapse of time in the requesting State as a ground for refusal for the requested State, considering the experience of some member States in cases where the requesting State failed to withdraw an extradition request despite expiration of lapse of time. It agreed, however, that there was no need to regulate the date at which the calculation of lapse of time should take place[61]. One delegation still expressed difficulties with the wording of paragraph 4, which was again discussed at the 59th meeting and amended in accordance with suggestions from the Bureau of CDPC[62].

On the occasion of a discussion on possible grounds to refuse extradition, held during the first special session of PC-OC on extradition, in 2014, several participating experts (eg. from the Czech Republic, Netherlands, Portugal and Sweden) considered that the consideration of lapse of time for the purpose of prosecution would only be relevant, should a judgement exist, if this

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[57] Art 4.4 EAW: "The executing judicial authority may refuse to execute the European arrest warrant (…) 4. where the criminal prosecution or punishment of the requested person is statute-barred according to the law of the executing Member State and the acts fall within the jurisdiction of that Member State under its own criminal law".

[58] **PC-OC (2006)15**, *List of decisions adopted at the 52nd meeting of the PC-OC*, Strasbourg, 20 October 2006, p. 3; and **PC-OC (2006)16**, *Summary Report of the 52nd meeting of the PC-OC*, Strasbourg, 20 November 2006, p. 9.

[59] **PC-OC (2008)16**: *Summary Report of the 54th meeting of the PC-OC*, Strasbourg, 20 May 2008, §§28-31; and **PC-OC (2008)29**, *Summary Report of the 55th meeting of the PC-OC*, Strasbourg, 14 April 2009, §§12-13.

[60] **PC-OC (2008)29**, *Summary Report of the 55th meeting of the PC-OC*, Strasbourg, 14 April 2009, §12-13; and **PC-OC (2009)12**: *Summary Report of the 56th meeting of the PC-OC*, Strasbourg, 1 September 2009, §§13-14.

[61] **PC-OC (2009) 21**, *Summary Report of the 57th meeting of the PC-OC*, Strasbourg, 23 February 2010, §12.

[62] **PC-OC (2010)22**: *Summary Report of the 59th meeting of the PC-OC*, Strasbourg, 31 January 2011, §5.

was found to have been rendered *in absentia*[63].

Recommendations

In relation to this Article, the Committee of Ministers recommends to Contracting States, in its **Resolution (75) 12 on the practical application of the European Convention on Extradition**:

> *That, when determining whether, according to the law of the requested state, the person claimed has become immune by reason of lapse of time from prosecution or punishment, the competent authorities of the said 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;*

Article 11: Capital punishment

Convention

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.

Explanatory report

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.

Comments

Interpretation of the European Court of Human Rights

There is a real divergence here between the provisions of **ECE** Article 11 – which leaves it to the national law of the requested State to determine whether the risk of imposition of the death penalty will prevent extradition – and the consolidated case law of the ECtHR, which determines that, in case the is a real risk of imposition of such penalty in the requesting State, this gives rise to a prohibition to extradite[64].

For more information, see chapter 3.2 “Capital punishment and extrajudicial killings”.

[63] **PC-OC (2014)03**, *Selected PC-OC Forum discussions as regards extradition: Double criminality* in abstracto *or* in concreto - Lapse of time, Strasbourg, 15 April 2014, pp. 3-4.
[64] See, for instance, “**PC-OC (2018)05**, “Introductory speech (…), Mr Vincent Glerum”, p. 16.

Judgements *in absentia*

Second Additional Protocol – Chapter III: Article 3

The Convention shall be supplemented by the following provisions:

Judgments *in absentia*

1. When a Contracting Party requests from another Contracting Party the extradition of a person for the purpose of carrying out a sentence or detention order imposed by a decision rendered against him in absentia, the requested Party may refuse to extradite for this purpose if, in its opinion, the proceedings leading to the judgment did not satisfy the minimum rights of defence recognised as due to everyone charged with criminal offence. However, extradition shall be granted if the requesting Party gives an assurance considered sufficient to guarantee to the person claimed the right to a retrial which safeguards the rights of defence. This decision will authorise the requesting Party either to enforce the judgment in question if the convicted person does not make an opposition or, if he does, to take proceedings against the person extradited.

2. When the requested Party informs the person whose extradition has been requested of the judgment rendered against him in absentia, the requesting Party shall not regard this communication as a formal notification for the purposes of the criminal procedure in that State.

Explanatory report

Chapter III complements the European Convention on Extradition with regard to judgments *in absentia*, i.e. judgments rendered after a hearing at which the sentenced person was not personally present.

(cf. the definition in Article 21.2 of the European Convention on the International Validity of Criminal Judgments.) The expression "judgments *in absentia*" means judgments properly so-called and does not include for instance, *ordonnances pénales*.

The sub-committee had first considered whether the text of the Protocol might not be based on Articles 21 *et seq*. of the European Convention on the International Validity of Criminal Judgments, since it might be illogical to treat some judgments *in absentia* as contentious for the purpose of that Convention and not for the purpose of the Extradition Convention. It was, however, considered that it was not possible to transfer the machinery of that Convention to a different context: that Convention concerns in particular execution of a judgment in the requested and not in the requesting state and the special procedure of notify cation followed by opposition would not really be appropriate as the individual claimed would, *ex hypothesi*, have to make an opposition in a state from which he was absent.

For these reasons the sub-committee decided to provide for a procedure proper to the Extradition Convention. Paragraph 1 of Chapter III allows the requested Party to refuse extradition if the proceedings leading to the judgment did not satisfy the rights of defence recognised as due to everyone charged with a criminal offence. An exception to this principle is made if the requesting Party gives an assurance considered sufficient to guarantee to the person concerned the right to a retrial which safeguards his rights of defence: in that case extradition shall be granted.

At the origin of this amendment is the Netherlands reservation to the Extradition Convention to the effect that extradition would not be granted if the individual claimed had not been enabled to exercise the rights specified in Article 6.3.c of the Human Rights Convention. The sub-committee was, however, of the opinion that any exemption from the obligation to extradite should apply if there had been a violation of any of the generally acknowledged rights of defence, in particular those specified in the whole of Article 6.3 of the Human Rights Convention and not merely those mentioned in sub-paragraph c thereof. Moreover, the Netherlands reservation refers only to

extradition to enforce a judgment *in absentia*; it is essential to specify that, if there is no longer an obligation to extradite for this purpose, it will, under certain conditions, remain obligatory to extradite to permit the requesting state to take proceedings.

As regards the reference to the "rights of defence recognised as due to everyone charged with a criminal offence", it should be noted that on 21 May 1975, the Committee of Ministers of the Council of Europe adopted Resolution (75) 11 on the criteria governing proceedings held in the absence of the accused. This resolution recommends the governments of member states to apply a number of minimum rules when a trial is held in the absence of the accused. These minimum rules are aimed at guaranteeing the accused's rights as laid down in the European Convention for the Protection of Human Rights and Fundamental Freedoms and may serve for the purpose of determining the scope of the phrase "rights of defence" used in Chapter III. The reference to the rights of defence due to "everyone charged with a criminal offence" is indeed drawn from the Human Rights Convention and is intended to cover in particular the rights specified therein.

Reference is made to the purpose of the extradition request because Article 1 of the Convention makes a distinction between requests for the purpose of enforcing a judgment and requests for the purpose of taking proceedings.

The phrase "in its opinion" is intended to underline that it is for the requested Party to assess whether the proceedings leading to the judgment (and not the judgment itself) satisfied the rights of defence. If the requested Party has doubts on that point, the requesting Party must try to dissipate them, but otherwise it is incumbent on the requested Party to say why it considers the proceedings unsatisfactory.

If the requested Party finds difficulties in extraditing, to enable the requesting Party to enforce the judgment, new contacts will be necessary between the states. The requested Party is obliged to extradite if it receives an assurance of the kind indicated; such an assurance must cover not merely the availability of a remedy by way of retrial but also the effectiveness of that remedy.

Once surrendered in pursuance of the requested Party's obligations to extradite upon receipt of sufficient assurances, the person concerned may, of course, accept the judgment rendered against him in his absence or demand a retrial. This is made clear in the last sentence of Chapter III.

If the domestic law of the requesting Party does not allow a retrial, there is no obligation for the requested Party to extradite.

Chapter III provides a further means of strengthening the legal interests of the person to be extradited by stating, in paragraph 2, that communication of the judgment rendered *in absentia* is not to be regarded by the requesting state as a formal notification. The chief object of this provision is to ensure that the person to be extradited will not find himself with only a very short time in which to make an opposition, whereas the formalities relating to his handing over may take several weeks or months.

Furthermore, in some states the opposition entered by the person sentenced nullifies the judgment rendered *in absentia*, with the result that those states will consider only the time limitation of the criminal proceedings. Others follow the principle that the time limitation of the sentence only should be taken into account. Since it is generally true that the time limitation is reached sooner in respect of the proceedings than in respect of the sentence, opposition by the person sentenced (in the case of formal notification in the requested state) might prevent extradition if the requesting and requested states do not follow the same principle in matters of time limitation.

It goes without saying that this provision applies only to a communication made subsequent to a request for extradition of a person referred to in a judgment rendered *in absentia*.

Comments

The possibility and consequences of a trial *in absentia* in the requesting State have been discussed by PC-OC in the context of the modernisation of CoE Conventions in the criminal field, in 2006[65]. A questionnaire on this topic and the possibility of retrial was prepared, extensively revised and sent to all delegations in 2011[66]. Replies received thereto have been compiled and are published (doc. **PC-OC (2013) 01 Rev.3 Bil**) at the public website of PC-OC among the **tools for implementation** in the thematic section on extradition. They have also served as background for further discussions by the PC-OC and PC-OC Mod on the topic of judgements *in absentia*, extradition and guarantees to be provided under Article 3 (1) of **AP2**[67].

PC-OC has discussed the summary and compilation of replies received[68], which reflect, inter alia, divergences in the interpretation of Article 3 of **AP2** by the respective States Parties. In view of this, PC-Mod was instructed to study a practical solution to the problems such divergence might create, for example by proposing guidelines on the interpretation of the notion of "minimum rights of defence", "retrial" and "sufficient guarantees".[69]. PC-OC considered that the purpose of this provision was to ensure that extradition of persons judged *in absentia* would not be denied if the requested State received sufficient guarantees that the extradition would not lead to a violation of the persons' fundamental rights enshrined in the ECHR and in particular those specified in Article 6 (3) concerning the minimum rights of defence. And also that the ratification of **AP2** should not lead to the creation of an additional obstacle to judicial co-operation. The Committee agreed with its working group that it is the responsibility of each requested Party to assess whether the proceedings leading to the judgment *in absentia* or the additional guarantees provided by the requesting State satisfy the rights of defence, in light of the ECHR and the ECtHR's case law, but that an attempt to reach a common opinion on the interpretation of Article 3 would not be helpful at that stage[70].

In order to assist States Parties in this regard, PC-OC requested that a summary of available criteria be prepared, based on the sources identified by PC-Mod[71]. This document was presented to, and approved by, PC-OC at its 66th meeting[72].

Considering as particularly relevant whether the person has chosen not to be present at his/her trial, PC-OC Mod underlined that Parties, when examining a request for extradition of a person sentenced *in absentia*, would find sufficient guidance to assess whether his or her fundamental rights of defence have been guaranteed, in the following sources[73]:

- the explanatory report to the Second Additional Protocol (see above);
- the case law of the ECtHR (see notably the document with **case law of the ECtHR of relevance for the application of the European conventions on international co-operation in criminal matters**, prepared by the PC-OC, under the keyword "in absentia") – see also chapter Part II, Chapter 3.5;
- the information contained in the reply of the requesting State to the questionnaire concerning judgments *in absentia* and the possibility of retrial, in connection with Article 3 of the **AP2** to the ECE (**PC-OC (2013) 01 Rev.3 Bil.**);

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[65] **PC-OC (2006)12**, *Summary report of the 51st meeting of the PC-OC*, Strasbourg, 6 October 2006, §32.
[66] **PC-OC (2011) 22 REV5**, *Questionnaire concerning judgments in absentia and the possibility of retrial*, as adopted by the PC-OC plenary during its 63rd plenary session, Strasbourg, 13 November 2012.
[67] **PC-OC (2011) 22 REV5**, p. 6.
[68] **PC-OC (2013) 01rev3 Bil.**, *Questionnaire concerning judgments in absentia and the possibility of retrial - Summary and Compilation of Replies*, Strasbourg, 28 April 2014.
[69] **PC-OC (2013) 09**, *List of decisions taken at the 64th meeting of the PC-OC*, Strasbourg, 30 May 2013, p. 2.
[70] **PC-OC Mod (2014) 02rev**, *Criteria to assess whether proceedings leading to a judgment in absentia or the additional guarantees provided by the requesting state satisfy the rights of defence (in connection with Article 3 of the Second Additional Protocol to the European Convention on Extradition)*, Strasbourg, 21 May 2014, pp. 2-3.
[71] **PC-OC (2013)14**: *List of decisions taken at the 65th meeting of the PC-OC*, Strasbourg, 28 November 2013, p. 3.
[72] **PC-OC (2014) 02**, *List of decisions taken at the 66th meeting of the PC-OC*, Strasbourg, 21 May 2014, p.4.
[73] **PC-OC Mod (2014) 02rev**, p.3.

- Resolution (75)11 of the Committee of Ministers on the criteria governing proceedings held in the absence of the accused (see below and Part III).

In the "Note for Practitioners" included in document **PC-OC Mod (2014) 02rev**[74], it is considered that, in principle, it can be assumed that a proceeding leading to a judgment *in absentia* satisfies the rights of defence and does not require an assurance, if the person sought:

- has ***waived his or her right to be present*** at the hearing after being either personally notified and thereby informed of the scheduled date and place of the trial or by other means actually received ***information*** regarding the scheduled date and place of such trial in such a manner as to be unequivocally established that the person was aware of the scheduled trial and informed that a decision could be handed down if he or she was absent from the trial (see Resolution [75]11, §§ 1- 2); or
- being aware of the scheduled trial, has ***mandated a legal counsellor***, either appointed by the concerned person or by the State, to defend him or her at the trial, and has indeed been ***defended*** by such counsellor at the trial (see Resolution [75]11, §5); or
- after being served with the decision and expressly informed about his or her right to a retrial, or to an appeal, in which the person has the right to participate and which allows for the re-examination of the merits of the case, including fresh evidence, and may lead to the original decision being reversed, expressly states that he or she ***does not contest the decision*** or ***does not request a retrial or appeal*** within the applicable time limit (see Resolution [75]11, §I.6).

When the requested State is not convinced that the "minimum rights of defence" have been respected in the proceedings leading to the judgment *in absentia*, the requesting State should be informed about any difficulties and be given the **opportunity to dissipate existing doubts**.

When the requested State concludes that doubts persist, extradition should nevertheless be granted in case the requesting State provides an **assurance considered sufficient** to guarantee that the person sought enjoys the right to a retrial safeguarding the rights of defence. ***If the domestic law of the requesting Party does not allow a retrial, there is no obligation for the requested Party to extradite.***

The **assessment** as regard the sufficient nature of the assurance can be based on the above mentioned following sources: explanatory report to **AP2**; case law of the ECtHR, in particular as it regards Article 6 (3) on *in absentia* judgements; and information contained in the reply of the requesting state to the questionnaire developed by the PC-OC on "in absentia cases" in connection with Article 3 of the **AP2** to ECE[75].

Accordingly, an ***assurance*** is to be regarded as ***sufficient*** if it is made clear that there is an **effective possibility of retrial**, or rehearing, in the requesting State according to its applicable law. The person has to be **expressly informed of his or her right to a retrial**, or a rehearing, (including the applicable **time frame**), in which he or she has the **right to participate** and which allows the **merits** of the case, including **fresh evidence**, to be **re-examined**, and which may lead to the original decision being **reversed**[76].

In 2016, PC-OC discussed a question raised as to whether it would be necessary to send a new requalified extradition request for the execution of the sentence of a person when, after the initial extradition request for prosecution and before a final decision is taken, this same person has been judged *in absentia* for the same facts retaining the right to retrial in case of extradition. Most countries said that it would not be necessary to send a new request and that the sending of additional information explaining the reasons for the trial *in absentia* would be sufficient.[77]

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[74] See pp. 10-11.
[75] **PC-OC (2013) 01rev3 Bil**.
[76] **PC-OC Mod (2014) 02rev**, p.11.
[77] **PC-OC (2016) 06**, *List of decisions taken at the 71st meeting of the PC-OC*, Strasbourg, 17 November 2016, p. 7.

In discussions held at the second special session on extradition (June 2018) the representative of the ECtHR stated that the case law of the Court is consistent regarding the need to offer an effective possibility to re-open the case in situations of *absentia*[78].

Recommendations

These are the recommendations addressed by the ***Committee of Ministers*** to Member States regarding the criteria governing proceedings held in the absence of the accused[79]:

1. No one may be tried without having first been effectively served with a summons in time to enable him or her to be present and to prepare his defence, unless it is established that the person has deliberately sought to evade justice.

2. The summons must state the consequences of any failure by the accused to be present at the trial.

3. Where the court finds that an accused person who fails to be present at the trial has been served (*atteint*) with a summons, it must order an adjournment of the hearing should it consider that the presence of the accused is indispensable or if there is reason to believe that the person has been unable to attend.

4. The accused must not be tried in his absence, in case it is possible and desirable to transfer the proceedings to another State or to request extradition.

5. Should the accused be tried *in absentia*, evidence must be produced in the usual manner and the defence must have the right to intervene.

6. A judgement passed in the absence of the accused must be notified to him or her according to the rules governing the service of the summons to be present and the time-limit for lodging an appeal must not begin to run until the convicted person has had effective knowledge of the judgement so served, unless it is established that the person has deliberately sought to evade justice.

7. Any person tried *in absentia* must be able to appeal against the judgement by whatever means of recourse that would have available to him or her, if he or she had been present.

8. Any person tried *in absentia* on whom a summons has not been served in due and proper form shall have a remedy enabling him or her to have the judgement annulled.

9. A person tried *in absentia* on whom a summons has been properly served is entitled to a retrial, in the ordinary way, if such person can prove that his or her absence and the failure to inform the judge thereof were due to reasons beyond his or her control.

In its **Guidelines on the model request for extradition**, PC-OC recommends the following:

- When the extradition request is based on an enforceable *in absentia* judgment, the requesting State should indicate whether the defendant was present in person during the trial or part of the trial and/or whether the defendant was represented during the trial. From the onset, the requesting State should provide sufficient details on the course of the trial. A proper ***assurance on the right to a retrial*** is required[80].

Amnesty

[78] See **PC-OC (2018) 05**, p. 53.
[79] See full text in Part III.
[80] **PC-OC (2021)04rev**, §§23 and 42.

Second Additional Protocol – Chapter IV: Article 4

The Convention shall be supplemented by the following provisions:

Amnesty

Extradition shall not be granted for an offence in respect of which an amnesty has been declared in the requested State and which that State had competence to prosecute under its own criminal law.

Explanatory report

Chapter IV deals with the question whether an amnesty granted in the requested state is a ground for refusing extradition. The Convention is silent on this point. The Protocol now offers a solution following the examples already contained in some bilateral extradition agreements.

Chapter IV does not deal with amnesties in the requesting Party, as the sub-committee considered it unlikely that a state would ask for extradition for an offence in respect of which it had previously granted an amnesty.

An amnesty (referring either to criminal prosecution or to the enforcement of sentences) in the requested Party is a barrier to extradition only if that state has jurisdiction over the offence concurrently with the requesting state (e.g. by virtue of the principles of active and passive personality).

Article 12: The request and supporting documents

Convention

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 5 (Chapter V) of the Second Additional Protocol replaces paragraph 1, above, with:

1. The request shall be in writing and shall be addressed by the Ministry of Justice of the requesting Party to the Ministry of Justice of the requested Party; however, use of the diplomatic channel is not excluded. Other means of communication may be arranged by direct agreement between two or more Parties.

Article 2 (1) of the Fourth Additional Protocol replaces Article 12 of the Convention, in its entirety, with:

1. The request shall be in writing. It shall be submitted by the Ministry of Justice or other competent authority of the requesting Party to the Ministry of Justice or other competent authority of the requested Party. A State wishing to designate another competent authority than the Ministry of Justice shall notify the Secretary General of the Council of Europe of its competent authority at the time of signature or when depositing its instrument of ratification, acceptance, approval or accession, as well as of any subsequent changes relating to its competent authority.

2. The request shall be supported by:

a. a 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, including provisions relating to lapse of time, 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 or her identity, nationality and location."

Article 2 (2) of the Fourth Additional Protocol: "Article 5 of the Second Additional Protocol to the Convention shall not apply as between Parties to the present Protocol."

Explanatory reports

Convention

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 *judicial authorities* of the requesting Party are proceeding or who are wanted by them.

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

Second Additional Protocol

According to Article 12.1 of the Convention, requests for extradition shall be communicated through the diplomatic channels. Experience in some states having shown that the diplomatic channel may give rise to delay, the sub-committee decided to substitute a more expeditious way of communication for the way prescribed by the convention. The sub-committee also noted that for some countries there might be difficulties in submitting a request for extradition within the minimum period of eighteen days provided for in Article 16 of the Convention where a request for provisional arrest has been made.

Chapter V provides for extradition requests to be communicated between the Ministries of Justice concerned without, however, excluding the use of diplomatic channels and allowing two or more Contracting Parties to resort to other specifically agreed channels.

This method of communication has been adopted in the light of similar provisions in Article 15.1 of the European Convention on Mutual Assistance in Criminal Matters.

In those states where there is no Ministry of Justice, the term is understood to mean the department of government, by whatever name it is known, which is responsible for the administration of criminal justice.

Fourth Additional Protocol

Article 12, paragraph 1 of the Convention provides that requests for extradition shall be communicated through the diplomatic channel. Chapter V of the Second Additional Protocol to the Convention simplified this system by providing for extradition requests to be sent by the Ministry of Justice of the requesting Party to the Ministry of Justice of the requested Party. However, for a number of countries the competent authority for sending and receiving extradition requests is not the Ministry of Justice, but another authority such as the Office of the Prosecutor General. The present wording is designed to accommodate this practice.

Any Party wishing to designate a competent authority other than the Ministry of Justice shall notify the Secretary General of the Council of Europe accordingly. The drafters agreed that any such authority shall be competent at the national level to send and receive extradition requests. In the absence of such notification, the competent authority with respect to that state is understood to be the Ministry of Justice.

The drafters took note of the practice of some Parties to the Convention to designate more than one competent authority. In such cases, the declaration of the Party concerned should make it clear how competences of the different authorities are apportioned in extradition cases.

It is important to note that Article 2, paragraph 2 of this Additional Protocol provides that Article 5 of the Second Additional Protocol shall not apply as between Parties to the Fourth Additional Protocol[(1)]

Channels and means of communication are now dealt with in Article 6 of this Fourth Additional Protocol so as to create a common system in this respect.

It is important to note that although Article 5 of the Second Additional Protocol will not apply, it will still be possible to conclude agreements between Parties in accordance with Article 28, paragraph 2 of the Convention, as foreseen in Article 7, paragraph 2, of the Fourth Additional Protocol.

As regards paragraph 2 of Article 12 of the Convention as amended by this Fourth Additional Protocol, contrary to the Convention which requires an original or authenticated copy of the documents mentioned under sub-paragraph a), this Additional Protocol only refers to “a copy”. This is in line with the possibility introduced under Article 6 of the Fourth Additional Protocol to use modern means of communication. However, sub-paragraph a) should also be read in conjunction with the reservation provided for under Article 6, paragraph 3 of this Additional Protocol. In cases where the requested Party has made such a reservation, the requesting Party would still have to send the originals or authenticated copies of these documents.

In addition, the Fourth Additional Protocol completes the original wording of paragraph 2 of Article 12 of the Convention in two respects. Firstly, Under sub-paragraph b), an explicit reference to provisions relating to lapse of time is included, with the understanding that the appraisal of lapse of time according to the law of the requesting Party, pursuant to Article 10, paragraph 1 of the Convention as amended by the Fourth Additional Protocol, should be based on the assessment made by that Party of lapse of time according to its own law. Secondly, under sub-paragraph c), the relevant information to be sent is completed with a reference to the location of the person, due to practical considerations.

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(1) Article 5 of the Second Additional Protocol will continue to apply in relations between Parties to the Second Additional Protocol and Parties to the Fourth Additional Protocol having ratified the Second Additional Protocol.

Comments[81]

See also comments to Articles 16 of the **ECE** (Provisional arrest) and 6 of the **AP4** (Channels and means of communication).

Convention

1. Model request form

The preparation of a model request form on extradition has been in the agenda of PC-OC since November 2018, as a follow-up to its second special session on extradition, held in June 2018[82]. In 2019, two concrete proposals to this effect were discussed, as presented by Mr. Erik Verbert (**PC-OC Mod (2019) 06**) and by the PC-OC Working Group (**PC-OC Mod (2019) 08**), and the Committee agreed on a text thereon, asking an expert to further prepare guidelines on the matter[83]. The model request form and guidelines have been adopted by PC-OC at its 79th meeting[84], in May 2021 (doc. **PC-OC(2021)04rev**), and are currently available online at the website of PC-OC. They can also be found in Part III of this publication. For more information, see "Recommendations", below.

2. Translation of documents

Under Article 12, paragraph 2.a) of the **ECE**, requests for extradition must be supported, inter alia, by 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.

Under Article 23, 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 CoE of its choosing. This rule means that very often documents must be translated.

In case extradition is requested in order to continue with criminal proceedings, the request must be supported by a warrant of arrest. Usually – not always – warrants of arrest are short documents that raise no difficulties in translation.

However, where extradition is requested in order to execute a sentence, the documents involved can be very long, sometimes over 200 pages. Translating such documents requires a great deal of time and considerable expense. Frequently, it requires a period of time which is longer than the period imposed by Article 16, paragraph 4. In such cases the language requirement may defeat the aim of extraditing the person.

Considerable advantages could be gained from solving this problem, which stems from a contradiction. The request for the continuation of criminal proceedings, particularly in the case of a well-founded suspicion, only needs to be supported by a warrant of arrest, whereas, for the execution of a sentence, the request must be supported by a court decision, which may also contain material of no relevance to the evaluation of the extradition request (for example, sentences passed in relation to other persons and details of the sentenced person's education and life).

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[81] The PC-OC has developed a section of its website dedicated to ***National procedures on judicial cooperation in the criminal field***. It contains information, updated on a yearly basis, on national procedures applicable in the areas of extradition, mutual assistance, transfer of sentenced persons and seizure and confiscation of assets.

[82] **PC-OC (2018) 11**, *List of decisions taken at the 75th meeting of PC-OC*, Strasbourg, 16 November 2018, p. 4.

[83] **PC-OC (2019) 12**, *List of decisions taken at the 77th meeting of PC-OC*, Strasbourg, 15 November 2019, p. 5; see also **PC-OC (2020) 12**, *List of decisions taken at the 78th meeting of the PC-OC*, Strasbourg, 9 October 2020, p. 6.

[84] **PC-OC (2021) 05**, *List of decisions taken at the 79th meeting of the PC-OC*, Strasbourg, 17 May 2021, p. 5.

It was suggested that, in such cases, an appropriate solution might be to require that the request be supported by a warrant of arrest issued by the competent judge. The warrant of arrest would contain all the evidence required to evaluate the extradition request (details of the court of first instance and of the court of appeal, personal details of the convicted person, sentence passed and all the facts established by the court). Several experts spoke against this suggestion and said that where extradition was requested for the purpose of executing a sentence, a copy of the latter must be produced.

Admittedly, this requirement is not explicitly embedded in the Convention. In this respect, the secretariat noted that the correspondence between the English and the French versions of Article 12, paragraph 2 (a) of the Convention is unfortunately unclear. Indeed "the conviction and sentence or detention order immediately enforceable" in one language becomes *"une décision de condamnation exécutoire"* in the other language.

The ensuing discussion showed that some countries could accept a "simplified translation", that is, a translated summary of the sentence plus a verbatim translation of the more relevant parts of the sentence; others, however, required the full translation of the entire sentence.

The conclusion thus was that requesting States should ***enquire*** whether the requested State accepts "simplified translations" and use that as far as possible. Where requested States do not accept that, there seems to be no available solution.[85]

During the discussions on the modernisation of CoE Conventions in the criminal field held in 2006, the point was made that a request for extradition would have better chances to be quickly handled in the requested State if such request is submitted in the language of this State. Apparently, this was usual practice for some States. However, it could also create practical difficulties in States with difficulties in acceding to translators into the various languages of CoE member. Such States would more easily find translators into CoE official languages (with the risk that the same documents would have to be translated again into the language of the requested State)[86].

The PC-OC agreed that, considering the wide variety of national legislation and practice among States, various solutions could be envisaged, for instance in a non-binding instrument outlining best practices to be followed by States. Such an instrument could identify which documents or which information should be transmitted to the requested State and translated, with reference to Art 12 **ECE**[87]. The discussion on language issues was resumed as from the 57th meeting of the PC-OC (November 2009) and a short draft questionnaire on State practice in this regard prepared[88]. The PC-OC also decided, as a practical measure, to complete the information included in its database on national procedures relating to extradition with more detailed information regarding the accepted and preferred languages of States Parties to the Convention, as well as to reflect on the feasibility of amending the Convention in what concerns to the requirements for the translation of supporting documents specified under Article 12, paragraph 2 of the Convention[89].

3. Exposure of facts

Problems have arisen when extradition requests from one member State were refused – or only satisfied partly – on the grounds that the arrest warrant did not mention all the offences for which the person was accused. However, under that State's domestic law, all necessary documents had been supplied. This question raises different problems. An arrest warrant is necessary where extradition is sought. The phrase "or other order having the same effect and issued in accordance

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[85] PC-OC, *report of the 36th meeting* (9-11 February 1998), §§ 53-67.
[86] **PC-OC (2006) 16**, *Summary report of the 52nd meeting of the PC-OC*, Strasbourg, 20 November 2006, p. 11.
[87] **PC-OC (2006) 15**, *List of adopted decisions at the 52nd meeting of the PC-OC*, Strasbourg, 20 October, 2006, p. 4.
[88] **PC-OC (2009) 21**, *Summary report of the 57th meeting of the PC-OC*, Strasbourg, 23 February 2010, §§17-18.
[89] **PC-OC (2010) 11**, *List of decisions taken at the 58th meeting of the PC-OC*, Strasbourg, 6 May 2010, p. 2.

with the procedure laid down in the law of the requesting Party" should be interpreted restrictively, to mean an arrest warrant even when this bears a different name. A "warrant of arrest" may be defined as a formal document, issued by a "competent authority" ("autorité judiciaire") in the meaning of Article 1 of the Convention, whereby that authority certifies that a given person is wanted because proceedings against such person for an offence are pending in the requesting State. Therefore, an arrest warrant has the legal value of certifying that measures taken by the requested State pursuant to the extradition request, which restrict the right of the concerned person to liberty, are justified under Article 5 (1) (c) of the ECHR.

An arrest warrant must make reference to facts, namely the facts that amount to the offence or offences for which the person is sought. Article 12, paragraph (b) requires that such facts be described separately, one by one, in detail. Vague references, for example, to "a number of thefts committed between January and April 1997" should be avoided. It goes without saying that there must be clear accord between the facts mentioned in the arrest warrant and those described for the purposes of Article 12, paragraph 2 (b). The question of whether different facts either qualify as one single offence, committed in a continuous fashion, or as several offences, should be solved under the national law of the requesting State.

According to the rule of speciality (Article 14 of the Convention), a person who has been extradited shall not be proceeded against (or sentenced, etc.) for any offence committed prior to his surrender other than that for which he was extradited. "Offence" should be read as meaning facts punishable under criminal law. One implication of this rule is that there should be no misunderstanding as to the fact or facts for which extradition is granted.

The best practice in this field should probably be that States, when requesting extradition, use an *ad hoc* arrest warrant, issued by a competent authority/*autorité judiciaire* and that makes reference to all the facts for which extradition is requested.[90]

4. Expiry of the validity of a national arrest warrant

Experience as a requested State showed that it was not clear from an arrest warrant issued by a national authority and on the basis of which an extradition was to take place, when its validity would begin, therefore, and when it would expire. Would the period of validity begin as from the moment of the arrest in the requested State or from the moment of surrender to the requesting State? The committee noted that it is important to be sensitive to the procedural issues in the requesting State. The State issuing the arrest warrant should always specify in it (or in the extradition request) when the time limit for validity will begin to run.[91]

5. Channels of communication

A question has been raised as to whether Article 12 concerns channels of communication or the production of the request. It is however clear that extradition requests are addressed by one State to another. Thus, the **ECE** regulates in its Article 12 channels of communication between States. The powers of domestic authorities is a question to be solved at the national level and in accordance with a State's own procedures; not a question which concerns the other State.[92]

6. Checking the competence of the requesting State

Mutual trust and fairness are the foundations of international co-operation in criminal matters. State authorities must bear in mind the importance of preserving mutual trust, so as not to endanger future co-operation and, in particular, in order to avoid unnecessary (and time-consuming) examinations of the validity of requests by the requested State.[93]

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[90] PC-OC, *report of the 39th meeting* (27-29 September 1999), §§ 95-106.
[91] **PC-OC (2004) 15 Rev**, *Summary report of the 48th meeting*, Strasbourg, 15 October 2004, p. 10.
[92] **PC-OC (2002) 11 REV.**, *Summary report of the 45th meeting*, Strasbourg, 16 June 2003, § 25.
[93] **PC-OC (2003) 1**, *Summary report of the 46th meeting of the PC-OC*, Strasbourg, 11 September 2003, p. 10.

7. Request of extra documents

It has been reported to the PC-OC that some States required extra documents to those specified in this article; such a practice is not conducive to effective co-operation between States.[94]

8. *Information on detention and measures of restriction*

For the ***Guidelines on the provision of information regarding the detention or other measures of restriction imposed in extradition proceedings***, adopted by PC-OC in 2018, see comments and recommendations on Article 16.

Second Additional Protocol

Article 5 of **AP2** should be interpreted in the sense that most requests are to be communicated via the Ministry of Justice, although "the use of the diplomatic channel is not excluded". The words "addressed" and "channel" would tend to confirm this interpretation.[95]

In discussions concerning the modernisation of CoE Conventions in the criminal field held in 2006, PC-OC examined the application of Article 5 of **AP2**. A suggestion was made that Parties could be encouraged to make agreements on the use electronic means of communication (e-mails), at least in order to facilitate the exchange of information regarding the preparation or the execution of co-operation requests. The Committee agreed that these articles could possibly be updated in order to refer not only to diplomatic channels or to Ministries of Justice, but to the central authority "as defined by each Party by declaration", which can be, as it is the case for some States, the Prosecutor's Office. It decided to present this proposal to the CDPC for consideration. It further instructed the limited Group of experts to consider the possibility of normative developments as regards the practical measures of communication in application of the Convention (post, fax, e-mail), but considered that any new instrument should remain as flexible as possible so that it could be applicable to future technological innovations and hence avoid the need to be regularly updated[96].

See also Article 6 of the Fourth Additional Protocol.

Fourth Additional Protocol

In 2006, PC-OC agreed that Articles 12 **ECE** and 5 **AP2** "could possibly be updated in order to refer not only to diplomatic channels or to Ministries of Justice, but to the central authority "as defined by each Party by declaration", and presented this proposal to the CDPC for consideration. Also, PC-OC instructed its limited Group of experts to consider the possibility of normative developments as regards the practical measures of communication in application of the Convention (eg. post, fax, e-mail). It further considered there was no added value in developing a model form for extradition requests at that point[97].

In PC-OC discussions on a simplified extradition procedure, held in 2006, one Committee member suggested that the requirements of Article 12 should be reviewed, not only in the perspective of simplified extradition, but also in "normal" extradition procedures. The aim would be to avoid costs and delays, particularly in cases of extradition for the purpose of executing a sentence, where the decision (which can have hundreds of pages) has to be sent (and translated). It was considered as an alternative, that, in such cases, only the relevant information (e.g.: Mr/s A was sentenced, for these facts – summarised- by Court X, on date xx, to a penalty of xxx; that decision is final) and a copy of the decision, could be sufficient[98].

These discussions continued and, in November 2008, the issues of competent authorities and necessary documentation have been examined on the basis of a proposal submitted by the

[94] PC-OC, *Report of the 25th meeting* (13-15 January 1993), §§ 12-14.
[95] **PC-OC (2002) 11 REV**, Summary report of the 45th meeting, Strasbourg, 16 June 2003, §25.
[96] **PC-OC (2006) 16**, *Summary report of the 52nd meeting*, Strasbourg, 20 November 2006, p. 12.
[97] **PC-OC (2006) 15**, *List of adopted decisions*, Strasbourg, 20 October 2006, p. 4.
[98] **PC-OC (2006) 16**, *Summary report of the 52nd meeting*, Strasbourg, 20 November 2006, p. 7.

Russian Federation. As regards competent authorities, the PC-OC took note of the fact that Article 5 of **AP2** allows for requests to be submitted directly between Ministries of Justice, whereas in some countries the Prosecutor General's Office is competent in extradition matters. Some delegations voiced concern about the term "central authority" used in the Russian proposal, considering that it might not cover all different systems, whereas one delegation suggested that the possibility should be given to States to specify the competent authority by way of a declaration. With regard to documents, the Russian delegate explained that his proposal intended to allow the substitution of original documents by information, provided that the authenticity of this information is certified by a competent authority. While some delegations questioned the feasibility of such an approach, others pointed to the fact that in certain cases the translation and sending of very long judgments or long arrest warrants was a very laborious process and expressed support for the possibility of sending only the relevant extracts of such documents[99].

Recommendations

1. ***Indication of legal basis***
   While the requesting State should indicate the relevant convention to be applied, the States concerned should not consider themselves bound by such a formal reference as they are bound by any convention in force between the two States. Sometimes extradition is sought on the basis of a combination of different conventions, for example a combination of a bilateral extradition treaty and a UN convention. This may be necessary when the bilateral extradition treaty contains a limitative list of offences for which extradition may be granted, while more modern transnational offences such as organised crime are not covered by the bilateral treaty. This is without prejudice to the rules of prevalence in treaty law[100].

2. ***Previous verifications***
   PC-OC recommends that, before transmitting an extradition request, requesting States verify or consult the following elements: entry into force, signatures and ratifications of the relevant treaties and current status of the reservations and declarations made by the requested Party to them; recommendations and resolutions of the Committee of Ministers; explanatory report(s); essential country information on the procedure applicable in each State Party; relevant case law of the ECtHR; other obligations binding upon the requesting and requested States (eg. emerging from membership to the EU or Commonwealth of Independent States); reservations concerning Article 23 (languages to be used)[101].

3. ***Previous contacts with authorities from the requested State***
   - PC-OC recommends that, for obtaining information on the law of the requested State, authorities of the requesting State take into account the provisions of the European Convention on Information on Foreign Law (ETS No. 62) and its Additional Protocol (ETS No. 97) which extended the provisions of the former to criminal law;
   - For further information it might be useful to contact one's national PC-OC representative. In more complicated or sensitive extradition cases, it is important, even essential, to discuss the matter with the central authority of the requested State before transmitting the (final) extradition request. This can avoid a scenario where the extradition would be refused for reasons of lack of clarity as to the time and place of the facts (offences), lapse of time or, in some requested States, lack of *prima facie* evidence. In other States, certain formalities, such as the proper certification of supporting documents, may impact on the extradition process. (e*.g. South Africa requires an extradition request and the documents support it to be in a booklet form with continuous page numbering etc.)*[102]

[99] **PC-OC (2008) 29**, *Summary report of the 55th meeting*, Strasbourg, 14 April 2009, §§15-17.
[100] **PC-OC (2021)04rev**, *Guidelines and model request for extradition*, Strasbourg, 6 May 2021 [hereinafter, **PC-OC (2021)04rev**], §§2-3.
[101] **PC-OC (2021)04rev**, §§4-8 and 11.
[102] **PC-OC (2021)04rev**, §§9-10.

4. Consideration of the principle of proportionality and possible alternatives to extradition

- Proportionality requires consideration by the requesting State, and primarily by its judicial authorities, of the balance between the purpose and need of the requested measure and the seriousness of the offence, the length of the penalty and the degree to which the concerned person's human rights are to be affected.
- In some circumstances, a transfer of proceedings (under the European Convention on the Transfer of Proceedings in Criminal Matters, ETS No. 73), laying of information (under Article 21 of the **European Convention on Mutual Assistance in Criminal Matter**s, ETS No 30) or a transfer of the execution of the sentence (under the European Convention on the International Validity of Criminal Judgments, ETS No 70) could be considered as appropriate alternatives to extradition[103].

5. Transmission of requests

Extradition requests are traditionally transmitted through the diplomatic channel, as indicated in article 12 of the **ECE**. Article 5 of the **AP2** amended article 12 to allow for a direct transmission between the Ministries of Justice. However, some Parties to this Protocol have excluded this possibility through a reservation. **AP4** has introduced the possibility of transmitting extradition request via electronic means (Article 2). Again, the application of this provision requires verification of the reservations that the Parties to this Protocol may have made[104].

6. Contents of the request

- The model and guidelines leave it to the discretion of the Parties to opt for a comprehensive extradition request that includes all elements, such as the text of the relevant criminal law stating the offences and applicable penalties. An extradition may even include assurances and thus limit the number of attachments to the arrest warrant(s) and / or judgments.
- As to assurances, it should be underlined that, depending on their contents, the assurances may not be given and signed by the same authority – usually, the central authority – that elaborates and signs the extradition request. Assurances regarding prison conditions, for example, are logically provided by the competent authority, i.e. the prison administration or an equivalent authority that oversees the prison system in the requesting State.
- The requested Party should also communicate applicable limitations to the duration of the detention well in advance to the requesting Party in order to avoid the release of the person sought before the surrender can take place.[105]

7. Translation

Reservations made with respect to Article 23 of the **ECE** (languages to be used) should be verified in order to present a proper translation of the extradition request and relevant documentation.[106]

8. *Structure and elements of the request*:

- **Identity and description of the person sought** (*Name, First name(s), Aliases, Gender, Date of birth, Place of birth, Nationality/es, Passport(s), Occupation, Last known residence, Current location, Language(s) spoken, Other, Any distinguishing features, Photographs/fingerprints of the sought person are enclosed*):
  - ❖ The ***identity*** of the person sought is the first essential element of any extradition request. Requesting States should make sure that the person

[103] **PC-OC (2021)04rev**, §12.
[104] **PC-OC (2021)04rev**, §13.
[105] **PC-OC (2021)04rev**, §§14-16.
[106] **PC-OC (2021)04rev**, §17.

sought is in fact the person sought. In case of doubts raised by the use of false identities and accompanying ID-documents such as passports, police cooperation and, if needed, MLA should be exploited to the fullest in order to establish the correct identity of the person sought. In some cases, the name/ ID of the person sought, mentioned in the domestic arrest warrant or even in the conviction, differs from the real identity or from the identity known to the requested State. Such differences should be explained or rectified in the extradition request[107];

- ***Nationality*** should also be properly established since most Parties to the **ECE** do not extradite their own nationals. Dual nationality of the person sought, of which one is the nationality of the requested State, can mean that this State will not extradite the person sought or might subject it to conditions. Nationality is normally established at the time of the (final) extradition decision of the requested State[108];
- States that do not have a (national) register, always require univocal information that allows for the proper identification of the person sought, i.e. (if possible recent and high quality) ***photographs*** or, even better, ***fingerprints*** and ideally a ***DNA-profile***. Fingerprints and DNA-profiles should be delivered in internationally accepted standard. Print outs of fingerprints are most often distorted and cannot be used for comparison[109];
- For certain States, the addition of ***patronymics and / or matronymics*** is important to enable the identification of the person sought[110].

- **Purpose of the extradition request:**
  - Extradition has a ***twofold purpose***: either to pursue (or further) the prosecution of a suspect or a charged person or to start or to resume the execution of a sentence – or a measure involving deprivation of liberty. This means that the case of the requesting State is either in the pre-trial or, following conviction, in the post-trial stage. Extradition requests may combine the two: seeking the surrender of a sentenced person who is also wanted for prosecution for other offences. As for the judgment(s) convicting the person sought, it is not necessary that the judgment(s) is (are) final. It is sufficient that the imposed penalty or measure involving deprivation of liberty can be enforced[111];
  - When the extradition request is based on an enforceable judgment rendered ***in absentia***, the requesting State should indicate whether the defendant has been present in person during the trial or part of the trial and/or whether the defendant has been represented during the trial. From the onset, the requesting State should provide sufficient details on the course of the trial. A proper **assurance on the right to a retrial** is required[112];
  - An extradition request should be ***as complete as possible***, i.e. be based on all valid (i.e. still enforceable) arrest warrants and/ or judgments (convictions). Insofar as the person sought does not waive the rule of specialty, the requesting State is limited in its ability to prosecute or enforce the sentence. Even if an extradition request can be supplemented at a later stage or even after the surrender has taken place, such complications are best avoided by transmitting a complete extradition request comprising all the facts and offences from the beginning[113];

[107] **PC-OC (2021)04rev**, §18.
[108] **PC-OC (2021)04rev**, §19.
[109] **PC-OC (2021)04rev**, §20.
[110] **PC-OC (2021)04rev**, §21.
[111] **PC-OC (2021)04rev**, §22.
[112] **PC-OC (2021)04rev**, §23.
[113] **PC-OC (2021)04rev**, §24.

- ❖ The arrest warrant(s) or the judgment(s) or the equivalent thereof must be ***valid and enforceable***. This means that the arrest warrant(s) and/ or the judgment(s), at the time of the extradition request, are a valid legal basis enabling the detention of the person sought[114].

- **Offences** for which the extradition is sought:
  - ❖ The offences are the ***legal definitions*** of the incriminated behaviour. Applicable legislation can be either included in the request or attached as an annex[115];
  - ❖ Where necessary, legislation regarding ***general principles*** should be added, for example legislation defining general or more specific concepts such as "participation", "conspiracy", "attempt", "recidivism", etc.[116]
- **Penalty** (foreseen or imposed):
  - ❖ Insofar as the ***death penalty*** may apply, an assurance as prescribed by Article 11 of the **ECE** should be included[117];
  - ❖ Insofar as the offence(s) is / are punishable with a ***life sentence***, an explanation as to the compressible nature of such sentence might be needed[118].
- **Statement of facts comprising the offence(s) for which the extradition is sought:**
  - ❖ An essential requirement of Article 12 **ECE** is to state the facts of the offence(s) committed as well as the date and place of their commission. The first purpose of the statement of facts is to enable the requested Party to verify the ***double criminality*** requirement. This verification is in essence a matter of re-qualifying the facts of the matter under its own (criminal) law. When the facts are also punishable to a sufficient degree, the double criminality requirement and the associated ***penalty threshold*** have been met. Depending on the law of the requested State, the assessment of double criminality should take into account the date of the commission of the offence and the legislation applicable at that time. The ***date*** of the commission of the offence is also important to assess the lapse of time criteria. The ***place*** where the offence has been committed is important to determine jurisdiction, if required;[119]
  - ❖ Arguably the ***most difficult*** part of any extradition request is the statement of the facts. The same applies when writing acceptable MLA-requests. Such a statement can be challenging when the facts of the case are complicated (e.g. organised crime, financial crime), happened a long time ago or if the person sought is wanted for a multitude of charges or convictions;[120]
  - ❖ The right balance is to present the relevant facts, avoiding *exposés* that are only comprehensible to police officers, prosecutors or judges that dealt with the case(s). Like an MLA-request, an extradition request is addressed at another State which, as a rule, is not at all familiar with the case(s);[121]
  - ❖ When the requested State requires *prima facie* evidence or *probable* cause under its extradition law, it may be necessary to include ***evidentiary elements*** in the extradition request[122];

[114] **PC-OC (2021)04rev**, §25.
[115] **PC-OC (2021)04rev**, §26.
[116] **PC-OC (2021)04rev**, §27.
[117] **PC-OC (2021)04rev**, §28.
[118] **PC-OC (2021)04rev**, §29.
[119] **PC-OC (2021)04rev**, §30.
[120] **PC-OC (2021)04rev**, §31.
[121] **PC-OC (2021)04rev**, §32.
[122] **PC-OC (2021)04rev**, §33.

- ❖ The statement of facts should be ***as complete as possible*** in order to avoid future issues regarding the ***principle of specialty***[123].

- **Lapse of time:**
  - ❖ Lapse of time is essentially the ***procedural accessory of double criminality***. After it is established that the facts are punishable (to a minimum degree) in both Parties, the next step is to certify whether the prosecution or the enforcement of the sentence imposed is still possible under the laws of both Parties[124];
  - ❖ Often, a ***simple statement*** that "the prosecution of the offences for which the extradition is sought/ the execution of the sentence for which the extradition is sought is not elapsed", should be sufficient to avoid any doubt or discussion about the lapse of time condition to extradition[125];
  - ❖ However, in cases where the prosecution in the requesting State regards "old" facts or regards the enforcement of a sentence imposed a ***long time ago***, questions regarding lapse of time may raise in either State. In those cases, the requesting State should include additional information on investigative actions or decisions and/or judicial acts that have occurred and either ***suspended or interrupted*** lapse of time, including in relation to co-defendants or co-authors. This applies to lapse of time regarding either the prosecution or the enforcement of the sentence[126];
  - ❖ Sometimes, it may be necessary to verify both forms of lapse of time. This is particularly the case when the person sought has been tried and convicted by a ***sentence in absentia*** and when an assurance in the sense of Article 3 of **AP2** has been provided as required. In those cases, the extradition request relies on an enforceable judgment *in absentia*, meaning that the imposed sentence may be enforced following the eventual surrender of the person sought. At the same time, the surrendered person must have at least the opportunity to obtain a contradictory re-trial. A re-trial means that the prosecution shall revive and may thus not have elapsed. In those cases, both lapse of time regarding the enforcement of the sentence and regarding prosecution may come under scrutiny;[127]
  - ❖ Insofar as the Parties involved are also Parties to the ***Fourth Additional Protocol*** to the Convention and *did not make a reservation*, the requesting State is exempted from providing detailed or additional information on the law regarding lapse of time, since the requested State should no longer look at lapse of time in accordance with its own law. This means that any further assessment in doubtful cases is irrelevant.[128]

- **Other:**
  - ❖ "Other" may regard a wide variety of specific issues that exceed straightforward extradition requests. Currently, issues surrounding ***fundamental rights*** may raise even in straightforward requests and may give rise to the inclusion of ***assurances*** in that respect[129];
  - ❖ The requesting State should take into account ***earlier experiences*** with the requested State in terms of assurances that were requested in the past. Future requests, especially when these regard similar offences or circumstances, will need to include the same or similar assurances than those provided after the transmission of an earlier extradition request[130];

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123 **PC-OC (2021)04rev**, §34.
124 **PC-OC (2021)04rev**, §35.
125 **PC-OC (2021)04rev**, §36.
126 **PC-OC (2021)04rev**, §37.
127 **PC-OC (2021)04rev**, §38.
128 **PC-OC (2021)04rev**, §39.
129 **PC-OC (2021)04rev**, §40.
130 **PC-OC (2021)04rev**, §41.

- ❖ In case the extradition request relies on a conviction ***in absentia***, the right to a retrial must be assured in accordance with Article 3 of **AP2** to the ECE[131];
- ❖ Other assurances may relate to Article 3 of the ECHR, more specifically to the ***conditions of the prison*** where the person sought may be held after his or her surrender[132].
- ❖ When the person sought is considered ***dangerous*** or has a serious ***medical condition***, it is useful to provide the requested State with a ***risk assessment***, including indications on the risk of escape, violent behaviour, medical history and criminal records. The transfer of medical records is subject to the consent of the person concerned[133].

- **Enclosures: according to PC-OC, standard enclosures are –**
  - ❖ The arrest warrant(s) and / or
  - ❖ The enforceable judgment(s)
  - ❖ A statement of the facts
  - ❖ The applicable legislation (offences and their sanctions; additional legislation, where needed)
  - ❖ Assurances
    - Retrial in case of conviction *in absentia*;
    - Fundamental rights issues[134]

Article 13: Supplementary information

Convention

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.

Explanatory report

This article does not call for any special comment.

Article 14: Rule of speciality

Convention

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;

131 **PC-OC (2021)04rev**, §42.
132 **PC-OC (2021)04rev**, §43.
133 **PC-OC (2021)04rev**, §44.
134 **PC-OC (2021)04rev**, §45.

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 3 of the Fourth Additional Protocol replaced Article 14, in its entirety, with:

1. A person who has been extradited shall not be arrested, prosecuted, tried, sentenced or detained with a view to the carrying out of a sentence or detention order, nor shall he or she be for any other reason restricted in his or her personal freedom for any offence committed prior to his or her surrender other than that for which he or she was extradited, except in the following cases:

a. when the Party which surrendered him or her 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. The decision shall be taken as soon as possible and no later than 90 days after receipt of the request for consent. Where it is not possible for the requested Party to comply with the period provided for in this paragraph, it shall inform the requesting Party, providing the reasons for the delay and the estimated time needed for the decision to be taken;

b. when that person, having had an opportunity to leave the territory of the Party to which he or she has been surrendered, has not done so within 30 days of his or her final discharge, or has returned to that territory after leaving it.

2. The requesting Party may, however:

a. carry out pre-trial investigations, except for measures restricting the personal freedom of the person concerned;

b. take any measures necessary under its law, including proceedings by default, to prevent any legal effects of lapse of time;

c. take any measures necessary to remove the person from its territory.

3. Any State may, at the time of signature or when depositing its instrument of ratification, acceptance, approval or accession or at any later time, declare that, by derogation from paragraph 1, a requesting Party which has made the same declaration may, when a request for consent is submitted pursuant to paragraph 1.a, restrict the personal freedom of the extradited person, provided that:

a. the requesting Party notifies, either at the same time as the request for consent pursuant to paragraph 1.a, or later, the date on which it intends to apply such restriction; and

b. the competent authority of the requested Party explicitly acknowledges receipt of this notification.

The requested Party may express its opposition to that restriction at any time, which shall entail the obligation for the requesting Party to end the restriction immediately, including, where applicable, by releasing the extradited person.

4. 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."

Explanatory reports

Convention

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.

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.

Fourth Additional Protocol

The rule of speciality corresponds to the principle that an extradited person may not be arrested, prosecuted, tried, sentenced or detained for an offence other than that which furnished the grounds for his or her extradition. In this context, it is important to underline the responsibility of the requesting Party to ensure that the initial request for extradition is as complete as possible and based on all available information, in order to avoid future requests for the extension of extradition to other offences committed prior to the initial request.

This article rewords Article 14 of the Convention, by introducing the following amendments:

1. in paragraph 1, the words “proceeded against” are replaced by the words “arrested, prosecuted, tried” and a new sub-paragraph is inserted under paragraph 2, in order to clarify the scope of the rule of speciality;

2. in paragraph 1, the sentence containing the words “nor shall he or she be for any other reason restricted in his or her personal freedom”, has been restructured in order to align the English and French versions;

3. in paragraph 1, sub-paragraph a, a time limit of 90 days is introduced for the formerly requested Party to communicate its decision on the extension of the extradition to other offences;

4. in paragraph 1, sub-paragraph b, the period of 45 days is reduced to 30 days;

5. a new paragraph 3 is introduced, creating the possibility for the requested Party to authorise the requesting Party to restrict the personal freedom of the extradited person pending its decision on extension of the extradition.

29. As regards point 1, the reason for the change is the fact that there had been many different and sometimes conflicting interpretations of the words “proceeded against” in different legal systems. The replies to a questionnaire sent by the PC-OC indicated notably that the authorities of some Parties to the Convention had interpreted the words “proceeded against” to cover any measure taken by the authorities of the requesting Party, even before a case is brought to trial. This had made it impossible for those Parties to investigate and collect evidence in relation to offences committed prior to a person’s extradition and which are discovered after her/his surrender. This has created significant difficulties in some Parties or led to the rejection of evidence collected on such offences by courts.

The drafters of the Fourth Additional Protocol were of the view that such an interpretation did not reflect the intention of the drafters of the Convention, as the requesting Party should not be barred from doing whatever is necessary in order to organise the file for a request to be addressed to the Party which surrendered the person in accordance with paragraph 1, sub-paragraph a, seeking the consent of that Party to the extension of the extradition to offences not covered in the initial extradition request. Such a request for consent should notably be accompanied by the documents mentioned in Article 12, which implies that the requesting Party may initiate or continue proceedings up to the point where it obtains the necessary documents for requesting the other Party’s consent, such as a new warrant of arrest.

The new wording of paragraph 1, in combination with the new paragraph 2, subparagraph a, makes it clear that the rule of speciality does not bar the requesting Party from conducting pre-trial investigations and doing what is necessary in order to obtain the documents mentioned under paragraph 1, sub-paragraph a, while still ruling out the possibility for the requesting Party to bring the case to trial or restrict the personal freedom of the extradited person, solely based on these newly discovered offences. In this context, pre-trial investigations are to be understood to comprise intrusive measures such as wiretapping or house searches with regard to the extradited

person, as well as confrontation and interrogation of persons other than the extradited person in connection with these additional offences. The extradited person may be interrogated or confronted insofar as this investigative measure does not imply coercion, i.e. the restriction of the personal freedom of the extradited person. Article 14 of the Convention, as revised by this Fourth Additional Protocol, should also not prevent the requesting Party from summoning the extradited person for the purpose of gathering evidence in order to institute proceedings against other persons who are not covered by the rule of speciality.

The concept of "restriction of personal freedom" is to be interpreted so as to include not only deprivation of liberty in accordance with Article 5 of the European Convention of Human Rights, but also restrictions on "liberty of movement", in accordance with Article 2 of Protocol No. 4 thereto. Thus, a ban to leave the territory of the requesting Party would for example qualify as a restriction of personal freedom.

Paragraph 1, sub-paragraph a

As regards point 3, the PC-OC considered that the introduction of a time limit for the requested Party would be an added value in the context of the modernisation of the Convention. This is linked to the observation of the PC-OC that extension of extradition to new offences is sometimes characterised by co-operation which is less prompt compared to the initial request and can cause significant delays, which causes problems in the criminal procedures of requesting Parties and may also have negative consequences for the defendant. The PC-OC therefore agreed that the introduction of such a time limit would have a clear added value.

Even though some Parties to the Convention follow the same procedure for giving consent to the extension of the extradition decision as they do for the initial extradition request, the PC-OC observed that certain elements, such as the presence of the person already in the requesting Party or the technical nature of many extension requests, may allow for a speedy decision on extension. The drafters thus agreed that 90 days would be sufficient for the requested Party to take its decision on consenting to the extension of extradition.

However, in certain cases, it might not be possible for the requested Party to treat the request for consent within 90 days, in which case this period can be extended. This nonetheless constitutes progress vis-à-vis the mother Convention, as in such cases the requested Party would have an obligation to inform the requesting Party of the reasons for the delay and the time needed for reaching a decision. This would reduce uncertainty for the requesting Party and limit the disruption to its criminal procedure.

Paragraph 1, sub-paragraph b

The amendment to paragraph 1, sub-paragraph b concerns the delay following the final discharge of the extradited person after which the rule of speciality ceases to apply. The Convention provides that the rule of speciality shall not apply if the person has not left, having had the opportunity to do so, the territory of the requested Party within 45 days of the person's discharge or if the person has returned to that territory after leaving it. The drafters considered that the 45-day period had no objective justification 50 years after the adoption of the Convention, given that it has become much easier to travel and leave the territory of Parties. They therefore agreed to restrict this delay to 30 days.

This provision also contains two conditions which have to be fulfilled for the rule of speciality to cease to apply. The person must have been "finally discharged" and had the "opportunity to leave the territory".

The term finally discharged should be interpreted in line with the meaning attributed to that term under the Additional Protocol to the Convention on the Transfer of Sentenced Persons. Paragraph 32 of the explanatory report to that Protocol provides that:

> "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."

With regard to the words "opportunity to leave the territory", and as clarified in the explanatory report to Article 14 of the original Convention, the person must not only be free to leave the territory, but also not be hindered from doing so for other reasons (for example, for serious health reasons).

Paragraph 3

The rule of speciality prohibits any restriction of the personal freedom of the extradited person for offences committed prior to his or her extradition, other than those which furnished the grounds for this extradition. However, there might be rare cases where this principle could potentially create an impediment to the pursuit of the ends of justice, even where there is no oversight on the side of the requesting Party.

A typical example would be a situation where the requesting Party discovers new elements after the extradition implicating the extradited person in connection with an offence not included in the original extradition request, on the basis of new evidence or new links to existing evidence. Another example would be the situation where a third country submits a request for re-extradition after the surrender of a person. If the release of that person from custody for the initial offence is imminent, the requesting Party may have to release the person before it can obtain the consent from the requested Party to extend the extradition to the new offence.

Paragraph 3 contains an optional provision which will only apply between Parties to this Protocol having made a declaration to that effect. The provision introduces a special procedure within the rule of speciality for such exceptional cases, which allows the requesting Party to continue restricting the personal freedom of the extradited person until the requested Party takes its decision on consent pursuant to paragraph 1, sub-paragraph a.

According to this procedure, in order to restrict the personal freedom of the extradited person on the basis of new offences, the requesting Party must notify its intention to do so to the requested Party. This notification must take place either at the same time as the request for consent pursuant to paragraph 1, sub-paragraph a, or at a later stage. No restriction on the basis of new offences can take place outside the knowledge of the requested Party and before its acquiescence, which is tacitly given by the competent authority acknowledging the receipt of the notification of the requesting Party of its intention to proceed to such a restriction. The competent authority is the authority referred to in Article 12, paragraph 1 of the Convention as modified by Article 2, paragraph 1, of the present Protocol. Parties making a declaration in favour of this optional provision are encouraged to indicate, by the notification foreseen under Article 12, paragraph 1, of the Convention as modified, who will be the competent authority delivering the acknowledgment of receipt. In the absence of such notification, the competent authority will be the Ministry of Justice (reference is made to paragraphs 19 to 21 of this Explanatory Report). An automatically generated receipt of acknowledgment cannot be regarded as an explicit acknowledgment of the receipt by the competent authority.

This acquiescence allows the requesting Party to take measures on the basis of its warrant of arrest for new offences, according to its own law and subject to its procedural guarantees and to the control of its domestic courts. However, the requested Party may at any time express its opposition to such a restriction of personal freedom, either simultaneously with its acknowledgement of receipt or at a later stage. The requesting Party must comply with this opposition, in the former case by abstaining from taking the measure restricting the personal freedom of the extradited person, and in the latter case by putting an immediate end to the measure in question.

The drafters considered that the opposition of the requested Party pursuant to this paragraph may be only limited to certain types of restriction. For example, the requested Party could inform the

requesting Party that the latter may not detain the person in question, but use alternative measures restricting her or his personal freedom, such as a house arrest or a ban to leave the country.

The drafters of the Additional Protocol considered that the changes to the rule of speciality have no impact on surrender procedures between EU member states on the basis of the EU Framework Decision on the European Arrest Warrant.

Comments

Convention

1. The impact of the Third Optional Protocol

The **Third Optional Protocol to the European Convention on Extradition** (AP3), expressly providing for a simplified extradition procedure, has had a profound impact on the implementation of this rule. It establishes, inter alia, that each State Party may declare, at the time of signature or at any later moment, that the rules laid down in Article 14 of the Convention do not apply where the person to be extradited by this State ***consents*** to be subject to the ***simplified extradition procedure*** and expressly ***renounces*** his or her entitlement to the rule of speciality (Article 5 of **AP3**).

Such consent and renunciation shall be given before the competent judicial authority of the requested Party in accordance with its domestic law and must be ***recorded*** and expressed ***voluntarily*** and in full awareness of the ***legal consequences*** thereof. For this purpose, the person sought has the right to legal counsel and, if necessary, to the assistance of an interpreter. Consent to simplified extradition and renunciation to the rule of speciality may not be ***revoked***, except if the Contracting State makes expressly permitting them, under Article 5 (5). If this is the case, ***consent*** may be revoked until the requested Party takes its final decision on extradition under the simplified procedure; and ***renunciation to the rule of speciality*** until the surrender of the person concerned (**AP3**, Article 4).

No later than ten days after provisional arrest, the requested Party shall ***notify*** the requesting Party of whether os not the person sought has given consent to extradition under simplified procedure so that the latter may submit, if applicable, a request for extradition under Article 12 of the Convention. If consent is given after the expiry of such ten-day deadline, the simplified extradition procedure may still be applied provided that the requested Party has not yet received a request for extradition within the meaning of Article 12 of the Convention (**AP3**, Articles 6 and 10).

2. Meaning of "final discharge"

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 no longer risks 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 or her, the term "final discharge" applies. Many experts disagreed with this interpretation and stated that the term "final discharge" applies only to situations when the person is sure of his or her legal situation with respect to the proceedings on account of which extradition was carried out.[135]

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

[135] PC-OC, Report of the 28th meeting (2-4 February 1994), §§ 31-33.

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."

PC-OC considered the interpretation of Article 14 (1) (b) and recalled that the issue was dealt with within the elaboration of **AP4**, suggesting that the explanatory report of this instrument (see above) can be used as an additional source of inspiration for the interpretation of this paragraph, in particular as it regards the notions of "opportunity to leave" and "final discharge"[136].

3. Meaning of "be proceeded"

A question has also been raised as to the meaning of the expression "be proceeded" in Article 14 (1), above. The query is limited to offences that may have been committed before the surrender of the person, other than the offence or offences for which extradition has been sought. The wording of Article 14 (1) leads to believe that the obligation not to proceed includes the obligation not to institute proceedings. However, that obligation not to institute proceedings is not absolute, since – under Article 14 (2) – proceedings by default may be instituted.

It is questionable whether the obligation not to proceed also includes the obligation to discontinue proceedings already instituted. The requesting State should not be barred from doing whatever is necessary in order to organise the file for a request to be addressed, where appropriate, to the Party which surrendered the person, seeking (under Article 14 (1)) the consent of that Party for fresh proceedings. Such a request for consent should be 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". In other words, the requesting Party may initiate, or continue proceedings, up to the point where it obtains whatever is needed (for example, an arrest warrant) to request the other Party's consent.

Some thought that the scope of the obligation not to proceed must be defined in connection with the interests protected by the rule of speciality, in particular the interest of the requested State that the effects of extradition are limited to designated offences. The interests of the person concerned, including his or her fundamental rights and freedoms, are not legally protected by the rule of speciality. Such interests and rights are protected by the law of one and, separately, the law of the other State involved, as well as – again separately – by their respective international obligations under treaties other than the **ECE**, for example the ECHR.

The scope of the obligation not to proceed is clearly also limited in terms of time, namely the period that starts with surrender and runs up to such a point in time as described in Article 14 (1) (b). One can argue that where a State is barred from instituting proceedings within a given period of time, such State is also barred from taking steps the only purpose of which is to put itself in a position where proceedings may be instituted within that period of time. Some therefore think that the extradited person should not be summoned in case such procedure has no other purpose but to initiate proceedings against such person within that period of time. However, many cannot see any valid arguments according to which Article 14 should prevent the State from summoning the person in connection with the above-mentioned offences, where the purpose of the procedure for which the person is being summoned is not to institute proceedings against that person or is not to institute proceedings against that person within the protected period of time. In particular, Article 14 cannot prevent the State from summoning the extradited person in order to gather evidence enabling the initiation of proceedings against other, unprotected, persons.

The person may neither be indicted (formerly accused) nor deprived of his or her liberty while protected by the rule of speciality[137].

4. Meaning of "for any other reason"

[136] **PC-OC (2013) 14**, *List of decisions taken at the 65th meeting of the PC-OC*, Strasbourg, 28 November 2013, p. 3.
[137] **PC-OC (2000) 13**, *Summary report of the 40th meeting*, Strasbourg, 17 March 2000, §§ 82-94.

The prosecution authorities in A withdrew the indictment against an individual who had been extradited several years earlier from B. When this individual sought to depart A, however, he was unable to do so due to stop orders that had been issued against him in a civil bankruptcy matter. These civil actions related to the same transactions that had given rise to the indictment against him. At least one of the stop orders appears to have been issued prior to his extradition.

Article 14 expresses the rule of speciality as it must apply within the framework of the **ECE**. It restricts the powers of the receiving State when exercising jurisdiction over the extradited person. Although the extradited person moves to the territory of the receiving State, the latter may not fully exercise its jurisdiction over that person. Indeed, Article 14 recognises the immunity of an extradited person.

The effect of the immunity is that the person shall not:

> "a. 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;
>
> b. for any other reason be restricted in his or her personal freedom."

Clearly, immunity ceases to apply under the circumstances described in Article 14, paragraphs 1 (a) and 1 (b).

As far as it concerns offences, namely (a) above, immunity is clearly limited in time to those allegedly committed prior to the surrender of the person. Although such is not written down in Article 14, it is appropriate to extend that conclusion to the whole scope of the immunity. Indeed, within the context of Article 14, it appears to be indisputable that immunity applies only to facts that occurred prior to the surrender of the person.

Although immunity is therefore not absolute in terms of time, is it absolute in terms of substance? The words "for any other reason" indicate that immunity covers a very wide range of reasons. There appears to be no indication of any circumstances under which immunity would not apply, other than those described in Article 14, paragraphs 1 (a) and 1 (b).

Indeed, there are circumstances under which public interest may be seen to require that the person does not benefit from immunity (for example, where obligations under family law are not complied with). In such cases, the issue is not one of questioning the applicability of Article 14. The response may well be that it is up to the extraditing State, eventually at the request of the receiving State, to weigh in the different public interests at stake in any given circumstances and to decide whether or not to consent that immunity ceases to apply.

A stop order amounts to a "restriction to the personal freedom" of the person concerned and therefore, according to Article 14, cannot be imposed unless the provisions of paragraphs 1 (a) and 1 (b) apply, notably if the extraditing Party consents thereto.

See also under Article 12 (The request and supporting documents): 3. *Exposure of facts*.

Fourth Additional Protocol

At its 54th meeting, in April 2008, PC-OC considered the rule of speciality as a major priority, to be dealt with as quickly as possible. Examples have been presented of cases where difficulties related to the rule of speciality had been found, emphasizing the complexity of the issues involved, including the fact that extension of extradition to new offences is usually characterised by poorer co-operation compared to the initial request and can cause significant delays, which can also have negative consequences for the human rights of the defendant and/or lead to his or her release due to procedural concerns relating to such rule. PC-OC identified the following issues which should be addressed in a future binding instrument:

- Lack of time limits: many delegations considered that the absence of a time limit for the requested State to give its consent to the extension of extradition to new offences lead to long delays and created problems for criminal procedures in requesting States. The PC-

OC agreed that the introduction of such a time limit would be a clear added value in the context of the modernisation of the **ECE**;

- Consent of the person: the PC-OC agreed that, in light of modern trends in international cooperation, consideration should be given to the possibility of affirming the rule of speciality as the right of the person concerned rather than of the requested State. In this context, the importance of the consent of the person concerned to the extension of the extradition decision should be emphasised;
- Lack of legal basis for detention: in the interest of justice, it might be useful to foresee the possibility of detention of the extradited person, on the basis of new offences discovered after surrender, under strict conditions. One delegation proposed the introduction of an "emergency custody procedure" in such cases;
- Meaning of "having had the opportunity to leave the territory" (Article 14, paragraph 1 (b)): the meaning of this provision might need to be rethought in the modern context, for example given the absence of border controls within the Schengen area;
- Meaning of "final discharge" (Article 14, paragraph 1 (b)): the discussions of the PC-OC brought to light different interpretations of this concept in different legal systems;
- Questions relating to re-extradition[138].

A questionnaire[139] on the rule of speciality was prepared and sent to all States Parties to the **ECE**: replies thereto highlighted the difficulties and differences of interpretation between States Parties, as well as the evolution of criminality and means of co-operation since 1957, which would justify a reform of such rule. This idea enjoyed wide support, although some delegations urged caution, in particular as regards the proposal to introduce an "emergency custody procedure". In addition to replies to this questionnaire, PC-OC also based its discussions on this issue – which preceded the elaboration of a revised version by the Secretariat - on written contributions prepared by the delegates from Sweden, Italy and Slovakia. Furthermore, it took note of a pending case before the ECJ concerning the interpretation of the provisions on the rule of speciality of the EU Framework-Decision on the European Arrest Warrant[140]. For further information of this point, see chapter 2.6 ("The rule of speciality").

At its 56th plenary meeting, PC-OC considered the various amendments proposed to modernise Article 14. It notably agreed on the need to clarify the meaning of the words "proceeded against" in paragraph 1 of the original Article, and considered that a time limit should be introduced for the formerly requested State to take its decision on the extension of the extradition to new offences. As regards the introduction of a new "emergency custody procedure", a number of delegations expressed very strong reservations *vis-à-vis* this possibility, which they saw as an excessive limitation of the personal freedom of the person, without adequate safeguards. Many delegations also considered that, with the changes envisaged to Article 14, it could be superfluous to introduce such a procedure[141].

At the following meeting, agreement was reached on the following points: replacement of the words "proceeded against" in the first sentence of paragraph 1 with the words "arrested, prosecuted, tried" and the addition of an explicit reference to the possibility of carrying out pre-trial investigations under paragraph 2; introduction of a 90-day time limit for the (formerly) requested State to decide on a request to extend the scope of the initial extradition, with the possibility of extending this time limit (paragraph 1 a); and shortening of the 45-day limit foreseen in paragraph 1.b to 30 days. Strong divergences regarding the need and adequacy of a new "emergency custody procedure" persisted and work thereon continued throughout 2010, with two

[138] **PC-OC (2008) 16**: *Summary report of the 54th meeting of the PC-OC*, Strasbourg, 20 May 2008, §25.
[139] PC-OC (2008) 01.
[140] **PC-OC (2008) 29**, *Summary report of the 55th meeting of the PC-OC*, Strasbourg, 14 April 2009, §§9-11.
[141] **PC-OC (2009) 29**, *Summary Report of the 56th meeting of the PC-OC*, Strasbourg, 1 September 2009, §§10-12.

delegations requesting the addition of a provision giving States the ability to make a declaration excluding the use of such a measure.[142]

In its **Guidance on good practices regarding the post-surrender phase in extradition proceedings**, adopted in November 2023, the PC-OC considered, in relation to this Article, that: "In complicated cases, conducting legal proceedings following the surrender in a manner which takes into account and respects the rule of speciality (as defined by the Convention or by the 4th Additional Protocol), requires the requesting Party to fully understand the requested Party's decision and its grounds. This is crucial for the on-going cooperation between the two parties as well as a guarantee for the rights of the extradited person. Difficulties may occur in two aspects, alternatively or cumulatively:

> A. The "additional" offences attributed to the extradited person: attribution of facts and offences which did not serve as a basis for extradition vs. modification of facts and offences which might be covered by the extradition decision;
>
> B. The measures taken against the extradited person: measures which are considered to be "proceedings", "sentencing" or "detention" and therefore are not allowed in the context of additional offences vs. measures which are allowed, such as mere interrogation.

The decision whether to take a certain act *vis-à-vis* the risk of violation of the rule of speciality is in the hands of the requesting Party and its courts. Nevertheless, it is in the interest of the two parties to avoid an unintended breach of speciality and therefore it is most advisable that in complicated cases and when relevant, the requested Party's central authority would, at an informal level, contribute its insights, based on its national law. Such a cooperation is even more crucial when the extradited person argues that their rights (derived from the requested Party's rights in accordance with the rule of speciality) were breached. No affirmative conclusion regarding an alleged violation of the rule of speciality by the requesting Party can be reached, if the arguments were not communicated to the requesting Party's central authority for its attention[143].

Recommendations

- When it comes to questions regarding the application of the rule of speciality, direct communication between central authorities should be prioritised and occur at the earliest possible stage.
- The central authorities of the requested State should promptly respond to requests for clarification, including at an informal level to help the requesting State in interpreting the extradition decision in the light of the national law of the requested State.[144]

Article 15: Re-extradition to a third state

Convention

[1.] 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

[142] **PC-OC (2009) 21**, *Summary report of the 57th meeting of the PC-OC*, Strasbourg, 23 February 2010, §§5-10, **PC-OC (2010) 11**, *List of decisions taken at the 58th meeting of the PC-OC*, Strasbourg, 6 May 2010, pp. 1 and 4; **PC-OC (2010) 22**, *Summary report of the 59th meeting of the PC-OC*, Strasbourg, 31 January 2011, §5.
[143] **PC-OC(2023)11**, *Guidance on good practices regarding the post-surrender phase in extradition proceedings*, Strasbourg, 2 October 2023, p. 4.
[144] **PC-OC(2023)11**, *Ibid.*

committed before his surrender. The requested Party may request the production of the documents mentioned in Article 12, paragraph 2.

Article 4 of the Fourth Additional Protocol supplemented this Article by introducing a new paragraph 2 and numbering, as follows:

2. The requested Party shall take its decision on the consent referred to in paragraph 1 as soon as possible and no later than 90 days after receipt of the request for consent, and, where applicable, of the documents mentioned in Article 12, paragraph 2. Where it is not possible for the requested Party to comply with the period provided for in this paragraph, it shall inform the requesting Party, providing the reasons for the delay and the estimated time needed for the decision to be taken.

Explanatory reports

Convention

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.

Fourth Additional Protocol

The changes to Article 15 of the Convention are in line with the amendments to Article 14 of the Convention, and concern the introduction of a time limit not exceeding 90 days for the requested Party to decide whether or not it consents to a re-extradition of the person surrendered to another Party or to a third state.

Comments

1. Exception to the rule of speciality

Re-extradition should be seen as a possibility envisaged by the Convention by way of an exception to the rule of speciality and 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 without the person concerned having been given the opportunity to put forward his or her views, in particular regarding 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.[145]

2. Re-extradition – Procedure

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 request the consent of State X to place the concerned person in detention on remand for the purpose of extradition. Once this consent is obtained and the formal request for extradition 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 established 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 or her 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

[145] PC-OC, *report of the 25th meeting* (13-15 January 1993), §§ 17-22.

required prior to issuing an arrest warrant, but that warrant shall not be carried out without prior consent of State X.[146]

At its 57th meeting, the PC-OC decided to align the text of Article 15 with the newly revised text of Article 14 (1) (a) by introducing a 90-day time limit for the consent to re-extradition[147].

In its **Guidance on good practices regarding the post-surrender phase in extradition proceedings**, adopted in November 2023, the PC-OC stated that, despite the similarity between requests for exception and re-extradition, the scenario of the latter – as rare as it is – might become more complex as it involves three parties. When the requested Party (Party A), the requesting Party (Party B) and the third Party (Party C) are parties to a/the Treaty/Convention and all terms of extradition are met, the consideration of the re-extradition request should not pose significant difficulties. However, the request might become rather complicated, when a condition to extradition (such as dual criminality or lack of legal barrier such as prescription) is not fulfilled. While Party B is, and will remain, the requesting Party, direct communication between Party A and Party C becomes crucial for thorough consideration of the matter. Translation requirements also need to be taken into account in this context, as it could be onerous for Party B to ensure translation into the language of Party A of documentation it received in its own language.

The PC-OC considered that direct transmission of information and documents between Party A and Party C would be desirable in these cases, while the continuing involvement of Party B is also crucial.[148]

Recommendations

1. Consent and conditions to re-extradition

In **Recommendation No. R (96) 9 of the Committee of Ministers to Member States concerning the practical application of the ECE**, it has been recommended, in relation Articles 15 and 17 of the Convention, that:

> *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.*

2. Consultations

In its **Guidance on good practices regarding the post-surrender phase in extradition proceedings**, the PC-OC recommends the following in relation to Article 15:

> *Consultations between all three parties would be beneficial in cases involving re-extradition, including before submitting the request whenever possible. It is a good practice for Party B's request to be accompanied by information, such as a form or a checklist, drafted by Party C's authorities, detailing the relevant information in first-hand, and not by proxy.*

Article 16: Provisional arrest

Convention

[146] *Ibid*., §§ 15-16.
[147] **PC-OC (2009) 21**, *Summary report of the 57th meeting of the PC-OC*, Strasbourg, 23 February 2010, §6.
[148] **PC-OC(2023)11**, *Guidance on good practices regarding the post-surrender phase in extradition proceedings*, Strasbourg, 2 October 2023, pp. 4-5.

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.

Explanatory report

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.

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.

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.

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.

Comments

In accordance with Article 3 of **AP3**, States Parties to this Additional Protocol must inform any person arrested under Article 16 of the Convention, in accordance with its law and without undue delay, of the request relating to him or her and of the possibility of applying the ***simplified extradition procedure***. No later than ten days after provisional arrest, the requested Party shall

notify the requesting Party of whether or not the person sought has given his or her consent to extradition (**AP3**, Articles 3 and 6 (1)).

In case this consent is given, but the the requested Party decides not to apply the simplified procedure, the requesting Party shall be notified sufficiently in advance so as to be able to submit a request for extradition before the expiry of the period of forty days established under Article 16 of the Convention (**AP3**, Article 6 (2)).

Arrest and detention pending extradition have raised numerous questions and discussions among practitioners, notably relating to the respect of human rights and individual freedom. The PC-OC elaborated several documents addressing this matter, including:

- "Legal co-operation in criminal matters and the rights to defence – case law of the European Commission and the Court of Human Rights", February 1998[149];
- Arrest in the context of the European Convention on Extradition – Human rights and other requirements[150], March 2000;
- Provisional arrest: comments by INTERPOL[151], March 2000;
- Provisional arrest – reservations and declarations by member States[152], 14 April 2000;
- Provisional arrest and detention pending extradition – time limits applicable in each country[153], July 2012;
- Measures of restriction in extradition cases- Replies to question posed by Mr Vladimir ZIMIN[154] (Federation of Russia), February 2016;
- Discussion paper[155] prepared by Ms. Barbara Goeth-Flemmich (Austria) on questions related to the application and interpretation of Article 16 of the European Convention on Extradition, on the basis of which PC-OC members agreed that this article provides a legal basis for provisional arrest. In this discussion, the majority of delegations agreed that, when considering a specific case, the requested State should be able to find sufficient grounds to establish that the conduct of the person sought constitutes a criminal offence under its national law.[156]

In November 2018, at its 75th meeting, PC-OC finally discussed and adopted its ***Guidelines on the provision of information regarding the detention or other measures of restriction imposed in extradition proceedings***[157]. These Guidelines consider "detention" as holding a person in custody at any stage of the extradition proceedings until surrender, and apply equally to alternative measures of restriction during the same time-frame. They underline that detention or alternative means of restriction should be adequate and sufficient, but serve only to ensure the presence of the person sought during the extradition proceedings and to enable his or her surrender to the requesting Party, which should take place as soon as the final decision to extradite is taken. [158]

Alternative measures to detention pending extradition procedures had already been discussed by PC-OC in 2015.[159] The 2018 Guidelines underline that the use of such alternatives – eg. : bail,

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[149] Document PC-OC/INF 19.
[150] **Document PC-OC/INF 22,** available at the PC-OC website (Extradition – **Tools for Implementation**).
[151] **Document PC-OC (2000)11**, available at the PC-OC website (**Extradition – Tools for Implementation**).
[152] **Document PC-OC(2000) 16**, available at the PC-OC website (**Extradition** – **Archives**).
[153] **Document PC-OC / INF 71**, available at the PC-OC website (**Extradition** – **Archives**).
[154] Document **PC-OC(2015)15rev.BIL**., available at PC-OC website (**Extradition** – **Tools for Implementation**).
[155] Document PC-OC (2011) 26.
[156] **PC-OC (2011) 27**, *List of decisions taken at the 61st meeting of the PC-OC*, Strasbourg, 24 November 2011, §6 h).
[157] **PC-OC(2018)02rev3**, *PC-OC Guidelines on the provision of information regarding the detention or other measures of restriction imposed in extradition proceedings*, adopted by the PC-OC at its 75th Meeting, Strasbourg, 15 November 2018 [hereinafter, "**PC-OC (2018)02rev3**"],
[158] **PC-OC (2018)02rev3**, p. 2.
[159] **PC-OC (2015) 19**, *List of decisions taken at the 69th meeting of the PC-OC*, Strasbourg, 5 November 2015, p. p. 4.

house arrest, electronic monitoring, travel ban, handing over of the passport and the obligation to report regularly to law enforcement authorities – is becoming increasingly important, given the multiple factors that may interfere in extradition proceedings and extend their duration (such as appeals, potential parallel domestic prosecution(s), parallel requests, parallel asylum proceeding and the application of the **Petruhhin** mechanism) with the consequent risk of exceeding the maximum duration of detention admitted by the law of the requested State[160].

1. Time limits

In discussions concerning the modernisation of CoE Conventions in the criminal field held in 2006, PC-OC experts observed that legislation and practice varied widely among States on the minimum and maximum time for provisional arrest pending extradition (between 18 and 40 days) and that, in certain circumstances, it would be difficult to respect shorter time limits, notably for reasons of translating documents and obtaining *prima faciae* evidence. They also stated that it would be difficult to envisage a shorter time limit for a decision on a person's surrender and that, since many elements intervene in the national procedures, it might not be the in the interest of the person subject to an extradition procedure, nor in the interest of justice, to have too strict time limits on the decision on surrender. On the other hand, the fact that the person consents to his or her extradition ("simplified extradition") could be an element to be considered when defining shorter time limits[161].

In relation to this, PC-OC then suggested that the following issues be discussed: whenever a State has good reasons to ask for a speedy treatment of an extradition request, it should explicitly ask for a quick reaction and States should, to the extent possible, deal with such request with celerity; the question of languages and translations of documents (in application of Article 23 of the Convention) and the possibility to translate only relevant extracts of documents; the means of communication, including electronic media; channels of communication for formal requests (as well as for complementary information needed by a Court and the possibility to directly address such request to a competent judicial authority); facilitation of co-operation in extradition matters if legal practitioners had a clearer view on the other States' legislation and practice.

In recognition of the difficulty of inserting strict time limits in a binding instrument, PC-OC requested its limited Group of experts to identify possible measures to include them in a non-binding instrument so as to reduce time limits and avoid long extradition procedures[162].

In 2015, this issue was again discussed by PC-OC, in the context of a question posed by the representative of Portugal, who inquired, in particular, on the time-limits imposed when the requested State chooses to retain the person sought by a restrictive measure other than detention. The PC-OC noted that while in some States alternatives to provisional arrest are never applied, in many others such alternatives are in fact used (such as conditional release on bail, house arrest or confiscation of passport). Among the States applying alternatives to detention, some applied Article 16 under the same conditions and time-limits as detention. Others were of the opinion that the time-limits of Article 16 only applied to provisional arrest in detention.[163]

Noting the divergence in application of Article 16 in this regard, PC-OC decided to ask its Working Group to further consider this issue, to make proposals for follow-up and to report back to the plenary. Discussions within Mod confirmed the lack of consensus on the matter and, "in order to avoid unnecessary obstacles to extradition procedures due to this divergence of interpretation", PC-OC decided to invite all experts from Parties to the **ECE** to complete the country information available on its website with an indication of whether the time-limits established in Article 16 (4) were applicable to alternative measures to provisional arrest; and to invite those who had not already done so to reply to a questionnaire presented by the expert from the Russian Federation

[160] **PC-OC (2018)02rev3**, p. 2.
[161] **PC-OC (2006) 12**, *Summary report of the 51st meeting of the PC-OC*, Strasbourg, 6 October 2006, §§27-30.
[162] **PC-OC (2006) 15**, *List of adopted decisions*, Strasbourg, 20 October 2006, pp. 3-4.
[163] **PC-OC (2015) 14**, *List of decisions taken at the 68th meeting of the PC-OC*, Strasbourg, 29 May 2015, p. 4.

on the use of measures of restriction in extradition cases. An intervention has also been heard about concerns relating to cases where persons had flee pending extradition procedures further to a decision by the requested State to grant them conditional release. This was followed by an exchange of views about criteria used to impose alternative measures to detention pending extradition procedures.[164]

Within discussions held in November 2017 on the basis of the 26 replies received until then to such questionnaire, PC-OC agreed with the findings of its Mod that detention for the purpose of extradition is the principle, but stressed that, "given the increasing length of extradition proceedings, the use of alternatives to detention is becoming more important and that a combination of measures of restriction is probably the most efficient way to avoid escape." Experts also agreed that, pending the decision on extradition but also once the decision to extradite has been taken, national legislation should allow for the application of adequate measures to avoid that the person sought escapes and to ensure his or her surrender. Furthermore, it was agreed that, at any stage of the extradition proceedings until surrender, the requested Party should promptly inform the requesting Party about any change in the situation of the requested person, from detention to other restrictive measure(s). It was at this time that the PC-OC decided, inter alia, to ask its Mod to discuss the possibility of developing guidelines on the provision of timely information to the Parties requesting extradition on the detention or measures of restriction imposed on the person sought; and to address this issue again should the drafting of a fifth additional protocol to the Convention be discussed[165]. A draft proposal of guidelines on this matter, elaborated by Mr. Erik Verbert (Belgium), has been presented in June 2018, at the 74th meeting of PC-OC. Discussions built on previous exchanges on the same topic and stressed, inter alia, that an efficient application of the **ECE** requires requested Parties to surrender the person sought as soon as the decision to extradite is taken, the importance of keeping the requesting Party informed of the person's concrete situation and any final decision with an impact thereon (rather than each and every request or motion filed) and applicable legislation, including maximum duration of detention and alternative restrictive measures applicable[166]. As stated before, these Guidelines have been adopted by PC-OC in November 2018.

In 2020, the PC-OC discussed the impact of the COVID-19 pandemic on extradition proceedings and the length of procedures, with many experts acknowledging that, while national lockdowns and travel restrictions often complicated procedures, cooperation was very fruitful during this exceptional time. The EJN and AIAMP also prepared documents in this regard[167].

2. Consideration by the requesting State of time spent in custody

The time spent in detention by an individual solely for the purpose of extradition in the territory of the requested State or of a State of transit shall be taken into consideration when deciding the penalty involving deprivation of liberty or detention that is to be served for the offence giving rise to extradition. If new proceedings are instituted by the requesting State against the individual in respect of whom the requested State has terminated proceedings for the extradited offence, any period spent on remand or in custody in the requested State shall be taken into consideration when deciding the penalty involving deprivation of liberty or detention that is to be served in the requesting State (see Resolution (75) 12 of the Committee of Ministers to Member States on the practical application of the European Convention on Extradition, recommendation in relation to Article 9). The requested Party must therefore provide information on the length of time that the

[164] **PC-OC (2015) 19**, *List of decisions taken at the 69th meeting of the PC-OC*, Strasbourg, 5 November 2015, p. 4.
[165] **PC-OC (2017) 10**, *List of decisions taken at the 73rd meeting of the PC-OC*, Strasbourg, 22 November 2017, p. 6.
[166] **PC-OC (2018) 02**, *Draft guidelines on the provision of timely information to the Parties requesting extradition on the detention or measures of restriction imposed on the person sought, proposed by Mr. Erik Verbert* (Belgium, Strasbourg, 5 June 2018.
[167] **PC-OC (2020) 12**, *List of decisions taken at the 78th meeting of the PC-OC*, Strasbourg, 9 October 2020, pp. 5-6.

person spent detained with the view to surrender once such person is surrendered[168] and when an application for compensation for unjustified detention is submitted.

3. Use of Interpol "red notices"

The PC-OC discussed the legal basis for the use of Interpol "red notices" 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. Human rights issues have been raised in connection to the use of red notices where there is an insufficient flow of information between the concerned Member States concerned and Interpol.[169]

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.[170]

Concerning the introduction of safeguards in the INTERPOL system to protect individuals against requests for red notices or diffusions introduced for political reasons, see Article 6 of **AP4**.

4. Time limits for translation

The PC-OC made reference to the difficulties in complying with these time limits when documents needed to be translated, and the detainee's individual rights respected.[171]

5. Provisional release

An issue was raised as to the consequences of a case in which extradition was granted, but surrender was subsequently blocked by the requested State; the person sought was not in custody and was subject to an expulsion order.

In principle, once a request for extradition is granted, a transfer must take place. Nevertheless, domestic legislation might complicate compliance with this obligation. For example, during provisional arrest or during custody pending extradition, some countries may provide for release from custody for certain reasons. Problems might also arise in the application of Article 19 (postponed or conditional surrender).

The possibility of suspending custody for the purpose of extradition is a useful option. Once the court finds the person extraditable, if the same person is already in custody, then the detention for the purpose of extradition may be suspended. This decision is communicated to the penitentiary department, so that as soon as any domestic decision or trial is over, custody is converted into custody for the purpose of extradition. The danger posed by this solution is that custody for the purpose of extradition (which is not limited in time) may be exploited for the purposes of domestic proceedings.

Another option would be to include in the person's file a reference to a pending extradition.

As for the issue of the concurrence of an expulsion order and an extradition request, see Chapter 4.3: "Disguised extradition and its connection with deportation or expulsion procedures".

6. "Urgent" action versus "immediate" action

The PC-OC discussed the problems arising from the fact that Article 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 the transmission of an immediate informal request for "provisional arrest" pending a request under Article 16 could be envisaged.

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[168] PC-OC, *report of the 25th meeting* (13-15 January 1993), §33.
[169] PC-OC, *report of the 35th meeting* (22-24 September 1997), §§67-76; PC-OC, report of the 36th meeting (9-11 February 1998), §§ 78-79.
[170] PC-OC, *report of the 34th meeting* (3-5 February 1997), §§ 45-48.
[171] PC-OC, *report of the 35th meeting* (22-24 September 1997), §§ 60-66; and PC-OC, *report of the 36th meeting* (9-11 February 1998), §§ 58-59.

Some experts felt that the police, rather than legal co-operation, can be of great assistance in such cases and the provision for hot pursuit contained in Article 41 of the 1990 Schengen Agreement 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 before receiving the request for provisional arrest.[172]

7. Causes for the refusal of extradition

In at least one country, custody pending trial of certain categories of persons (for example, 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 to provisionally arrest the sought person may be questioned in case it actually frustrates either the extradition of such person, or the purpose for which extradition is sought.[173]

8. Provisional arrest and arrest pending extradition – the obligations of Parties

The usual method of starting an extradition procedure consists in the requesting State asking for the provisional arrest of the wanted person, and in the requested State undertaking this provisional arrest. The practice of provisional arrest is widespread, as is the use of Interpol red notices and Schengen "signalisation".

It is, however, possible to request the extradition of a person without asking for his or her provisional arrest – indeed without asking for that person's arrest altogether. That would be the case, for example,

a. where simplified extradition was envisaged; and

b. where the request for extradition was supported by an "order of arrest" amounting to an order to restrict the liberty of the person by means other than imprisonment.

It is underlined that provisional arrest is only possible in cases of urgency. In other cases, arrest pending extradition would be preceded– where appropriate – by a formal request for extradition.

It has been said that the Convention does not literally include an obligation to arrest. However, some experts thought that the conventional obligation to extradite carried as an implicit consequence the obligation for the State to put itself in the situation of being able to fulfil such obligation, i. e., to surrender the person. To the extent that persons not kept in custody cannot be surrendered, it can be said that the obligation to extradite carries with it the obligation to arrest, and keep under arrest for a certain period of time, the person claimed.

Some experts have observed that where the person claimed does not object to his or her extradition, coercion – thus arrest – is not necessary. Other said that, although there were exceptions, the normal way to proceed would be to have the person claimed under arrest for the duration of the extradition procedure. Alternatives such as bail applied only in a limited number of cases.[174]

Although it is in principle the requesting Party's responsibility to follow the progress of its own extradition request, the requested State should immediately communicate to the former any situation of absconding or the outcome of final decisions that have an impact on the situation of the person sought. In case national legislation limits the duration of detention for extradition purposes, the mandatory date of release should also be communicated well in advance. There is no practical need to inform the requesting Party of every application the person submits for provisional or conditional release, when such an application is from the onset deemed meritless,

[172] PC-OC, *report of the 30th meeting* (1-3 February 1995), §§ 52-58.
[173] PC-OC, *report of the 30th meeting* (1-3 February 1995), §§ 59-60.
[174] PC-OC, *report of the 39th meeting*, (27-29 September 1999), §§35-43.

or when the outcome of such an application is negative in the first place. Also, there is no use in informing the requesting Party about the outcome of such an application when an appeal is lodged.[175].

Please, see chapter 2.2, in Part II (The lawfulness of arrest and detention), for further details. See also under: Article 12 (requests and documents): 2. Translation of documents; Article 15 (re-extradition): comments 2 and 3; and Article 25 (security measures): 1. Early release: assessment of the person's behaviour in prison for extradition purposes.

8. Reservations and declarations

For reservations and declarations concerning Article 16 (2), see Comments to Article 26.

Recommendations

1. Grounds for provisional arrest and maximum length

a. *The requesting authority should ask for the provisional arrest of the person sought only if there are strong reasons to suggest that otherwise the extradition could not be effected*.

b. *The period of provisional arrest should be kept as short as possible. It should exceed the period of eighteen days only in cases of necessity, particularly where the requesting authority indicates difficulties in submitting the documents within that period*. (**Recommendation No. R (80) 7 concerning the practical application of the European Convention on Extradition**).

2. Consideration of time spent in custody

In relation to this Article and Article 18 (jointly), the Committee of Ministers of the CoE, in its **resolution 75 (12), on the practical application of the European Convention on Extradition**, recommended:

> *That the time spent in detention by an individual solely for the purpose of extradition in the territory of the requested state or of a state of transit shall be taken into consideration when deciding the penalty involving deprivation of liberty or detention which he has to serve for the offence for which he was extradited;*

Furthermore, in its **Recommendation No. R (86) 13 concerning the practical application of the European Convention on Extradition in respect of detention pending extradition**, the Committee of Ministers further recommended that:

- *time spent in custody pending extradition should be deducted from the sentence in the same manner as time spent in custody pending trial;*

3. Proportionality

In the same **Recommendation No. R (86) 13,** the Committee of Ministers adds that:

- *where the requested party considers that the duration of detention pending extradition is disproportionate to the sentence to be enforced or the penalty likely to be incurred upon conviction, it should consult the requesting party with a view to ascertaining whether the request for extradition is maintained. The requesting party should inform the requested party without delay*;

4. Compensation

Still in **Recommendation No. R (86) 13,** the same body recommends States Parties to the Convention:

[175] **PC-OC (2018)02rev3**, pp. 2-3.

- *to examine their legislation with a view to enabling persons who have suffered unjustified detention pending their extradition to claim compensation under the same conditions as those governing compensation for unjustified pre-trial detention*;

5. Information

- *Complete and update the **country information** on extradition published on the website of the PC-OC, including on what concerns information on their national legislation and practice as regards detention and other measures of restriction*[176].
- ***Requesting Parties***[177]:
  - *provide the requested Party with all relevant information on the person sought at the earliest stage possible, in particular factors increasing the risk of escape (such as earlier occasions where the person sought has absconded, precedents of abuse of provisional release and / or bail) so as to enable the competent authorities of the requested Party to take these into account when considering possible measures of restriction to be taken;*
  - *inform the requested Party as soon as possible on any legal or practical time limits concerning the validity of arrest warrants or convictions, that are at the basis of the extradition request and, accordingly, of the withdrawal of (the) extradition request(s)*.
- ***Requested Parties***[178]:
  - *inform the requesting Party as soon as possible, throughout the extradition proceedings, of any relevant change of the detention situation of the person sought. This applies in particular when the person sought is released (under certain conditions and /or on bail), has absconded after his / her release (despite conditions and / or bail) during the extradition process. Informing the requesting Party is also recommended in case of the re-arrest of the person sought;*
  - *provide the requesting Party with information about a change of the legal basis for the detention. This is relevant, for example, when the person sought is already in detention for domestic purposes or, conversely, when the person sought is detained for the purpose of extradition and is subsequently in detention for domestic purposes. This information allows the requesting Party to consider the application of Article 19 of the ECE. In addition, this information will affect the calculation of the duration of the detention for the purpose of extradition*.

Article 17: Conflicting requests

Convention

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.

Explanatory report

[176] Guideline 1 of the PC-OC Guidelines on the provision of information regarding the detention or other measures of restriction imposed in extradition proceedings.
[177] Guideline 2 of the PC-OC Guidelines on the provision of information regarding the detention or other measures of restriction imposed in extradition proceedings.
[178] Guideline 3 of the PC-OC Guidelines on the provision of information regarding the detention or other measures of restriction imposed in extradition proceedings.

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.

Recommendations

In its **Recommendation No. R (96) 9 to member states concerning the practical application of the European Convention on Extradition**, the Committee of Ministers of the CoE recommended, in relation to Convention articles 15 and 17, the following:

> *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.*
>
> *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 proceedings being brought against that person for offences in respect of which one or more of the concurrent extradition requests were made.*

Article 18: Surrender of the person to be extradited

Convention

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.

Explanatory report

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.

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.

Comments

Interpol – Transmission of information

Paragraph 3 has been mentioned as a provision in respect of which States often use Interpol as an intermediary to pass on information concerning the surrender.[179]

In 2011, PC-OC considered the question whether a decision to extradite remains valid when the person concerned absconds before surrender. This seemed to be the case in a majority of member States[180].

The post-surrender phase

The **ECE** has a clear focus on the pre-surrender stage of extradition, but a discussion on the post-surrender phase was held by PC-OC in May 2022, on the basis of a **discussion paper** prepared by Ms. Yael Bitton and Mr. Aviad Eliya (Israel)[181]. Considering that this phase "formally commences at the moment in which the requesting party accepts responsibility for the rights and welfare of the newly extradited person, but in fact develops earlier", the authors argue that the role of central authorities in the framework of **ECE** is also essential upon surrender. And, while "[t]he role of the ***central authority of the requesting party***, which has to clearly communicate to its domestic law enforcement agencies the terms of the extradition set by the requested party, is well-established, in practice […], it seems that the role of the ***central authority of the requested party*** receives much less attention, and possibly requires a consideration, if not an actual formation of guidelines". They consider that the role of the requested central authority is composed of three elements:

> **1. An obligation to clearly communicate the terms of the extradition**
>
> While some decisions allowing extradition are clear-cut, others are more complex and set conditions restricting prosecution on the requesting State. A brief message on behalf of the requested central authority does not always provide sufficient clarity and legal certainty.
>
> Obviously, the requested Party's central authority cannot be the interpreter of the court's extradition decision. This is certainly the role of the competent authority of the requesting Party, which has to interpret the foreign decision, according to its own legal procedures, to the best of its understanding.
>
> However, on a systematic level, in cases of conditional or partial extradition, the requested central authority should take the necessary measures to ensure that at least the operational parts of such decisions, as well as the ensuing administrative decisions to partially grant the extradition, do not leave the requesting Party's prosecution with doubts, or worse, with issues that must be litigated, in an attempt to avoid any breach of the rule of specialty. It is important to bear in mind that, frequently, proceedings in the requesting Party are conducted while the extradited person is in custody, and any delay may potentially infringe on his or her rights, or disrupt the legal proceedings.
>
> **2. Requesting Party's inquiries**
>
> Stating that "[u]nfortunately, ambiguities – real or supposed – do sometimes arise", and that the "central authority does not cease to function as such at the post-surrender phase", the authors stress that "both central authorities are expected to maintain the spirit of cooperation. As said above, even if requested to do so by its counterpart, the requested central authority cannot interpret the relevant decision. It can, however, assist in deciphering the context and subtext of its own legal system's writing or by presenting the rules of the system which go beyond the scope of the decision in question. In our view,

[179] PC-OC, *report of the 35th meeting*, (22-24 September 1997), § 67.
[180] **PC-OC (2011) 27**, *List of decisions taken at the 61st meeting of the PC-OC*, Strasbourg, 24 November 2011, p. 4.
[181] **PC-OC (2022) 02**, *Discussion paper- Extradition: the post-surrender phase*, Strasbourg, 29 April 2022 [hereinafter, **PC-OC (2022) 02**].

maintaining an active dialogue with the requesting Party to ensure a successful post-surrender inquiry is part and parcel of the requested Party's obligations pursuant the" **ECE**.

3. Inquiries in the requested State

"This centres on the proper way to discuss disputes. Fundamental principles of international cooperation, based upon formal obligations as well as trust, remain relevant during the post-surrender phase". In the authors' view, "any inquiry that takes place in the requested state, initiated by the extradited person for an alleged breach of specialty, should lead to a dialogue between the two central authorities; bearing in mind the presumption of regularity. This is particularly relevant in cases where arguments are raised before an official government body, which is not the requested state's central authority for matters of extradition. In such cases, it should be clear that there should be mechanisms in place to initiate a dialogue with the authorities of the requesting state, even if said government body is not a usual counterpart. Such a dialogue will hopefully serve to prevent any disputes from arising between the parties. "[182]

The 2022 discussions within PC-OC showed a variety of approaches by member States, for example when it comes to the communication of the extradition decision to the requesting State, or to the provision of information regarding time already served by the surrendered person. The Committee considered that these issues would merit further consideration in view of developing some guidance on good practices, and instructed the PC-OC Mod to co-ordinate this work[183]. At its next meetings, it further decided that such guidance should also include issues such as the rule of speciality, re-extradition, communication regarding the length of time already served within its scope, and temporary surrender.[184] The **Guidance on good practices regarding the post-surrender phase in extradition proceedings**[185] was adopted at the 84th meeting of the PC-OC, in November 2023[186], and includes an appendix with a template for an agreement on temporary surrender.

In it, the post-surrender phase has been identified as a lengthy and sometimes troublesome stage in extradition proceedings and the PC-OC considered that such guidance should comprise all aspects of potential relevance thereto. The paper consists, lengthwise and crosswise, of two layers: the first listing legal occurrences and needs which take place during the post-surrender phase and require the PC-OC's further attention (having been identified occurrences in connection with **ECE** articles 14, 15, 18 and 19.2, as well as in practices which were developed during the years, which are not explicitly covered in the Convention); and the second containing recommendations on non-binding and sometimes informal courses and methods of action, which would be considered as "good practice", *vis-a-vis* various legal situations. At the same time, the PC-OC calls on the parties to make sure that their central authorities fulfil the obligations stemming from the Convention also during this segment of the post-surrender phase.

The PC-OC underlines that, for the purposes of this guidance, ***informal communications*** should be considered as ***confidential***, in principle.

Particularly in relation to Article 18, the PC-OC stated that it requires transmission of information from the requested State to the requesting State, of its decision with regard to the extradition, as well as introduction of the reasons for any complete or partial rejection (subsections 1 and 2).

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[182] **PC-OC (2022) 02,** pp. 2-3.
[183] **PC-OC (2022)04**, *List of decisions taken at the 81st meeting of the PC-OC*, Strasbourg, 20 May 2022, p. 4.
[184] **PC-OC (2022) 05**, *List of decisions taken at the 82nd meeting*, Strasbourg, 17 November 2022, p. 4, and **PC-OC (2023)05**, *List of decisions taken at the 83rd meeting of the PC-PC-OC*, Strasbourg, 4 May 2023, p. 4.
[185] **PC-OC(2023)11**, *Guidance on good practices regarding the post-surrender phase in extradition proceedings*, Strasbourg, 2 October 2023.
[186] **PC-OC (2023)14**, *List of decisions taken at the 84th meeting of the PC-OC*, Strasbourg, 16 November 2023, p. 3.

This article deals with a matter which has a great significance to the post-surrender phase, in particular when extradition of the requested person is sought for prosecution. Clearly, the article regulates the formal obligation to transmit the most relevant information, such as the final decision on extradition (or, by analogy, the requested person's renunciation of entitlement to the rule of speciality – see article 4 of the **AP3**). However, on the informal level, a requested central authority should be open to the idea of transmitting the information as soon as possible after the decision(s) are taken, well-before surrender. In this regard, there was agreement in the PC-OC that the requested central authority should inform the requesting Party of the main decisions taken regarding its request for extradition, even before the decisions become final, for two main reasons:

a. Early notice allows the authorities of the requesting State to analyse the legal significance of the decision and to make the necessary adjustments to their proceedings. Such information might be highly significant in cases where proceedings against co-perpetrators or seizure proceedings are already conducted at the requesting Party's courts.

b. When the denial of extradition is based upon reasons stemming from the proceedings in the requesting State, its law or the conditions in it, information provided by its authorities might serve as a basis for the consideration of the authorities of the requested State whether to file an appeal or not against the denial before their courts, when such a possibility exists.

The PC-OC further considered that a flexible interpretation of the term "reasons" in Article 18 is desirable. While a clear although partial decision should not require elaboration, a complicated one could affect the extent to which the requesting Party would be able to conduct the proceedings, within the new prosecutorial frame drawn and dictated by the decision of the requested Party.

In addition, it should be reminded tha,t usually, the decision on extradition does not provide the overall information regarding the period and the forms of custody and restrictive measures taken against the requested person in the requested Party, or medical and social information; all of which might be significant factors in the scope of the legal proceedings against, and deprivation of liberty of, the extradited person following the surrender (frequently in their favour). This information could include, for example:

- addictions and rehabilitation;

- vulnerabilities which might put at risk their rehabilitation efforts or prevention of deterioration;

- sources of moral support;

- any other information which might contribute to the continuity of the treatment, if given, and the welfare of the extradited person, in particular if expected to be held in custody after surrender.

The PC-OC encourages the transmission of a wide range of such information, when available, provided that specific legal constraints, such as the applicable data protection framework, do not prevent it.

As for the timetable for the transmission of the information, information regarding the length of deprivation of liberty should be transmitted, according to Article 18, paragraph 3 of the Convention, with the surrender, and the right occasion to do so seems to be at the time of surrender. Obtaining the information regarding medical and social conditions of the extradited person from other agencies (eg. prison services) should not delay the surrender and may be transmitted afterwards. The PC-OC considered that while this information is typically not transmitted except in specific situations (for example, in the case of dangerous persons, or where medical attention is required during transport), it would be useful for the authorities of the requesting State to receive it on a more regular basis. The PC-OC noted that the authority which can obtain and transmit such information might not always be the central authority.

Another type of additional information that States considered useful in this context concerned the behaviour of the person while in prison in the requested State, which can have an impact for sentencing in the requesting State.

Post-surrender monitoring

One of the legal consequences of extradition could be a post-extradition monitoring procedure carried out in light of previously provided guarantees. In that case, depending on the essence of those guarantees, which could vary based, for instance, on the circumstances of the case, the status of the sought person and the overall human rights situation in the requesting Party, representatives of the requested State, including diplomats or consulate officers, may visit an extradited person and carry out private meetings with such person. Moreover, depending on the guarantees provided, they can also be allowed to monitor the trial of such person. Requesting those guarantees should be considered a form of cooperation, since without them extradition would not be possible.

Due diligence while enforcing these guarantees is essential for further cooperation in extradition matters, since once the promises fail to be implemented, this can result in losing trust in the provided guarantees, thereby endangering positive decisions on future extradition cases.

In many cases, conditions are set directly by the courts of the requested State, while monitoring is performed and coordinated mainly by other State agencies, such as consular staff dependent from the Ministries of Foreign Affairs, and prison authorities. Direct communication between such agencies is inevitable. Nevertheless, the PC-OC considered that the central authorities of both parties should stay closely involved in this sensitive and sometimes lengthy process and co-ordinate it, since it is a part of the extradition process and due to its possible implications for cooperation in the future[187].

Conclusion of criminal proceedings in the requesting Party

The working group saw some benefits in the transmission of the outcome of the proceedings against the extradited person in the requesting Party to the central authority of the requested Party, at least in some cases. While some States provide this information regularly and as a matter of course, many States do not.

The discussion within the PC-OC revealed that many States considered that this would be very useful information, for example from a public safety and security point of view, when the requested State should be aware that the person may try to re-enter its territory. This information was considered particularly relevant by States whose the central authorities act as the litigating body following requests for extradition submitted by requesting States before national courts.[188]

See also under Article 16: 2. Consideration by the requesting State of time spent in custody.

Recommendations

In relation to this Article and Article 16 (jointly), the Committee of Ministers of the CoE, in its **resolution 75 (12), on the practical application of the European Convention on Extradition**, recommended:

> *That the time spent in detention by an individual solely for the purpose of extradition in the territory of the requested state or of a state of transit shall be taken into consideration when deciding the penalty involving deprivation of liberty or detention which he has to serve for the offence for which he was extradited;*

[187] **PC-OC(2023)11**, *Guidance on good practices regarding the post-surrender phase in extradition proceedings*, Strasbourg, 2 October 2023, p. 6.
[188] **PC-OC(2023)11**, *Guidance on good practices regarding the post-surrender phase in extradition proceedings*, Strasbourg, 2 October 2023, p. 6.

The **Guidelines to the model request on extradition** provide as follows:

> *Organising the surrender usually takes several weeks, if not longer. Moreover, external factors, such as a pandemic, may have a significant impact on the practical aspects of the surrender. Even if such circumstances qualify under the force majeure clause of article 18 paragraph 5, the prolonged detention of the person sought may come to end due to legal limitations of the duration of the detention for the purpose of extradition / surrender that apply in the requested State. The requested Party should communicate applicable limitations to the duration of the detention well in advance to the requesting Party in order to avoid the release of the person sought before the surrender can take place*.[189]

The **Guidance on good practices regarding the post-surrender phase in extradition proceedings** provide as follows:

- Whenever possible, the requested State should communicate, at an informal level, information concerning the content and terms of extradition decisions even before they become final.
- The central authority(ies) of the requested State should remain available to respond to inquiries from the requesting State to clarify terms of the extradition decision following surrender, when they are in a position to do so.
- The requested State should endeavour to communicate medical and social information regarding the extradited person, as well as information on their behaviour in prison, where this information would be relevant for the authorities of the requesting State. The requesting State should communicate particular needs in this regard as early as possible.
- When they are needed, guarantees should be provided by the central authorities of the requesting State. The central authorities of the requested State should always co-ordinate the provision of these guarantees (by indicating precisely how they should be worded) and their monitoring.
- The central authorities of the two parties should be defined as the relevant interlocutors for any monitoring activity or its effects and results.
- In cases where the requested Party indicates its need to have information about the outcome of the proceedings following extradition, the authorities of the requesting Party should endeavour to provide that information.

Article 19: Postponed or conditional surrender

Convention

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.

Explanatory report

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.

[189] **PC-OC (2021)04rev,**, §14.

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.

Comments

1. Extradition of nationals: provisional surrender and sentencing in the requested state

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 them 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.[190]

2. Is a new request necessary after temporary surrender and sentencing?

A person, X, is serving a sentence in state B. State A requests extradition for the purposes of prosecution. Extradition is granted, but temporary surrender under Article 19, paragraph 2, of the convention is arranged. After the surrender of the person, the courts of state A complete the proceedings and render a judgment sentencing the person to a term of imprisonment. As a consequence, state B requests that state A send a new request for extradition, this time for the purpose of serving the imposed sentence.

State A replies that under its legal framework such a new request is not necessary once extradition is granted. Many experts supported this view. Once extradition is granted and unless it is granted under a specific provision, the assumption is that it is valid for both the purpose of prosecution and the purpose of serving the sentence that the prosecution eventually leads to.[191]

3. Requirements

In its **Guidance on good practices regarding the post-surrender phase in extradition proceedings**, the PC-OC made the following considerations in relation to Article 19 (2):

Theoretically, “temporary surrender” – which is contained under Article 19 “Postponed or conditional surrender” – is a sophisticated mechanism which should assist delaying the completion of the extradition, or, instead, completing it under the condition to send the extradited person back to requested Party, thus avoiding conflicts of enforcement interest between parties. Functioning mechanisms of scheduling and prioritizing the conduction of parallel proceedings in two countries should minimize immunity and maximize enforcement. However, the extent of uncertainty regarding future events was always large, and apparently led the drafters of the Convention to assign the determination of the terms of the temporary surrender to the parties involved in such a legal event if and when time comes (terms should be set “in accordance with conditions to be determined by mutual agreement between the Parties”). However, in general, this uncertainty, as well as logistical challenges, limit the usefulness of this mechanism. Nevertheless, during its discussions, the PC-OC noted that some States Parties had reached an extent of mutual trust which allows them, under their domestic laws, to use this practice often, with no notable complications.

The mechanism requires, therefore, a fresh consideration. The PC-OC took three main elements into account in this respect:

a. The right of the requested Party to make the surrender temporary and conditional on the return of the extradited person to the requested Party means that the return shall not be considered as extradition, and will not bear the legal consequences of extradition;

b. The condition of return might be set for the purpose of proceedings against the extradited person (temporary transfer of a witness in custody is regulated in the MLA

[190] PC-OC, *report of the 35th meeting* (22-24 September 1997), paragraphs 105-106.
[191] **PC-OC (2000) 27**, *report of the 41st meeting*, Strasbourg, 31 October 2000, §§ 69-74.

Convention). However, it may not be necessary to issue a warrant of arrest or detention against the extradited person in the requested Party, as their departure from the requested Party is probably involuntary; In any case, any warrant determining preventive measures against the extradited person, anticipating the resumption of their trial upon their return, clearly suffices;

c. No agreement between the two parties' authorities may bind the court in the requesting Party and prevent the release of the extradited person after being extradited, even though some States considered that the agreement must specify that the person must be kept in detention and sent back to the requested Party in all cases (including, for example, when they are nationals of the requesting Party).

Recommendations

- The PC-OC recommends that, if risk of flight of the person threatens to jeopardise the temporary surrender, the parties should consider that their agreement will expire if the person is released in the requesting Party; accordingly, the requesting Party undertakes to return them to the requested Party immediately.[192]

Article 20: Handing over of property

Convention

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.

Explanatory report

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 in so far as its law permits. The committee also decided that property, acquired as a result of an offence and which is discovered after the arrest of the person claimed, shall also be delivered to the requesting Party.

The other paragraphs of this article do not require special comments.

Comments

[192] **PC-OC(2023)11**, *Guidance on good practices regarding the post-surrender phase in extradition proceedings*, Strasbourg, 2 October 2023, pp. 5-6.

Request to freeze assets accompanying a request for extradition

Although some States allow for search, seizure and transfer of property in their national law on the basis of an extradition request, this is not always the case. Where an arrest for extradition should be followed by a search and seizure, the latter should be carried out pursuant to a request for mutual legal assistance. In such cases, requests for extradition should be accompanied by a request for mutual legal assistance. One expert pointed out 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.[193]

Recommendations

1. Interests of the victim – Customs and financial rights

In **its Resolution (75) 12, on the practical application of the European Convention on Extradition**, the Committee of Ministers of the CoE recommended to Contracting Parties:

> *That, in applying the provisions of Article 20, paragraph 3, of the Convention, Contracting Parties shall take into consideration the interest of the victim of the offence in a speedy return of the property seized;*
>
> *That, furthermore, the requested State, when handing over property without demanding that it be sent back, shall not enforce any demand for customs duty or any other claim under its customs or fiscal legislation unless the owner of the property who was the victim of the offence is himself liable for the payment.*

2. Facilitation

In its **Recommendation No. R (96) 9, concerning the practical application of the European Convention on Extradition**, the Committee of Ministers further recommends:

> *in so far as extradition requests communicated in accordance with Article 12 of the Convention include a request, based on Article 20, to hand over property, the requested State should take all possible measures to facilitate the handing over of the property sought in the context of the extradition proceedings.*

Article 21: Transit

Convention

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

[193] PC-OC, *report of the 31st meeting* (25-27 September 1995), § 11, and **PC-OC (2003) 1**, Summary report of the 46th meeting, Strasbourg, 11 September 2003, p. 6.

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 5 of the Fourth Additional Protocol replaced Article 21, in its entirety, with:

1. Transit through the territory of one of the Contracting Parties shall be granted on submission of a request for transit, 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. The request for transit shall contain the following information:

a. the identity of the person to be extradited, including his or her nationality or nationalities when available;

b. the authority requesting the transit;

c. the existence of an arrest warrant or other order having the same legal effect or of an enforceable judgment, as well as a confirmation that the person is to be extradited;

d. the nature and legal description of the offence, including the maximum penalty or the penalty imposed in the final judgment;

e. a description of the circumstances in which the offence was committed, including the time, place and degree of involvement of the person sought.

3. In the event of an unscheduled landing, the requesting Party shall immediately certify that one of the documents mentioned in Article 12, paragraph 2.a exists. This notification shall have the effect of a request for provisional arrest as provided for in Article 16, and the requesting Party shall submit a request for transit to the Party on whose territory this landing has occurred.

4. Transit of a national, within the meaning of Article 6, of a country requested to grant transit may be refused.

5. Any State may, at the time of signature or when depositing its instrument of ratification, acceptance, approval or accession, declare that it reserves the right to grant transit of a person only on some or all of the conditions on which it grants extradition.

6. The transit of the extradited person shall not be carried out through any territory where there is reason to believe that his or her life or freedom may be threatened by reason of his or her race, religion, nationality or political opinion.

Explanatory report

Convention

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 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.

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.

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.

Fourth Additional Protocol

This article, which was inspired by Article 11 of the Third Additional Protocol to the Convention, simplifies considerably the transit procedure foreseen in Article 21 of the Convention. The drafters of the Additional Protocol noted that, for an effective and speedy transit procedure, the request for transit should be sent as soon as possible. The drafters also took note of Recommendation No. R (80) 7 of the Committee of Ministers of the Council of Europe concerning the practical application of the European Convention on Extradition.

In accordance with paragraph 2, the request for transit does not have to be accompanied by the documents referred to in the new Article 12, paragraph 2 of the Convention. Accordingly, the information listed in this paragraph may be considered sufficient for the purposes of granting transit. Nevertheless, in exceptional cases where this information is not sufficient for the state of transit to reach a decision on granting transit, Article 13 of the Convention would apply and allow that Party to request supplementary information from the Party requesting transit. While information concerning lapse of time is not included in this list, the drafters agreed that such information should also be provided in cases where lapse of time is likely to be of concern, for example due to the time of commission of the offence.

Pursuant to Article 6 of this Fourth Additional Protocol, communications for transit purposes may be made through electronic or any other means affording evidence in writing (such as fax or electronic mail), and the decision of the Party requested to grant transit may be made known by the same method. Parties can also make use of these means of communication for practical arrangements. Thus, the Party requesting transit is encouraged to communicate, to the extent possible, information such as the intended time and place of transit, the route, flight details, or the identity of the escorting officers, as soon as this information becomes available.

The drafters of this Fourth Additional Protocol considered that the new Article 21 of the Convention could also cover cases where only the Party requesting transit and the Party requested to grant transit are Parties to the Convention, and extradition has been granted on a legal basis other than the Convention.

It is no longer an obligation under this Fourth Additional Protocol to notify a Party whose air space will be used during transit when it is not intended to land. However, paragraph 3 foresees an emergency procedure in the event of an unscheduled landing. As soon as the requesting Party is informed of such an event, it shall notify to the Party on whose territory the unscheduled landing occurs that one of the documents mentioned in Article 12, paragraph 2, sub-paragraph a exists. While this Additional Protocol does not specify the form this notification should take, the relevant documentation carried by the escorting officers, or information contained in the INTERPOL or Schengen Information Systems could, for example, be considered sufficient in this respect.

Similarly to the original wording of Article 21, paragraph 4 of the Convention, the Party on whose territory the unscheduled landing occurs shall consider this notification as a request for provisional arrest, pending the submission of an ordinary request for transit in accordance with paragraphs 1 and 2.

Comments

Fulfilment of obligations under paragraph 4 in practice

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 and the small 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.[194]

Recommendations

Transit procedures

In **Recommendation No. R (80) 7 concerning the practical application of the European Convention on Extradition**, certain points regarding transit have been clarified:

> **a.** *To render the procedure more expeditious, arrangements for obtaining the consent of the transit states should be made, whenever possible, at the time extradition is requested. The requested state should be promptly informed of the means of transit envisaged and whether transit permission is being sought from other Contracting States.*
>
> **b.** *In principle, the requested state should comply with the wishes of the requesting state with regard to the way in which the transit is to be effected. However, in cases of particular difficulty, the two states should consult each other on the appropriate means of transport (rail, road or air) and possibly on the place where the person to be extradited is to be handed over*.

[194] PC-OC, report of the 25th meeting (13-15 January 1993), §§ 25-28.

c. *A Contracting State which has been asked to grant transit should act on the request and make the necessary arrangements in a way as to avoid any delay*.

d. *If, under the conditions mentioned above, the requested state uses a summary extradition procedure, and transit involves the presence of the person concerned in the territory of the transit state for only a short period, the transit state should consider whether transit can be authorised without the production of all the documents mentioned in Article 12 of the convention*.

e. *Transit by air should be used as widely as possible because it is likely to facilitate and accelerate the handing over of the person to be extradited. As a general rule, the person to be surrendered should be escorted.*

Article 22: Procedure

Convention

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.

Explanatory report

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.

Comments

With the view to preparing and facilitating the smooth conduct of extradition (and surrender) procedures, States can make use of the services and tools offered by the INTERPOL. IN particular, some of the notices published by INTERPOL may be of particular relevance to extradition requests, eg:

> ***Red notices:*** requests to law enforcement worldwide to locate and provisionally arrest a person pending extradition, surrender, or similar legal action. It is based on an arrest warrant or court order issued by the judicial authorities in the requesting country. Member countries apply their own laws in deciding whether to arrest a person, but in many INTERPOL Member countries are considered valid requests for provisional arrest pending extradition. They are published by INTERPOL at the request of a member country, and must comply with INTERPOL's Constitution and Rules.
>
> ***Blue notices:*** requests to obtain information (eg. location, identification) about a person of interest in a criminal investigation.

INTERPOL can also facilitate the transmission of requests related to extradition (and mutual legal assistance) in a timely and secure manner, through its **national central bureaux** which are connected to the **I-24/7 network** (INTERPOL's secure global police communications system). It is the technical network which links law enforcement in all member countries and enables authorised users to **share sensitive and urgent police information** with their counterparts around the globe.

The PC-OC has compiled a Guide to national procedures on extradition[195].

Recommendations

1. Judicial supervision

[195] **PC-OC INF 4**, *European Convention on Extradition (ETS 24) – A Guide to Procedures*, Strasbourg, 2 July 2012.

The Committee of Ministers of the CoE, in its **resolution 75 (12) on the practical application of the European Convention on Extradition**, recommended:

> *That the Contracting Parties, whilst providing for a speedy extradition procedure, shall ensure that the person whose extradition has been requested has the right to be heard by a judicial authority and to be assisted by the lawyer of his own choosing and shall submit to a judicial authority the control of his custody for the purpose of extradition as well as the conditions of his extradition;*

2. Rights of the person subject to extradition proceedings

Recommendation No. R (80) 7 concerning the practical application of the European Convention on Extradition goes further in stating that, irrespective of the administrative or judicial nature of the extradition proceedings, the person concerned:

- *should be informed, promptly and in a language which he understands, of the extradition request and the facts on which it is based, of the conditions and the procedure of extradition, and, where applicable, of the reasons for his arrest;*
- *should be heard on the arguments which he invokes against his extradition;*
- *should have the possibility to be assisted in the extradition procedure; if he has not sufficient means to pay for the assistance, he should be given it for free.*

3. Use of a summary procedure for extradition

The use of a summary extradition procedure is addressed in **Recommendation No. R (80) 7 concerning the practical application of the European Convention on Extradition**, as follows:

> *With a view to expediting extradition and keeping the period of provisional arrest as short as possible, consideration should be given to the use of a summary procedure enabling the rapid surrender of the person sought without following ordinary extradition procedures, provided that the person concerned consents to it.*

See also the Third Additional Protocol.

4. EU Guidelines on Extradition to Third States[196]

These Guidelines. published in 2022, contain important procedural guidance for EU Member States. In addition to guidelines regarding cases when States apply the nationality exception – either for purposes of prosecution or for the execution of a sentence (see Article 6), there are **Guidelines applicable to all States regardless of the nationality exception**, which contain, inter alia, the following requirements:

> ***a) Fundamental rights assessment before an extradition***
>
> The **CFREU** applies in cases such as the extradition of a Union citizen which has exercised his or her right of free movement, or of a third country national to a third State with which the Union has concluded an extradition agreement (eg. USA, UK). In other cases, the **ECHR** shall apply, with **Articles 3** (prohibition of torture and ill-treatment) **and 6** (the right to a fair trial, the presumption of innocence and the rights of defence) assuming particular relevance in this regard.
>
> Therefore, in so far as the competent authority of the requested Member State is in possession of evidence of a real risk of inhuman or degrading treatment of individuals in the requesting third State, it is bound to assess the existence of that risk when it is called upon to decide on the extradition of a person to such State. To that end, the competent authority of the requested Member State must rely on information that is objective, reliable, specific and properly updated. That information may be obtained from, inter alia,

[196] EC, Commission Notice - **Guidelines on Extradition to Third States** (2022/C 223/01), 8 June 2022 [hereinafter, "EC – **Guidelines on Extradition to Third States"**].

judgments of international courts, such as judgments of the ECtHR, judgments of courts of the requesting third State, and also decisions, reports and other documents produced by bodies of the CoE or under the aegis of the United Nations (cf. eg. case ***Aranyosi and Căldăraru***, C-404/15 and C-659/15 PPU, EU:C:2016:198, §§ 88 and 89)[197].

b) Unfounded or abusive, including politically motivated red notices, arrest warrants and extradition requests

Interpol screening and removal mechanisms

There is an automated screening and detection system of red notices in place within ***Interpol*** which allows misused cases to be filtered out. Furthermore, a special Task Force, composed of lawyers and police officers from different Interpol Member States, assesses all incoming requests for publications of notices and diffusions from Interpol member countries with regard to their compatibility with the respective legal framework and requirements.

Interpol red notices can be removed on a number of grounds by making submissions to the independent Commission for the Control of Files (CCF) claiming that they breach Interpol's Constitution and its Rules on the Process of Data. Member States can advise the individuals concerned by abusive red notices, in particular by politically motivated red notices, to exercise their rights before the CCF and alert them beforehand, or ask for the notices or diffusions to be deleted.

A permanent notice advisory group supports these activities.

Contact points

With the view to promote and facilitate judicial cooperation in criminal matters between EU Member States, these States have established an European Judicial Network (EJN) composed of contact points in Member States designated by each Member State among central authorities in charge of international judicial cooperation and the judicial authorities or other competent authorities with specific responsibilities in the field of international judicial cooperation. Such contact points should be seized for the purposes of the application of the **Petruhhin** mechanism and in case of unfounded or unlawful, in particular politically motivated extradition requests[198]. The EJN should be swiftly informed of any changes in focal points and these can consult Eurojust and the EJN if they have any issues.[199]

Notification mechanism among the focal points

In cases of reasonable suspicion that a request for extradition is abusive, in particular politically motivated or otherwise unfounded (unlawful), the focal point of a State that has received an extradition request from a third State regarding a national of another State, should always inform the focal point of the State of nationality . This will allow the exchange of relevant information so that an informed decision might be taken on whether the request for extradition is politically motivated or otherwise unfounded.

Moreover, any focal point should in cases of reasonable suspicion that an extradition request is unfounded or abusive, in particular politically motivated, promptly and proactively inform and consult other focal points, as well as Eurojust, Europol and Interpol.

This notification mechanism applies to nationals of EU Member States, as well as to nationals of third States and stateless persons.

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[197] EC – **Guidelines on Extradition to Third States**, p. 19.

[198] The updated list of the focal points is available at: https://www.ejn-crimjust.europa.eu/ejn/AtlasChooseCountry/EN.

[199] EC, **EU Guidelines on Extradition to Third States**, p. 21.

c) Language and costs

An official language of the State of nationality is proposed as the language regime for documents transmitted between the requested State and the State of nationality. States can also notify the Commission if they decide to accept translations in one or more other official languages of the EU, Icelandic or Norwegian. The requested State and the State of nationality should each cover their own costs (mainly translation costs) [200].

d) Data protection

Concerning ***data protection***, **Directive (EU) 2016/680** on the protection of natural persons with regard to the processing of personal data by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and on the free movement of such data applies[201]

Channels and means of communication

Fourth Additional Protocol – Article 6

The Convention shall be supplemented by the following provisions:

Channels and means of communication

1. For the purpose of the Convention, communications may be forwarded by using electronic or any other means affording evidence in writing, under conditions which allow the Parties to ascertain their authenticity. In any case, the Party concerned shall, upon request and at any time, submit the originals or authenticated copies of documents.

2. The use of the International Criminal Police Organization (Interpol) or of diplomatic channels is not excluded.

3. Any State may, at the time of signature or when depositing its instrument of ratification, acceptance, approval or accession, declare that, for the purpose of Article 12 and Article 14, paragraph 1.a, of the Convention, it reserves the right to require the original or authenticated copy of the request and supporting documents."

Explanatory report

This Article, which is based on Article 8 of the Third Additional Protocol to the Convention, provides a legal basis for speedy communication, including electronic means of communication, while ensuring the authenticity of the documents and information transmitted. It would affect means of communication in relation to several provisions of the Convention, including Articles 12, 13, 14, 15, 16, 17, 18, 19 and 21. The Parties may also request to obtain the original document or an authenticated copy, in particular by mail.

The drafters of this Fourth Additional Protocol agreed that the current trend was towards a more intensive use of electronic means of communication, and that the text of the Convention should be open to future developments in this respect, including the possibility of sending all extradition documents using electronic means. However, some delegations considered that for the most essential documents, namely those referred to in Article 12, paragraph 2 and Article 14, paragraph 1, sub-paragraph a of the Convention as amended, it would be premature in the current circumstances to abolish the requirement for transmission by mail, until more reliable electronic means, such as communication with secure electronic signatures, are more widespread.

In order to accommodate these concerns, paragraph 3 of this Article allows states to declare that they reserve the right to require the original or authenticated copy of the request and supporting

[200] EC, **EU Guidelines on Extradition to Third States**, p. 21.
[201] EC, **EU Guidelines on Extradition to Third States**, p. 21.

documents for these specific Articles in all cases. This reservation can be withdrawn as soon as circumstances permit.

Comments

At its 55th session, the PC-OC had an exchange of views concerning the modernisation of the **ECE** as regards the ways and means of communication between States Parties, taking a proposal from the Russian Federation as a basis for its discussions. The discussed proposal addressed three different issues, namely the competent authorities for sending and receiving requests and documents, the necessary documentation accompanying extradition requests, and channels of communication, and involved several provisions of the **ECE**, namely those of Article 12 (The request and supporting documents), equally revised by the **AP4**.

As regards channels of communication, the PC-OC was in favour of simplifying and modernising this aspect of the Convention. One delegation considered that the relevant provisions of the draft Third Additional Protocol could be used as a basis. Several delegations expressed support for the idea of abolishing the use of the diplomatic channel in extradition cases and establishing direct contacts between the competent authorities[202]. However, it was later decided not to exclude the use of diplomatic channels and to emphasize the role of INTERPOL and the use of electronic means of communication[203].

In fact, INTERPOL launched, 2011, the "e-Extradition Initiative" which envisages the development of a secure, electronic workflow for the transmission of requests for extradition. It aims at providing INTERPOL member States with the opportunity to transmit extradition requests in an electronic format through a state-of-the-art communication tool with due respect for current legislative and institutional norms. Its specific objectives are to: enhance the efficiency of the transmission process; guarantee the absolute security and integrity of the contents in transmission; and harmonize the transmission process. While the diplomatic channel remains to be the main avenue for the transmission of extradition requests, the initiative will veritably streamline this process and, in an unprecedented manner, open electronic communication lines between extradition authorities across the world.[204]

Further to a request made by the CDPC during its 60th meeting, the PC-OC considered ways to ensure the authenticity of communications forwarded by electronic means: some Member States indicated they had the possibility of ensuring the authenticity of such communications by electronic signature, but that experience was very limited as regards trans-border communications. This, however, was not regarded as an obstacle to judicial cooperation[205].

In 2017, the PC-OC discussed the issue of the abusive recourse to the INTERPOL system and the need for more stringent safeguards, having been informed of reforms and additional safeguards introduced into such system in order to protect individuals against requests for red notices or diffusions entered for political reasons. These reforms included, in particular, the strengthening of the Commission for the Control of INTERPOL files (CCF) as well as efforts by the Secretariat General to review compliance of requests with INTERPOL's Constitution and Rules. INTERPOL asked for support and assistance from State authorities, in particular by providing INTERPOL with all relevant information on persons subject to red notices and diffusions, in particular when they have obtained refugee status or where extradition has been refused, for example for human rights reasons. The questions raised concerned, amongst others, the criteria for deleting red notices as well as the confidentiality of information provided to the CCF on

[202] **PC-OC (2008) 29**, *Summary report of the 55th meeting of the PC-OC*, Strasbourg, 14 April 2009, §§14-18.
[203] **PC-OC (2009) 21**, *Summary Report of the 57th meeting of the PC-OC*, Strasbourg, 23 February 2010, §15.
[204] INTERPOL, **INTERPOL e-Extradition Initiative: Introductory Document**, pp. 3-5.
[205] **PC-OC (2011) 27**, *List of decisions taken at its 61st meeting of the PC-OC*, Strasbourg, 24 November 2011, p. 3.

suspects so as to ensure that prosecution will not be jeopardised. PC-OC decided, inter alia, to continue the dialogue and exchange of information with INTERPOL in this regard[206].

See also comments to Article 12.

Article 23: Language to be used

Convention

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.

Explanatory report

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.

Comments

Application in practice

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."

Other ideas are:

> – translations into the language of the requested State should preferably be carried out in the requested State itself;
>
> – bilateral agreements should provide that each State translates the other's requests.[207]

See also under Article 12: 1. Translation of documents.

Recommendations

At the EU level, under the implementation of the **Petruhhin** consultation mechanism, an official language of the State of nationality is proposed as the language regime for documents transmitted

[206] **PC-OC (2017) 10**, *List of decisions taken at the 73rd meeting of the PC-OC,* Strasbourg, 22 November 2017, p. 7.
[207] PC-OC, *report of the 34th meeting* (3-5 February 1997), §§ 58-68; *report of the 35th meeting* (22-24 September 1997), §§ 47-59; and *report of the 36th meeting* (9-11 February 1998), § 44.

between the requested State and the State of nationality. States can also notify the Commission if they decide to accept translations in one or more other official languages of the EU, Icelandic or Norwegian languages[208].

For language requirements of each State Party to the **ECE** and its Additional Protocols, see the charter of national requirements with respect to languages used in requests received under the conventions on extradition, mutual assistance, transfer of prisoners and money laundering, compiled by the PC-OC in December 2002 (**PC OC INF 7**)[209]. More updated information in relation to the language requirements of each State Party can be found in the website of PC-OC, under the section entitled **Extradition – Country Information**.

Article 24: Expenses

Convention

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.

Explanatory report

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.

Comments

Expenses devolved to the extradited person?

The question was raised of whether the costs of extradition that the convention allots to the requesting Party may be, or ever are in practice, devolved to the extradited person. Thus the following concerns only the requesting Party. Different national answers were given to this question, as follows:

– the costs of extradition are dealt with as court costs (DK, D, F);

– the costs of extradition are borne by the State (CZ, CY, HR);

– the costs of extradition are dealt with as prosecution costs and therefore no effort is made to recover such costs from the person concerned (USA, P, CH, MT, GR);

– the costs of extradition are billed to the person concerned (A).[210]

Recommendations

[208] EC, **EU Guidelines on Extradition to Third States**, p. 21.
[209] **PC-OC INF 7**, *Chart showing requirements of states with respect to languages used in requests received under the following Conventions*, Strasbourg, 10 May 2016.
[210] PC-OC, *report of the 39th meeting* (27-29 September 1999), §§ 91-92.

At the EU level, when implementing the **Petruhhin** consultation mechanism, the requested State and the State of nationality should each cover their own costs (mainly translation costs)[211].

Article 25: Definition of "detention order"

Convention

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.

Explanatory report

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.)

Comments

Early release: assessment of the person's behaviour in prison for extradition purposes

Where a person has been extradited from state A to state B, the person may be granted early released in state B on account of his good behaviour in prison. It can happen that the legislation of state B foresees that the court empowered to decide on early release is under a duty to assess the person's behaviour in prison, including the period during which the person was detained for extradition purposes. However, many countries do not keep a record of the detainee's behaviour during extradition arrest. A solution could be to empower the court deciding on the early release of an extradited person to presume good behaviour during extradition arrest where information to the contrary is not available.[212]

Final Clauses – European Convention on Extradition

Article 8 – Friendly settlement

Fourth Additional Protocol: Article 8

The Convention shall be supplemented by the following provisions:

Friendly settlement

The European Committee on Crime Problems of the Council of Europe shall be kept informed regarding the application of the Convention and the Additional Protocols thereto and shall do whatever is necessary to facilitate a friendly settlement of any difficulty which may arise out of their interpretation and application.

Explanatory report

See Article 8 of the Fourth Additional Protocol.

Article 26: Reservations

[211] EC, **EU Guidelines on Extradition to Third States**, p. 21.
[212] **PC-OC (2001) 21**, *Summary report of the 43rd meeting*, Strasbourg, 12 October 2001, §44.

Convention

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.

Explanatory report

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.

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 Algeria from the field of application of the Convention as that country had become independent.

Comments

1. Withdrawal and limitation of reservations

The PC-OC observed in this respect that Article 26, paragraph 1, of the **ECE** authorised – without any limitation – reservations to the Convention. The Committee acknowledged that the same national reservations had hardly ever been brought into play during the last forty years. Nevertheless, the mere fact that these reservations were in force, worded as they are, meant that the door was open for a more systematic recourse to them. It could not be excluded that such reservations, which do not facilitate international co-operation for the purpose of extradition, could be used – by States that entered the reservation as well as by States that resort to it on grounds of reciprocity – for the purpose of introducing undesirable requirements such as, for example, the requirement of *prima-facie* evidence.

In order to avoid difficulties arising out of new reservations (and declarations alike), the best practice would probably be for States that intend to enter reservations to discuss their projects beforehand with the PC-OC or its Bureau, either directly or via the Secretariat.

As for difficulties arising out of reservations already entered by States, the PC-OC remains available to examine them on a case-by-case basis. However, the best course of action would be for States to re-examine their reservations with a view to withdrawing them where appropriate.[213]

[213] PC-OC, *report of the 39th meeting* (27-29 September 1999), §§ 112-115.

In its discussions on the modernisation of CoE Conventions in the criminal field in October 2006, the PC-OC brought the following proposals to the attention of CDPC, for consideration: reservations should be limited to specific provisions; existing reservations could be reviewed and, where necessary, updated or withdrawn; a limited duration of validity could be envisaged for future reservations. The interest of such a limitation should however be balanced with the interest to have as many States as possible ratifying the instrument and with the necessity of an efficient cooperation[214]. The possible introduction of an obligation to periodically review all reservations made to the European Convention on Extradition and Additional Protocols thereto has also been discussed[215].

2. "Reservation" or "declaration" – Wording by Article 16

The "Treaty Office" section within CoE's website includes a database indicating every statement made by States in relation to CoE Conventions to which they are a signatory or Party. Such statements are considered either a "reservation" or a "declaration". This classification is made by the Secretariat under its own responsibility.

In some instances, statements make reference to conventional provisions that themselves indicate how such statements should be classified. In all other instances, the Secretariat makes reference to the definition of "reservation" under Article 2 of the Vienna Convention on the Law of Treaties (23 May 1969). That definition excludes any criteria which would be based on the "name" given by any State to its own statement.

Doubts may arise from time to time on whether some statements should be considered a "reservation" or a "declaration". Doubts arise, for example, with respect to certain statements made by states with reference to Article 16 of the **ECE** (provisional arrest). Presently, the database records some statements as "reservations", and others as "declarations".

Two different approaches may be taken. Under the first approach, one might say that Article 16, paragraph 2, is worded in such detail that it may not be interpreted to include any requirement not explicitly mentioned therein. Should a State, by way of a statement, require any other kind of information, it is proper to conclude that such State is modifying the legal effect of the provisions of Article 16, paragraph 2, in their application to it. In other words, such State is making a reservation.

A second approach remains, however, possible. One may indeed question the meaning of the provision of Article 16, paragraph 2, under which requests for provisional arrest must be accompanied by a statement indicating the offence for which extradition will be requested. Should that mean that the offence is to be described by its "name", then a difficulty arises because names given to offences vary from one country to another. The only helpful description of an offence consists in describing the facts that allegedly amount to such an offence. Therefore, where a State requires a description of the facts, it does no more than restate, in a clearer fashion, what is already contained in the Convention. It is therefore producing a "declaration", not a "reservation".

The PC-OC took note of the fact that statements produced by States when signing or ratifying CoE conventions are registered in the Treaty Office database as reservations and/or declarations. It considered that, in case of doubt, statements could be listed under both "declarations" and "reservations". It further thought that, where the country considers its statement to be a "declaration" or a "reservation", that denomination should be respected in the database. It deemed, however, that the fact that a given statement is so considered (by States as well as by the Secretariat) does in no way prevent different legal interpretations of such statement.[216] The

[214] **PC-OC (2006) 15**, *List of adopted decisions*, Strasbourg, 20 October 2006 p. 3 and **PC-OC (2006) 16**, *Summary report of the 52nd meeting of the PC-OC*, Strasbourg, 20 November 2006, p. 9.
[215] **PC-OC (2010) 22**, *Summary Report of the 59th meeting of the PC-OC*, Strasbourg, 31 January 2011, §7.
[216] **PC-OC (2000) 27**, *Summary report of the 41st meeting*, Strasbourg, 31 October 2000, §§ 51-58.

ECtHR has a long-standing case law concerning the differentiation between reservations and declarations.[217]

See also under Article 1: *Extradition to countries that allow the use of life sentences.*

Recommendations

The Committee of Ministers of the CoE, in its **resolution (78) 43, on reservations made to certain provisions of the European Convention on Extradition**, considering, inter alia, the great number of reservations made by States Parties to this Convention and certain problems this poses to the application of the Convention:

> *Recommends to the governments of member states Contracting Parties to the European Convention on Extradition that they limit the scope of the reservations or withdraw them, bearing in mind the contribution of the Additional Protocols.*

Article 27: Territorial application

Convention

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.

Explanatory report

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.[218]

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

[217] ECtHR, Case ***Belilos v. Switzerland***, judgement of 29 April 1988, §§ 40-49; Case ***Loizidou v. Turkey***, 23 March 1995, §§ 65-98, and D.M. McRae, *The legal effect of interpretative declarations*, British Yearbook of International Law, Vol. 49, 1978, pp. 155-173.

[218] The reference to Algeria no longer has any purpose following its independence, which occurred after the drawing-up of the convention.

Convention

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.

Explanatory report

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.

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 these 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.

Comments

Scope of a declaration

A question was raised concerning the interpretation of the declaration made by State A concerning Articles 27 and 28 of the **ECE**, with respect to the relations between that State and countries with which it had concluded a bilateral treaty still in force. The expert from State A maintained that bilateral treaties concluded by his State remain in force in respect of territories not covered by the **ECE**.

The POC-OC compiled a list of bilateral and multilateral regional treaties on extradition, mutual assistance, transfer of proceedings, execution of sentences, transfer of sentenced persons, illicit traffic in narcotic drugs and assets sharing, among others, binding upon CoE member States. This document (**PC OC INF 8 rev.7**), last updated in October 2018, is available at the website of PC-OC, under **Tools for implementation**.

Article 29: Signature, ratification and entry into force

Convention

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.

Explanatory report

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.

Recommendations

Recommendation No. R (80) 7 of the Committee of Ministers to member States concerning the practical application of the European Convention on Extradition, of 27 June 1980, recommended to governments of CoE member states:

> "if they are not yet Contracting Parties to the convention, to ratify it as soon as possible". (Recommendation I.1)

Article 30: Accession

Convention

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.

Explanatory report

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.

Commentary

Given the requirement of unanimity for the adoption of the resolution containing the invitation to accede, "a single member State party to a treaty can effectively veto accession by a third country, while the candidate country is not informed about the identity of the opposing state. This can become a frustrating experience for third countries"[219].

Although some defended that a case-by-case approach should be taken when choosing which countries to invite, on the basis of minimum guarantees offered in each case[220], the inevitable political considerations that play in these kind of deliberations, and the need for a more solid basis for a decision with obvious repercussions on a State's level of compliance with its extraterritorial human rights obligations, led to an idea beginning to take shape as to the importance of developing established criteria for the accession on non-CoE Member States to the conventions on international criminal cooperation.

At its 81st session, in May 2022, the PC-OC held a preliminary discussion on the issue of possible criteria for the assessment of requests for accession by third States to CoE Conventions on international co-operation in criminal matters presented to the Committee of Ministers, and decided to set up a working group to start preparing a draft document in this regard[221]. This working group elaborated a draft policy paper setting down a procedure and criteria for the PC-OC to assess and provide an opinion on such requests for accession and indicating a non-exhaustive list of reliable sources of information to base this assessment on; the draft was examined and adopted by the PC-OC, with amendments, at its 82nd meeting, in November 2022, and later submitted to, and approved by, the CDPC, which then transmitted it to the Committee of Ministers of the CoE.

The **Policy paper dealing with the question of accession of non-member States to Council of Europe conventions on international co-operation in criminal matters**[222] was finally adopted by the Committee of Ministers on 15 March 2023. The procedure set therein was first set in motion at the initiative of Chile which, at the 83rd meeting of PC-OC, informed this Committee of its intention to request to be invited to accede to the **ECE**[223]. A draft opinion on such an accession in accordance with the policy paper has been prepared by the Secretariat, examined and adopted by the PC-OC, for the first time, at its 84th meeting, in November 2023, and transmitted to the CDPC, with an invitation to this body to further transmit it to the Committee of Ministers at the appropriate moment[224].

Article 31: Denunciation

Convention

[219] See Mr Jörg Polakiewicz, *Opening of the special session,* Special session to celebrate the 60th anniversary of the European Convention on Extradition – 20 June 2018: Presentations and summaries of the panel discussion, Strasbourg, 10 August 2018, doc. **PC-OC (2018)05**, p. 12.
[220] See, for example, Mr Jörg Polakiewicz, *Opening of the special session* […], doc. **PC-OC (2018)05**, p. 12.
[221] **PC-OC (2022)04**, *List of decisions taken at the 81st meeting of the PC-OC*, Strasbourg, 20 May 2022, p. 3.
[222] **CM(2023)3-add2final**, *Policy paper dealing with the question of accession of non-member States to Council of Europe conventions on international co-operation in criminal matters*, adopted by the Committee of Ministers of the CoE at its 1460th meeting, 15 March 2023.
[223] **PC-OC (2023)05**, *List of decisions taken at the 83rd meeting of the PC-OC*, Strasbourg, 4 May 2023, p.4.
[224] **PC-OC (2023)14**, *List of decisions taken at the 84th meeting of the PC-OC*, Strasbourg, 16 November 2023, p. 3.

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.

Explanatory report

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: Notifications

Convention

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.

Explanatory report

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

Convention

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.

* * *

Final Clauses – Additional Protocol to the European Convention on Extradition

Chapter III: Final clauses

Explanatory report

General remarks

Articles 3 to 9 are, for the most part, based on the model final clauses of agreements and conventions which were approved by the Committee of Ministers of the Council of Europe, sitting at Deputy level, during its 113th meeting.

During the course of the preparation of the Protocol it was noted that, if the Extradition Convention itself ever came to be fully revised, it would be right to consider to what extent the final clauses of the convention should be brought into line with the more modern formulation utilised in the final clauses of the Protocol. In this context, reference was made to Article 27 of the convention (concerning territorial extension) as compared with Article 5, paragraph 2, of the Protocol. Again the convention has no provision resembling Article 7 of the Protocol on the friendly settlement of difficulties since, *inter alia*, the ECCP did not exist when the convention was being prepared.

The question was also raised of the relationship between the Protocol and the provisions of Article 28 of the convention restricting the content of bilateral agreements. It was agreed that the Protocol should not contain any provision that would affect existing bilateral agreements. It is, for example, known that certain states have concluded bilateral agreements setting limits on the extent to which an amnesty is a bar to extradition, such agreements would not be affected by the provisions of the Protocol. The question of the effect of future bilateral agreements bearing on a subject matter dealt with by the Protocol would, it was thought, fall to be regulated by general international law (cf. in particular, Articles 30 and 41 of the Vienna Convention on the Law of Treaties).

Most of the final clauses do not call for special comment but the following points may be mentioned.

Article 3

Additional Protocol

1. This Protocol shall be open to signature by the member States of the Council of Europe which have signed the Convention. It shall be subject to ratification, acceptance or approval. Instruments of ratification, acceptance or approval shall be deposited with the Secretary General of the Council of Europe.

2. The Protocol shall enter into force 90 days after the date of the deposit of the third instrument of ratification, acceptance or approval.

3. In respect of a signatory State ratifying, accepting or approving subsequently, the Protocol shall enter into force 90 days after the date of the deposit of its instrument of ratification, acceptance or approval.

4. A member State of the Council of Europe may not ratify, accept or approve this Protocol without having, simultaneously or previously, ratified the Convention.

Explanatory report

Article 3, paragraphs 1 and 4

Member states of the Council of Europe that have signed but not ratified the Extradition Convention may sign the Protocol before ratifying the convention. However, paragraph 4 of this article makes it clear that the Protocol may be ratified, accepted or approved only by a member state that has ratified the convention. There would be no obligation on a member state ratifying the convention in the future to ratify, accept or approve the Protocol.

Article 3, paragraph 2

If a state has exercised the option available under Article 6 not to accept one or the other of Chapters I or II, its instrument of ratification, acceptance or approval will be counted as one instrument for the purposes of Article 3, paragraph 2.

Article 4

Additional Protocol

1. Any State which has acceded to the Convention may accede to this Protocol after the Protocol has entered into force.

2. Such accession shall be effected by depositing with the Secretary General of the Council of Europe an instrument of accession which shall take effect 90 days after the date of its deposit.

Explanatory report

The Protocol may be acceded to by a non-member state only if it has acceded to the Extradition Convention.

Accession to the convention by non-member states of the Council of Europe has been and remains conditional on invitation from the Committee of Ministers, but no such invitation is required for accession to the Protocol. A non-member state that has at any time acceded to the convention thus has an automatic right (but not an obligation) to accede to the Protocol, the only limitation is that no such accession may be effected until after the Protocol's entry into force which, under Article 3, paragraph 2, is conditional on ratification, acceptance or approval by three member states.

Article 5

Additional Protocol

1. Any State may, at the time of signature or when depositing its instrument of ratification, acceptance, approval or accession, specify the territory or territories to which this Protocol shall apply.

2. Any State may, when depositing its instrument of ratification, acceptance, approval or accession or at any later date, by declaration addressed to the Secretary General of the Council of Europe, extend this Protocol to any other territory or territories specified in the declaration and for whose international relations it is responsible or on whose behalf it is authorised to give undertakings.

3. Any declaration made in pursuance of the preceding paragraph may, in respect of any territory mentioned in such declaration, be withdrawn according to the procedure laid down in Article 8 of this Protocol.

Article 6

Additional Protocol

1. Any State may, at the time of signature or when depositing its instrument of ratification, acceptance, approval or accession, declare that it does not accept one or the other of Chapters I or II.

2. Any Contracting Party may withdraw a declaration it has made in accordance with the foregoing paragraph by means of a declaration addressed to the Secretary General of the Council of Europe which shall become effective as from the date of its receipt.

3. No reservation may be made to the provisions of this Protocol.

Explanatory report

This article was inserted for the reasons indicated in paragraph 9 of this report.

The intention is that partial non-acceptance of Chapters I or II of the Protocol is not possible, from which it follows that there can be no question of a partial withdrawal under paragraph 2 of this article of a declaration made pursuant to its paragraph 1. In order to avoid any contrary argument that might he drawn from the terms of the Extradition Convention itself or from the general law of treaties, Article 6, paragraph 3, forbids the making of reservations to the Protocol.

Article 7

Additional Protocol

The European Committee on Crime Problems of the Council of Europe shall be kept informed regarding the application of this Protocol and shall do whatever is needful to facilitate a friendly settlement of any difficulty which may arise out of its execution.

Article 8

Additional Protocol

1. Any Contracting Party may, in so far as it is concerned, denounce this Protocol by means of a notification addressed to the Secretary General of the Council of Europe.

2. Such denunciation shall take effect six months after the date of receipt by the Secretary General of such notification.

3. Denunciation of the Convention entails automatically denunciation of this Protocol.

Article 9

Additional Protocol

The Secretary General of the Council of Europe shall notify the member States of the Council and any State which has acceded to the Convention of:

a. any signature;

b. any deposit of an instrument of ratification, acceptance, approval or accession;

c. any date of entry into force of this Protocol in accordance with Article 3 thereof;

d. any declaration received in pursuance of the provisions of Article 5 and any withdrawal of such a declaration;

e. any declaration made in pursuance of the provisions of Article 6, paragraph 1;

f. the withdrawal of any declaration carried out in pursuance of the provisions of Article 6, paragraph 2;

g. any notification received in pursuance of the provisions of Article 8 and the date on which denunciation takes effect.

Explanatory report

Article 9, paragraph g

It was considered that this paragraph was sufficiently wide to cover the automatic denunciation of the Protocol which, under its Article 8, was entailed by denunciation of the Extradition Convention.

Additional Protocol

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

Done at Strasbourg, this 15th day of October 1975, in English and French, both texts being equally authoritative, 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 each of the signatory and acceding States

* * *

Final Clauses – Second Additional Protocol to the European Convention on Extradition

Chapter VI: Final clauses

Article 6

Second Additional Protocol

1. This Protocol shall be open to signature by the member States of the Council of Europe which have signed the Convention. It shall be subject to ratification, acceptance or approval. Instruments of ratification, acceptance or approval shall be deposited with the Secretary General of the Council of Europe.

2. The Protocol shall enter into force 90 days after the date of the deposit of the third instrument of ratification, acceptance or approval.

3. In respect of a signatory State ratifying, accepting or approving subsequently, the Protocol shall enter into force 90 days after the date of the deposit of its instrument of ratification, acceptance or approval.

4. A member State of the Council of Europe may not ratify, accept or approve this Protocol without having, simultaneously or previously, ratified the Convention

Article 7

Second Additional Protocol

1. Any State which has acceded to the Convention may accede to this Protocol after the Protocol has entered into force.

2. Such accession shall be effected by depositing with the Secretary General of the Council of Europe an instrument of accession which shall take effect 90 days after the date of its deposit.

Article 8

Second Additional Protocol

1. Any State may, at the time of signature or when depositing its instrument of ratification, acceptance, approval or accession, specify the territory or territories to which this Protocol shall apply.

2. Any State may, when depositing its instrument of ratification, acceptance, approval or accession or at any later date, by declaration addressed to the Secretary General of the Council of Europe, extend this Protocol to any other territory or territories specified in the declaration and for whose international relations it is responsible or on whose behalf it is authorised to give undertakings.

3. Any declaration made in pursuance of the preceding paragraph may, in respect of any territory mentioned in such declaration, be withdrawn by means of a notification addressed to the Secretary General of the Council of Europe. Such withdrawal shall take effect six months after the date of receipt by the Secretary General of the Council of Europe of the notification.

Article 9

Second Additional Protocol

1. Reservations made by a State to a provision of the Convention shall be applicable also to this Protocol, unless that State otherwise declares at the time of signature or when depositing its instrument of ratification, acceptance, approval or accession.

2. Any State may, at the time of signature or when depositing its instrument of ratification, acceptance, approval or accession, declare that it reserves the right:

a. not to accept Chapter I;

b. not to accept Chapter II, or to accept it only in respect of certain offences or certain categories of the offences referred to in Article 2;

c. not to accept Chapter III, or to accept only paragraph 1 of Article 3;

d. not to accept Chapter IV;

e. not to accept Chapter V.

3. Any Contracting Party may withdraw a reservation it has made in accordance with the foregoing paragraph by means of declaration addressed to the Secretary General of the Council of Europe which shall become effective as from the date of its receipt.

4. A Contracting Party which has applied to this Protocol a reservation made in respect of a provision of the Convention or which has made a reservation in respect of a provision of this Protocol may not claim the application of that provision by another Contracting Party; it may, however, if its reservation is partial or conditional claim the application of that provision in so far as it has itself accepted it.

5. No other reservation may be made to the provisions of this Protocol.

Article 10

Second Additional Protocol

The European Committee on Crime Problems of the Council of Europe shall be kept informed regarding the application of this Protocol and shall do whatever is needful to facilitate a friendly settlement of any difficulty which may arise out of its execution.

Article 11

Second Additional Protocol

1. Any Contracting Party may, in so far as it is concerned, denounce this Protocol by means of a notification addressed to the Secretary General of the Council of Europe.

2. Such denunciation shall take effect six months after the date of receipt by the Secretary General of such notification.

3. Denunciation of the Convention entails automatically denunciation of this Protocol.

Article 12

Second Additional Protocol

The Secretary General of the Council of Europe shall notify the member States of the Council and any State which has acceded to the Convention of:

a. any signature of this Protocol;

b. any deposit of an instrument of ratification, acceptance, approval or accession;

c. any date of entry into force of this Protocol in accordance with Articles 6 and 7;

d. any declaration received in pursuance of the provisions of paragraphs 2 and 3 of Article 8;

e. any declaration received in pursuance of the provisions of paragraph 1 of Article 9;

f. any reservation made in pursuance of the provisions of paragraph 2 of Article 9;

g. the withdrawal of any reservation carried out in pursuance of the provisions of paragraph 3 of Article 9;

h. any notification received in pursuance of the provisions of Article 11 and the date on which denunciation takes effect.

Second Additional Protocol

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

Done at Strasbourg, this 17th day of March 1978, in English and in French, both texts being equally authoritative, 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 each of the signatory and acceding States.

Explanatory report

The provisions contained in Chapter VI are based on the model final clauses of agreements and conventions which were approved by the Committee of Ministers of the Council of Europe at the 113th meeting of their Deputies. Most of these articles do not call for specific comments, but the following points require some explanation.

As regards Article 6.4, it should be noted that member states of the Council of Europe which have signed but not ratified the Extradition Convention may sign the Protocol before ratifying the Convention. However, paragraph 4 of this article makes it clear that the Protocol may be ratified,

accepted or approved only by a member state which has ratified the Convention. There would be no obligation on a member state ratifying the Convention in the future to become a Contracting Party to the Protocol.

The Protocol may be acceded to by a non-member state only if it has acceded to the Extradition Convention (Article 7).

Accession to the Convention by non-member states of the Council of Europe has been and remains conditional on invitation from the Committee of Ministers, but no such invitation is required for accession to the Protocol. A non-member state that has at any time acceded to the Convention thus has an automatic right (but not an obligation) to accede to the Protocol; the only limitation is that no such accession may be effected until after the Protocol's entry into force which, under Article 6.2, is conditional on ratification, acceptance or approval by three member states.

With regard to reservations, Article 9.1 lays down the principle that in the absence of a declaration to the contrary, existing reservations to the Extradition Convention apply also to the Protocol.

Article 9.2 refers to the possibility for Contracting Parties not to accept one or more of the four chapters and to limit their non-acceptance of Chapter II to certain offences or to certain categories of offences. Contracting States have wide discretion in defining the categories of offences in respect of which they wish to accept Chapter II, for instance by reference to the acts constituting an offence, or by reference to the fiscal regulations which are affected. As regards Chapter III, they may limit their non-acceptance to paragraph 2.

These provisions were inserted in order to enable states which, for the time being, find it impossible to accept all chapters, to become, nevertheless, Parties to the Protocol. They may withdraw any reservation made under Article 9.2 (Article 9, paragraph 2).

* * *

Final Clauses – Fourth Additional Protocol to the European Convention on Extradition

Article 7 – Relationship with the Convention and other international instruments

Fourth Additional Protocol

1. The words and expressions used in this Protocol shall be interpreted within the meaning of the Convention. As regards the Parties to this Protocol, the provisions of the Convention shall apply, *mutatis mutandis*, to the extent that they are compatible with the provisions of this Protocol.

2 The provisions of this Protocol are without prejudice to the application of Article 28, paragraphs 2 and 3, of the Convention concerning the relations between the Convention and bilateral or multilateral agreements.

Explanatory report

This article clarifies the relationship between the Protocol on the one hand, and the Convention and other international agreements on the other hand.

Paragraph 1 ensures uniform interpretation of this Additional Protocol and the Convention by providing that the words and expressions used in the Protocol shall be interpreted within the meaning of the Convention. The Convention should be understood as the European Convention on Extradition of 1957 (ETS No. 24), as amended between Parties concerned by the Additional Protocol (ETS No. 86), the Second Additional Protocol (ETS No. 98) and/or the Third Additional Protocol (CETS No. 209) thereto.

Paragraph 1 further clarifies the relationship between the provisions of the Convention and those of this Fourth Additional Protocol, i.e. as between the Parties to this Protocol, the provisions of the Convention shall apply to the extent that they are compatible with the provisions of this Additional Protocol, in accordance with general principles and norms of international law.

Paragraph 2 is designed to ensure the smooth co-existence of this Fourth Additional Protocol with any bilateral or multilateral agreements concluded in pursuance of Article 28, paragraph 2 of the Convention. It states that the Additional Protocol does not alter the relation between the Convention and such agreements or the possibility for Parties to regulate their mutual relations with regard to extradition exclusively in accordance with a system based on a uniform law (Article 28, paragraph 3 of the Convention).

This implies in particular that declarations made by EU member states in relation with the European Union Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between member states (2002/584/JHA) would automatically apply to this Fourth Additional Protocol and would make it unnecessary for the States concerned to make new declarations to that effect.

Article 8 – Friendly settlement

Fourth Additional Protocol

The Convention shall be supplemented by the following provisions:

"**Friendly settlement**

The European Committee on Crime Problems of the Council of Europe shall be kept informed regarding the application of the Convention and the Additional Protocols thereto and shall do whatever is necessary to facilitate a friendly settlement of any difficulty which may arise out of their interpretation and application."

Explanatory report

This article recognises the important role of the European Committee on Crime Problems in the interpretation and application of the Convention and the Additional Protocols thereto, and follows the precedents established in other European conventions in the criminal justice field. It also follows Recommendation Rec (99) 20 of the Committee of Ministers, concerning the friendly settlement of any difficulty that may arise out of the application of the Council of Europe conventions in the penal field. The reporting requirement which it lays down is intended to keep the European Committee on Crime Problems informed about possible difficulties in interpreting and applying the Convention and the Additional Protocols thereto, so that it may contribute to facilitating friendly settlements and proposing amendments to the Convention and the Additional Protocols thereto which might prove necessary.

Comments

In 2005, the Bureau of the European Committee on Crime Problems (CDPC) requested PC-OC, pursuant to the 5th resolution on the effective implementation of co-operation mechanisms provided for by the Council of Europe conventions in criminal matters, adopted by the European Ministers of Justice at their 26th Conference in Helsinki, to consider, in particular, the question of the dispute settlement mechanisms foreseen in the CoE Conventions,[225] an issue which was the object of an information note discussed at the 51st session of PC-OC, in March 2006 (PC-OC

[225] PC-OC, 50th meeting, Conference on "The future of Judicial Co-operation: European Conventions and the fight against Criminality", **Conclusions**, §6.

(2006) 02)[226]. The Russian Federation proposed the adoption of an Additional Protocol specifically for this purpose, but several experts raised questions in this regard, identifying possible difficulties linked to the obligatory/binding nature of the mechanism proposed and considering that friendly settlement of disputes should be based on a voluntary attitude of the parties. The prevention of disputes was also discussed, with the Committee believing that increased assistance to States in terms of communication about the concrete application of co-operation mechanisms could help and deciding to adopt concrete measures in this regard, including a new presentation to its web site on transnational criminal justice; the setting up of a database as simple as possible with information on basic questions related to cooperation on criminal matters – the template for this database was approved at the 53rd meeting of PC-OC, in November 2007[227]; and a proposal to set up a network of national points of contact – this proposal would be further elaborated in a discussion paper presented in October 2006 with the view to promote networking among points of contact from CoE member States[228]. A suggestion to produce a newsletter was welcomed, while the creation of a office of specialists within the CoE Secretariat did not advance due to lack of resources[229].

In terms of possible future interpretations of the extradition mechanisms, the Committee's attention was brought to the fact that the decisions by the Court of Justice of the European Union (CJEU) on the application of the European Arrest Warrant (EAW) might have an impact on the way that EU member States apply extradition mechanisms with other Council of Europe Member States. It was also pointed out that the ECtHR could also be seized in cases involving human rights questions in application of the EAW[230].

The Committee underlined some legal difficulties linked, for instance, to the authority that any arbitral decision on a dispute could possibly have on a final judicial decision taken by a competent national – independent—jurisdiction. Several States underlined that such authority could hardly be compatible with current constitutional provisions[231].

Article 9 – Signature and entry into force

Fourth Additional Protocol

1. This Protocol shall be open for signature by the member States of the Council of Europe which are Parties to or have signed the Convention. It shall be subject to ratification, acceptance or approval. A signatory may not ratify, accept or approve this Protocol unless it has previously ratified, accepted or approved the Convention, or does so simultaneously. Instruments of ratification, acceptance or approval shall be deposited with the Secretary General of the Council of Europe.

2. This Protocol shall enter into force on the first day of the month following the expiration of a period of three months after the deposit of the third instrument of ratification, acceptance or approval.

3. In respect of any signatory State which subsequently deposits its instrument of ratification, acceptance or approval, this Protocol shall enter into force on the first day of the month following the expiration of a period of three months after the date of deposit.

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[226] **PC-OC (2006) 08**, *List of decisions and documents adopted at the 51st meeting*, Strasbourg, 6 March 2006, p. 1.
[227] **PC-OC (2007) 13 Rev**, *List of adopted decisions*, Strasbourg, 23 November 2007, p. 2.
[228] See document **PC-OC (2006) 15**, *List of adopted decisions*, Strasbourg, 20 October 2006, p. 7.
[229] **PC-OC (2006) 15**, pp. 1-2.
[230] **PC-OC (2006) 12**: Summary report of the 51st meeting of the PC-OC, Strasbourg, 6 October 2006, §§18-23.
[231] **PC-OC (2006) 16**, Summary report of the 52nd meeting of the PC-OC, Strasbourg, 20/ November 2006, p. 12.

Article 10 – Accession

Fourth Additional Protocol

1. Any non-member State which has acceded to the Convention may accede to this Protocol after it has entered into force.

2. Such accession shall be effected by depositing an instrument of accession with the Secretary General of the Council of Europe.

3. In respect of any acceding State, the Protocol shall enter into force on the first day of the month following the expiration of a period of three months after the date of the deposit of the instrument of accession.

Article 11 – Temporal scope

Fourth Additional Protocol

This Protocol shall apply to requests received after the entry into force of the Protocol between the Parties concerned.

Article 12 – Territorial application

Fourth Additional Protocol

1. Any State may, at the time of signature or when depositing its instrument of ratification, acceptance, approval or accession, specify the territory or territories to which this Protocol shall apply.

2. Any State may, at any later time, by declaration addressed to the Secretary General of the Council of Europe, extend the application of this Protocol to any other territory specified in the declaration. In respect of such territory the Protocol shall enter into force on the first day of the month following the expiration of a period of three months after the date of receipt of such declaration by the Secretary General.

3. Any declaration made under the two preceding paragraphs may, in respect of any territory specified in such declaration, be withdrawn by a notification addressed to the Secretary General of the Council of Europe. The withdrawal shall become effective on the first day of the month following the expiration of a period of six months after the date of receipt of such notification by the Secretary General.

Article 13 – Declarations and reservations

Fourth Additional Protocol

1. Reservations made by a State to the provisions of the Convention and the Additional Protocols thereto which are not amended by this Protocol shall also be applicable to this Protocol, unless that State otherwise declares at the time of signature or when depositing its instrument of ratification, acceptance, approval or accession. The same shall apply to any declaration made in respect or by virtue of any provision of the Convention and the Additional Protocols thereto.

2. Reservations and declarations made by a State to any provision of the Convention which is amended by this Protocol shall not be applicable as between the Parties to this Protocol.

3. No reservation may be made in respect of the provisions of this Protocol, with the exception of the reservations provided for in Article 10, paragraph 3, and Article 21, paragraph 5, of the Convention as amended by this Protocol, and in Article 6, paragraph 3, of this Protocol. Reciprocity may be applied to any reservation made.

4. Any State may wholly or partially withdraw a reservation or declaration it has made in accordance with this Protocol, by means of a notification addressed to the Secretary General of the Council of Europe, which shall become effective as from the date of its receipt.

Article 14 – Denunciation

Fourth Additional Protocol

1. Any Party may, in so far as it is concerned, denounce this Protocol by means of a notification addressed to the Secretary General of the Council of Europe.

2. Such denunciation shall become effective on the first day of the month following the expiration of a period of six months after the date of receipt of the notification by the Secretary General of the Council of Europe.

3. Denunciation of the Convention automatically entails denunciation of this Protocol.

Article 15 – Notifications

Fourth Additional Protocol

The Secretary General of the Council of Europe shall notify the member States of the Council of Europe and any State which has acceded to this Protocol of:

a. any signature;

b. the deposit of any instrument of ratification, acceptance, approval or accession;

c. any date of entry into force of this Protocol in accordance with Articles 9 and 10;

d. any reservation made in accordance with Article 10, paragraph 3, and Article 21, paragraph 5, of the Convention as amended by this Protocol, as well as Article 6, paragraph 3, of this Protocol, and any withdrawal of such a reservation;

e. any declaration made in accordance with Article 12, paragraph 1, and Article 14, paragraph 3, of the Convention as amended by this Protocol, as well as Article 12 of this Protocol, and any withdrawal of such a declaration;

f. any notification received in pursuance of the provisions of Article 14 and the date on which denunciation takes effect;

g. any other act, declaration, notification or communication relating to this Protocol.

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

Done at Vienna, this 20th day of September 2012, in English and in French, both texts being equally authentic, in a single copy which shall be deposited in the archives of the Council of Europe. The Secretary General of the Council of Europe shall transmit certified copies to each member State of the Council of Europe and to the non-member States which have acceded to the Convention.

Explanatory report

Article 11 has been introduced to ensure clarity about the application in time between Parties to this Fourth Additional Protocol. The Protocol will only apply to new requests, received after the entry into force in each of the Parties concerned. The word “requests” covers requests for extradition, additional requests for consent and requests for transit.

The remaining Articles are based both on the "Model final clauses for conventions and agreements concluded within the Council of Europe" which were approved by the Committee of Ministers at the 315th meeting of their Deputies in February 1980, and the final clauses of the European Convention on Extradition.

Since Article 12 concerning territorial application is mainly aimed at overseas territories, it was agreed that it would be clearly against the philosophy of this Additional Protocol for any Party to exclude parts of its main territory from the application of this instrument, and that there would be no need to lay this down explicitly in this Fourth Additional Protocol.

Reservations and declarations made by a state with regard to any provision of the Convention or the Additional Protocols thereto, which is not amended by this Fourth Additional Protocol, shall also be applicable to this Additional Protocol, unless that state declares otherwise in accordance with Article 13, paragraph 1.

It is underlined that under the provisions of Article 13, no reservation may be made with regard to the provisions of this Additional Protocol except for the reservations provided for under Article 10, paragraph 3, and Article 21, paragraph 5 of the Convention as amended by this Protocol, and Article 6, paragraph 3 of this Fourth Additional Protocol.

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CHAPTER 2 – The Third Additional Protocol to the European Convention on Extradition (ETS No. 209)

Third Additional Protocol to the European Convention on Extradition (CETS No. 209)

Opened for signature: 10 November 2010

Entered into force: 1 May 2012

List of Contracting Parties: https://www.coe.int/en/web/conventions/full-list?module=signatures-by-treaty&treatynum=209

Declarations and reservations: https://www.coe.int/en/web/conventions/full-list?module=declarations-by-treaty&numSte=209&codeNature=0

Full text of the Protocol: https://rm.coe.int/168008482c

Full text of the Explanatory Report: https://rm.coe.int/16800d3839

Preamble

Third Additional Protocol

The member States of the Council of Europe, signatory to this Protocol,

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

Desirous of strengthening their individual and collective ability to respond to crime;

Having regard to the provisions of the European Convention on Extradition (ETS No. 24) opened for signature in Paris on 13 December 1957 (hereinafter referred to as "the Convention"), as well as the two Additional Protocols thereto (ETS Nos. 86 and 98), done at Strasbourg on 15 October 1975 and on 17 March 1978, respectively;

Considering it desirable to supplement the Convention in certain respects in order to simplify and accelerate the extradition procedure when the person sought consents to extradition,

Have agreed as follows:

Explanatory report

I. The Third Additional Protocol to the European Convention on Extradition, drawn up within the Council of Europe by the Committee of Experts on the Operation of European Conventions in the Penal Field (PC-OC), under the authority of the European Committee on Crime Problems (CDPC), was opened for signature by the member States of the Council of Europe, in Strasbourg, on 10 November 2010.

II. The text of this Explanatory Report, prepared on the basis of that Committee's discussions does not constitute an instrument providing an authoritative interpretation of the text of the Protocol although it may facilitate the understanding of its provisions.

Introduction

Under the authority of the European Committee on Crime Problems (CDPC), the Committee of Experts on the Operation of European Conventions on Co-operation in Criminal Matters (PC-OC) is entrusted, in particular, with examining the functioning and implementation of Council of Europe conventions and agreements in the field of crime problems, with a view to adapting them and improving their practical application where necessary.

The need for the modernisation of the legal instruments of the Council of Europe in the criminal justice field, including the European Convention on Extradition (hereinafter referred to as "the Convention"), in order to enhance international co-operation, has been highlighted on several occasions. In particular, the "New Start" report (PC-S-NS (2002) 7, presented to the CDPC by the Reflection Group on developments in international co-operation in criminal matters) approved by the CDPC in June 2002 pointed to the necessity of realising a European area of shared justice. The Warsaw declaration and the Plan of Action adopted by the third Summit of Council of Europe Heads of State and Government of the member States of the Council of Europe (Warsaw, 16-17 May 2005) underlined the commitment, at the highest political level, to making full use of the Council of Europe's standard-setting potential and to promoting implementation and further development of the Organisation's legal instruments and mechanisms of legal cooperation.

At the High-Level Conference of the Ministries of Justice and of the Interior entitled "Improving European Cooperation in the Criminal Justice Field" held in Moscow (Russian Federation) on 9 and 10 November 2006, the Council of Europe was encouraged to continue its efforts to improve the operation of the main conventions regulating international cooperation in criminal matters, in particular those regarding extradition, in order to identify the difficulties encountered and to consider the need for any new instruments.

At its 52nd meeting (October 2006) the PC-OC put forward a number of proposals relating to the modernisation of the European Convention on Extradition, as amended by the two additional protocols thereto of 1975 and 1978. The Convention, which dates from 1957, is indeed one of the oldest European conventions in the criminal law field and has a direct impact on individuals' rights and freedoms, to which the CDPC asked the PC-OC to pay particular attention.

In this context, the PC-OC suggested, inter alia, that the Convention be revised first of all in order to include mechanisms of simplified extradition when the person sought consents to her/his extradition, the rationale being that if such consent is expressed, there is no need to go through all the formalities of extradition procedures. As a result, delays of surrender would in many cases be reduced substantially. This would contribute to achieve the important objective of increasing the efficiency and speed of extradition mechanisms, while respecting individuals' rights.

The PC-OC took account of the fact that extradition under simplified procedures already existed in practice and that it would be desirable to elaborate a treaty basis for such procedures, accessible to a large number of European States. It decided to draw inspiration from the simplified extradition mechanism provided for in the 1995 Convention on simplified extradition procedure between the Member States of the European Union.

The CDPC, at its 56th plenary session (June 2007), decided to mandate the PC-OC, inter alia, to draft the necessary legal instruments to give a treaty basis to simplified forms of extradition when the person sought consents, along the lines proposed by the PC-OC. Having studied various options, the PC-OC agreed that an additional protocol to the Convention was the most appropriate solution in this respect. Consequently, it adopted a draft Third Additional Protocol to the Convention at its 56th meeting (May 2009) and submitted it to the CDPC for approval.

The drafts of the third Additional Protocol and the Explanatory report thereto were examined and approved by the CDPC at its 58th plenary session (12-16 October 2009) and submitted to the Committee of Ministers.

At the 1090th meeting of their Deputies on 7 July 2010, the Committee of Ministers adopted the text of the Third Additional Protocol and decided to open it for signature, in Strasbourg on 10 November 2010.

General considerations

The Protocol was drafted to address the concern that, while persons concerned consent to their surrender in view of their extradition in a large number of cases, the procedure under the Convention still remains long and can last up to several months.

One of the central issues for the Protocol was whether, in the event that a person is arrested on the basis of a request for provisional arrest, in application of Article 16, paragraph 2 of the Convention, and consents to her/his extradition, there was a need for a formal request of extradition and for all the supporting documents requested by Article 12 of the Convention.

The PC-OC observed that practice varied among States. In a majority of States where a simplified procedure of extradition is applied, it is considered that it is in the interest of the person sought to be quickly surrendered once her/his consent has been given. Some States concerned often find the information they need in the request for provisional arrest. In other States however, there is a need for the extradition request and for all or some of the documents provided for in Article 12 of the Convention. The consent of the person would, in this case, be taken into account in the extradition procedure in order to have a quicker final decision and a quicker surrender.

This is the reason for which the Protocol establishes as a principle extradition in accordance with the simplified procedure on the basis of the information included in a request for provisional arrest (complemented, if necessary by additional information). Nevertheless, the Protocol provides the possibility for the Parties to make a reservation specifying that they still require an extradition request, including all or some of the documents mentioned in Article 12 of the Convention.

The consent of the person sought can be significant for the conduct of the extradition procedure in the requested Party, even if such consent has been expressed after the reception of a request of extradition and the supporting documents under Article 12 of the Convention. The scope of the Protocol therefore extends also to these situations.

In both cases, the consent expressed by the person sought is central for the simplified procedure of extradition and shall be voluntary, conscious and in full awareness of the legal consequences of this consent. The person concerned shall not be deprived from the procedural guarantees defined by the laws of each Party, notably the access to a defence lawyer and to an interpreter.

The Protocol also establishes a series of time limits which enshrine the concern for efficiency and speed in the criminal justice field and which should reduce to a minimum the delays in the proceedings in the requesting Parties awaiting surrender, when the persons concerned do not intend to oppose their surrender.

It is nevertheless important to note that the consent does not deprive the requested Party of the possibility of invoking a ground for refusal set forth in the Convention. That State also has full discretion as to the application of the rule of speciality, as defined under Article 14 of the Convention, in simplified extradition cases and as to the relationship between the rule of speciality and the consent of the person.

The Protocol does not preclude its Parties from establishing in their national legislation and applying in practice even more simplified extradition procedures as long as such procedures are compatible with the purpose and the general principles of the Protocol.

Comments

The provision of a simplified extradition mechanism for cases when the person concerns consents to his or her extradition has been one of the first issues discussed within the context of modernisation of CoE Conventions in the criminal field, with many PC-OC members considering that, in this case, there was no need to go through all the formalities of an extradition procedure. It was suggested that the simplified extradition mechanism proposed in the EU convention on simplified extradition of 1995 could serve as a reference for normative changes in the CoE context. Although several committee members underlined that forms of simplified extradition already existed in practice (one expert informed that 2/3 of extradition requests are dealt with through such simplified procedures), they considered it would be desirable to elaborate a treaty basis for this, accessible to a high number of States, and that any new norm should not have any negative or limitative impact on the practice in place. Concrete issues discussed in this regard

included whether, in these cases, there should be a need for a formal extradition request, the necessary documentation/information, consent and its consequences, and time limits[232].

At its 53rd meeting, in November 2007, PC-OC had an exchange of views on the basis of a preliminary draft text prepared by Mr. Per Hedvall and based on the 1995 EU Convention on Simplified Extradition. Agreeing that the future instrument on simplified extradition should allow for a certain degree of flexibility, the Committee approved a number of amendments to the draft text. However, certain issues remained outstanding at this point[233], such as:

- *Need for a formal request for extradition*: there was agreement that, for the purposes of simplified extradition, the need for a formal request should be abolished in principle. States should nonetheless be given the possibility of derogating from this principle by means of a declaration made at the time of ratification.
- *Necessary information*: Special attention should be given to the form that the transmission of information should take. Some delegations considered that an alert containing the required information would be sufficient. Certain delegations affirmed that information as such was not sufficient, and that some official documents, in accordance with Article 12 of the **ECE**, were indispensable. Some delegations also indicated that the information had to be provided by a judicial authority.
- *Rule of speciality*: The PC-OC agreed that the relation between the consent to extradition and the renunciation of entitlement to the rule of speciality had to be further examined. Some delegations stated that their national legislation treated consent to extradition as an automatic renunciation of the rule of speciality. For other States, consent to extradition and renunciation of the rule of speciality are two distinct elements, although the former is a precondition for the latter.
- *Time limits*: Whereas the draft text proposed time limits for the notification of consent and of the final decision on extradition, as well as for surrender, some delegations considered that the future instrument on simplified extradition should not include binding time limits. At its last plenary meeting, the CDPC mandated the PC-OC "to consider first of all drafting non-binding measures" regarding time limits. However, the majority of delegations were of the view that the future instrument would have little added value if it did not include any binding time limits, and that the elaboration of binding deadlines would be in conformity with the other part of PC-OC's mandate, i.e. to "draft the necessary legal instruments to give a treaty basis to simplified forms of extradition". The Committee understood that the CDPC's position on time limits was related to extradition in general and not to simplified extradition. Therefore, it decided to ask the CDPC Bureau to clarify whether time limit provisions could be included in a draft instrument on simplified extradition[234].

At the 54th meeting of PC-OC, in April 2008, the Committee discussed the question as to whether the scope of the future Third Additional Protocol to ECE should be limited to simplified extradition or extended to include other issues relating to the modernisation of this Convention then under examination (eg. rule of speciality, lapse of time, compensation). Some delegations expressed the view that it would be more expedient to treat simplified extradition separately from other issues, and the Committee agreed that its priority should be the finalisation of a binding instrument on simplified extradition as soon as possible, although it did not exclude, at this stage, the possibility of this protocol addressing other issues if finalised on time.

The draft discussed at the 54th and 55th meetings of the PC-OC, and finally approved at the 56th meeting, focused solely on the simplified extradition procedure, although discussions run in parallel on other above mentioned issues. The last outstanding issues were the 20-days deadline

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[232] **PC-OC (2006) 16**, *Summary report of the 52nd meeting of the PC-OC*, Strasbourg, 20 November 2006, p. 6.
[233] **PC-OC (2007) 13 Rev**, *List of adopted decisions*, Strasbourg, 23 November 2007, p. 1.
[234] **PC-OC (2007) 14**, *Summary report of the 53rd meeting of the PC-OC*, Strasbourg, 11 December 2007, p. 3.

provided for in Article 7 (considered difficult to accept by the French delegation) and the relationship between the declarations mentioned in Articles 4 (5) and 5 with Article 17 [235].

Article 1 – Obligation to extradite under the simplified procedure

Third Additional Protocol

Contracting Parties undertake to extradite to each other under the simplified procedure as provided for by this Protocol persons sought in accordance with Article 1 of the Convention, subject to the consent of such persons and the agreement of the requested Party.

Explanatory report

This article sets out the basic principle of the Convention, namely the obligation to extradite persons sought, subject to the consent of such persons to their extradition under the simplified procedure, given in accordance with Articles 3 to 5, and the agreement of the requested Party. In accordance with established practice under the Convention, simplified extradition procedures may concern persons against whom the competent authorities of the requested Party are proceeding for an offence (including prosecution and trial), or persons wanted for the carrying out of a sentence or detention order. It is clear from the wording chosen that the consent of the person to her/his extradition does not entail an obligation for the requested Parties to extradite the person in all cases.

The article does not distinguish between the two types of situation for the use of the simplified procedure depending on the supporting documents, namely simplified extradition on the basis of a request for provisional arrest only or on the basis of a request for extradition.

Comments

The PC-OC Mod decided that this Article should concern the principle of applying simplified extradition procedures in general, without distinguishing between the two main hypotheses for their use (presence or absence of a request for provisional arrest)[236].

Recommendations

Already in June 1980, the Committee of Ministers of the CoE had recommended that Contracting States of the **ECE** considered the introduction of a procedure of summary extradition, as follows:

> *With a view to expediting extradition and keeping the period of provisional arrest as short as possible, consideration should be given to the use of a summary procedure enabling the rapid surrender of the person sought without following ordinary extradition procedures, provided that the person concerned consents to it.* (**Recommendation No. R (80) 7 of the Committee of Ministers to member states concerning the practical application of the European Convention on Extradition**)

Article 2 – Initiation of the procedure

Third Additional Protocol

1. When the person sought is the subject of a request for provisional arrest in accordance with Article 16 of the Convention, the extradition referred to in Article 1 of this Protocol shall not be

[235] **PC-OC (2008) 29**: *Summary report of the 55th meeting of the PC-OC*, Strasbourg, 14 April 2009, pp. 1-4.
[236] **PC-OC (2008) 16**: *Summary report of its 54th meeting of the PC-OC*, Appendix IV, Strasbourg, 20 May 2008, p. 19.

subject to the submission of a request for extradition and supporting documents in accordance with Article 12 of the Convention. The following information provided by the requesting Party shall be regarded as adequate by the requested Party for the purpose of applying Articles 3 to 5 of this Protocol and for taking its final decision on extradition under the simplified procedure:

a. the identity of the person sought, including his or her nationality or nationalities when available;

b. the authority requesting the arrest;

c. the existence of an arrest warrant or other document having the same legal effect or of an enforceable judgment, as well as a confirmation that the person is sought in accordance with Article 1 of the Convention;

d. the nature and legal description of the offence, including the maximum penalty or the penalty imposed in the final judgment, including whether any part of the judgment has already been enforced;

e. information concerning lapse of time and its interruption;

f. a description of the circumstances in which the offence was committed, including the time, place and degree of involvement of the person sought;

g. in so far as possible, the consequences of the offence;

h. in cases where extradition is requested for the enforcement of a final judgment, whether the judgment was rendered *in absentia*.

2. Notwithstanding paragraph 1, supplementary information may be requested if the information provided for in the said paragraph is insufficient to allow the requested Party to decide on extradition.

3. In cases where the requested Party has received a request for extradition in accordance with Article 12 of the Convention, this Protocol shall apply *mutatis mutandis*.

Explanatory report

This article defines the two variants for the use of the simplified procedure of extradition:

– paragraphs 1 and 2 apply when the requested Party proceeds on the basis of a request for provisional arrest only, to be complemented, if necessary, with the information mentioned under these paragraphs;

– paragraph 3 extends the scope of the Protocol to cases where there is already an extradition request submitted in accordance with Article 12 of the Convention.

Paragraph 1

This paragraph concerns the main situation targeted by the Protocol, namely the simplified procedure following provisional arrest. It indicates that the starting-point for the simplified extradition procedure is the request for provisional arrest as provided for in Article 16 of the Convention. In accordance with Article 16, paragraph 3 of the Convention, a “red notice” or other message sent through Interpol may also be considered a request for provisional arrest for the purposes of this Protocol.

This paragraph also indicates the consequence of using the simplified procedure on the submission of documents, i.e. in such cases the submission of a request for extradition and the supporting documents required by Article 12 of the Convention are no longer necessary. The decision of extradition may be made on the basis of the information, specified under subparagraphs (a) to (h), including the confirmation that the person is sought in accordance with Article 1 of the Convention, which is either contained in the request for provisional arrest or complements it. This paragraph should not be understood as deterring the requesting Party from

submitting any other information which it considers useful for allowing the requested Party to take a decision on extradition under the simplified procedure.

Information has to be communicated both to the arrested person, providing the basis on which consent to extradition may be given, and to the competent authority of the requested Party, providing the authority with the necessary information to enable it to take its decision on using the simplified procedure of extradition. As a rule, this information should be regarded by the competent authority of the requested Party as being sufficient for taking a decision on extraditing the person concerned. It comprises all the details needed for a proper examination of the question of the requested Party's agreement to the surrender as regards the person concerned, the summary of facts of the offence, the legal description of the offence and reference to the relevant provisions or information about the sentence which has already been delivered. As regards sub-paragraph (h), where the judgment was rendered *in absentia*, the drafters considered that it would be desirable for the requesting Party to send additional information on the possibility of a retrial or the relevant circumstances of the proceedings so as to allow the requested Party to ascertain, without asking for supplementary information, whether the safeguards of the **European Convention on Human Rights** (ECHR) have been observed.

The discussions concerning these provisions showed that the majority of drafters were in favour of following the simplified extradition procedure on the basis of the request for provisional arrest, abolishing the requirement for a formal extradition request and the documents specified under Article 12 of the Convention, and indeed considered this to be the principal added value of this Protocol. However, some States wish to proceed with an extradition request in all cases. The majority of drafters agreed, therefore, that those States who cannot apply this paragraph should have the possibility of making a reservation to that effect (see Article 17, paragraph 2).

Thus, at the time of signature or when depositing their instrument of ratification, acceptance, approval or accession, States have the possibility of making a reservation to this paragraph, specifying that they require a request for extradition, and possibly some or all of the documents mentioned under Article 12 of the Convention, in cases of extradition under the simplified procedure.

Paragraph 2

This paragraph allows for the possibility of derogating from paragraph 1 and of requesting supplementary information if the information supplied is insufficient for the competent authority of the requested Party to give agreement to the extradition. However, this derogation concerns information as opposed to documents, and should not conflict with the abolition of the requirement to submit the documents specified by Article 12 of the Convention for the purposes of the simplified procedure of extradition.

Paragraph 3

This paragraph extends the scope of the Protocol to cases where the person sought consents after an extradition request has been submitted by the requesting Party, regardless of whether the request was or was not preceded by a request for provisional arrest. The Parties shall apply all the provisions of the Protocol in these cases, except for those which are only relevant to the simplified extradition procedure on the basis of a request for provisional arrest (such as Articles 6 and 10 of the Protocol).

Comments

In discussions concerning the necessary documentation or information to be provided, reference has been made to Articles 3 and 4 of the EU Convention on simplified extradition ("information to be provided"). In the view of experts, this information should in any case enable the requested State to assess notably whether the case deals with an extraditable offence, the double criminality requirement (for which a description of the facts and of the applicable legislation is needed), as well as possible grounds for refusal.

PC-OC discussed two distinct hypotheses for the use of simplified extradition procedures, depending on whether simplified extradition is initiated on the basis of a request for provisional arrest, or a formal extradition request in accordance with the Convention. It was agreed t to cater for the two variants in this same Article 2.[237]

Also, aware of the fact that a number of States cannot proceed without a formal extradition request in all cases, the PC-OC agreed that the Protocol should provide for the possibility of making a reservation regarding the first variant (i.e. simplified extradition only on the basis of a request for provisional arrest). The PC-OC decided that the best way for doing this would be to include Article 2 (1) among the list of provisions which can be subject to a reservation (Article 17 (2)). It also agreed that the reasoning behind this drafting decision should be made explicit in the explanatory report[238].

Following the proposal from two delegations, the PC-OC Mod agreed to include a reference to the person's nationality in the Protocol, as opposed to mentioning it only in the explanatory report[239].

Article 3 – Obligation to inform the person

Third Additional Protocol

Where a person sought for the purpose of extradition is arrested in accordance with Article 16 of the Convention, the competent authority of the requested Party shall inform that person, in accordance with its law and without undue delay, of the request relating to him or her and of the possibility of applying the simplified extradition procedure in accordance with this Protocol.

Explanatory report

The main purpose of this article is to ensure that the person sought is informed of the reasons for her/his arrest and the possibility of consenting to her/his extradition. For the purposes of this article, the drafters agreed that the term "arrested" refers to any action taken by the requested Party in accordance with Article 16 of the Convention. Depending on the national legislation, such action may include detention, as well as other measures restricting the individual freedom of the person, such as bail, house arrest or a ban to leave the country.

This article requires the Parties to ensure that persons arrested for the purpose of extradition are informed of the request concerning them and of the possibility of their consenting to their extradition. The information is to be given by the "competent authority", e.g. the authority empowered to take persons into custody. This does not necessarily imply the intervention of a judicial authority, and such information could for example be provided by the police at the moment of arrest. It should be given without undue delay after the person is taken into custody and in accordance with the law of the requested Party[240].

Article 4 – Consent to extradition

Third Additional Protocol

1. The consent of the person sought and, if appropriate, his or her express renunciation of entitlement to the rule of speciality shall be given before the competent judicial authority of the requested Party in accordance with the law of that Party.

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[237] **PC-OC (2008) 16**, *Summary report of the 54th meeting of the PC-OC*, Strasbourg, 20 May 2008, p. 2.
[238] **PC-OC (2008) 16**, *Summary report of the 54th meeting of the PC-OC*, Strasbourg, 20 May 2008, p. 2 and Appendix IV, p. 19.
[239] **PC-OC (2008) 16**, […], Appendix IV, p. 19.
[240] **PC-OC (2008) 16**, […], p. 7.

2. Each Party shall adopt the measures necessary to ensure that consent and, where appropriate, renunciation, as referred to in paragraph 1, are established in such a way as to show that the person concerned has expressed them voluntarily and in full awareness of the legal consequences. To that end, the person sought shall have the right to legal counsel. If necessary, the requested Party shall ensure that the person sought has the assistance of an interpreter.

3. Consent and, where appropriate, renunciation, as referred to in paragraph 1, shall be recorded in accordance with the law of the requested Party.

4. Subject to paragraph 5, consent and, where appropriate, renunciation, as referred to in paragraph 1, shall not be revoked.

5. Any State may, at the time of signature or when depositing its instrument of ratification, acceptance, approval or accession, or at any later time, declare that consent and, where appropriate, renunciation of entitlement to the rule of speciality, may be revoked. The consent may be revoked until the requested Party takes its final decision on extradition under the simplified procedure. In this case, the period between the notification of consent and that of its revocation shall not be taken into consideration in establishing the periods provided for in Article 16, paragraph 4, of the Convention. Renunciation of entitlement to the rule of speciality may be revoked until the surrender of the person concerned. Any revocation of the consent to extradition or the renunciation of entitlement to the rule of speciality shall be recorded in accordance with the law of the requested Party and notified to the requesting Party immediately.

Explanatory report

This article deals with the way in which consent is given. It also applies to renunciation of entitlement to the rule of speciality where the law of the requested Party provides for such renunciation, as distinct from consent to extradition, in accordance with Article 5 of the Protocol.

The Protocol does not specify at which point the person's consent must be established. However, where the procedure is set in motion by the provisional arrest of the person sought in accordance with Article 2, paragraph 1, the requested Party should take into account Article 6, which provides for notification of consent within 10 days from the date of the provisional arrest. This time limit does not apply where the requested Party made a reservation to Article 2, paragraph 1.

Consent (and, where appropriate, renunciation of entitlement to the rule of speciality) is established before the competent judicial authority of the requested Party. The competent judicial authority may be, for example, a judge, a court, a magistrate or a prosecutor, depending on the law of the requested Party.

The forms in which consent (and, where appropriate, renunciation of entitlement to the rule of speciality) is established are determined by the legislation of each Party. Paragraph 2, however, requires Parties to adopt the measures necessary to ensure that consent (and, where appropriate, renunciation of entitlement to the speciality rule) is established in such a way as to show that the person concerned has expressed it voluntarily and in full awareness of the legal consequences (free and informed consent). It provides that, for this purpose, the arrested person shall have the right to legal counsel, and where appropriate, to an interpreter. It is important for Parties to take all necessary measures in order to ensure that this right is efficiently implemented in practice, including through the provision of legal aid where necessary.

As to the legal consequences of consent, the information given to the person should include the implications of renunciation of the guarantees of the ordinary procedure, as well as the possible irrevocability of the consent given, in accordance with paragraph 4.

In view of the provisions of Article 5 of the Protocol, the person must also be aware of any effects of her/his consent to extradition on her/his entitlement to the rule of speciality, i.e. the possibility of being prosecuted on grounds other than those on which the simplified extradition procedure is based. As regards the effects of express renunciation of entitlement to the rule of speciality, the

information given should concern the effects of such renunciation, the rule of speciality and the possible irrevocability of renunciation.

Paragraph 3 provides that consent to extradition (and, where appropriate, renunciation of entitlement to the rule of speciality) shall be recorded. This provision implies that the procedure for establishing consent (and, where appropriate, renunciation of entitlement to the speciality rule) must allow for subsequent verification of whether consent was given voluntarily and in full awareness of the legal consequences. However, the procedures and forms for such a record are left to the national law.

Paragraph 4 provides that consent to extradition (and, where appropriate, renunciation of entitlement to the rule of speciality) shall not be revoked. While the drafters chose to establish this as the rule, they were also aware that for some States the possibility of revoking either consent or renunciation to the entitlement to the rule of speciality is a very important principle. They decided therefore to include paragraph 5 of this article, which provides the possibility for these States to allow for such revocation by way of a declaration made at the time of signature or when depositing their instrument of ratification, acceptance, approval or accession, or at any later time.

The drafters were also aware, however, that an untimely revocation may cause legal and practical difficulties, in particular with regard to the rule of speciality. An example for this would be the revocation of renunciation of entitlement to the rule of speciality after the first hearing in the requesting Party following surrender.

In order to strike a balance between the possibility of revocation foreseen in paragraph 5 and the concern for the efficiency of the simplified extradition procedure, and taking into account the fact that Article 4 provides the safeguards to ensure that consent is given in full awareness of legal consequences, the drafters decided that it would be appropriate to limit the possibility of revocation in time. In doing so, the Protocol distinguishes between the revocation of consent and of renunciation. Both of these time limits are to be seen as the maximum acceptable for the simplified extradition procedure, and shorter time limits for revocation defined in national legislation would be compatible with the Protocol.

As regards consent to extradition, the Parties can provide for the possibility of revocation until they take their final decision on simplified extradition which they notify to the requesting Party under Article 7 of the Protocol. In this case, in order to ensure that revocation of consent by the person concerned is not prejudicial to the smooth conduct of the extradition procedure, paragraph 5 provides that the period between the notification of consent and notification of its revocation shall not be taken into consideration in establishing the periods of provisional arrest of 18 and 40 days provided for in Article 16, paragraph 4 of the Convention. This means that where a person revokes her/his consent the requesting Party will have as many days for submitting its request for extradition as it had when it received notification of the person's consent to her/his extradition and it ceased preparing the documents required under Article 12 of the Convention.

As for revocation of renunciation of entitlement to the rule of speciality, the Protocol limits the possibility of such revocation until the actual surrender of the person to the requesting Party. The “surrender” should be understood as the moment at which the person is taken over by the authorities of the requesting Party.

While the Protocol requires revocation to be recorded and notified immediately to the requesting Party, it does not prescribe details of a procedure for revocation. Thus, the requested Party does not have the obligation to follow the same procedure for dealing with revocation as for establishing consent (see paragraphs 1 and 2).

Comments

Since its earlier discussions on a simplified extradition procedure, the PC-OC “agreed that the consent expressed by the person sought should be voluntary, conscious and in full awareness of

the legal consequences. The person should not be deprived from the procedural guarantees defined by each State, notably the access to a defence lawyer and to an interpreter". The consequences of such consent have also been discussed, with the Committee agreeing that such consent should not deprive the requested State to invoke a ground for refusal set forth in the Convention[241]. The application of the rule of speciality in relation with these cases has equally been early discussed[242] and several options considered in this regard[243].

The PC-OC Mod agreed that "competent judicial authority" included the Office of the Public Prosecutor, in accordance with Article 1 of the Convention and its explanatory report[244].

During its discussions on this Article, the PC-OC took note of the fact that the possibility of revoking either consent or renunciation to the entitlement to the rule of speciality was a very important principle for some States. Therefore, while consent and renunciation are, in principle, considered irrevocable, Article 5 (5) provides the possibility for States to allow for such revocation by way of a declaration made at the time of ratification[245].

The PC-OC was equally aware, however, that an untimely revocation could cause legal and practical difficulties, in particular with respect to the rule of speciality. The majority of delegations were therefore in favour of introducing time limits beyond which consent and renunciation should become irrevocable in all cases. Following a debate concerning which time limits would be acceptable for those countries particularly attached to the principle of revocability, the PC-OC came to the compromise conclusion that two separate deadlines should be envisaged in the final draft: consent to simplified extradition shall become irrevocable at the time of the notification of the extradition decision by the requested State to the requesting State; whereas renunciation to the entitlement to the speciality rule could be revoked until the date of surrender. It was also decided that the explanatory report should make clear that these would be the maximum time limits, which do not preclude shorter deadlines for revocation of either consent or renunciation. Nevertheless, two delegations still considered that this drafting solution could be problematic in certain situations and PC-OC Mod was instructed to look further into this issue and identify possible solutions. Another identified problem was the definition of the actual date of surrender – a modification of the templates for the PC-OC database on national procedures for extradition, with a view to including information for each State Party, was suggested in this regard [246]

In its **Guidance on good practices regarding the post-surrender phase in extradition proceedings**, adopted in October 2023, the PC-OC stated that Article 18 of the **ECE** regulates the formal obligation to transmit the most relevant information, such as the final decision on extradition or, by analogy, the requested person's renunciation of entitlement to the rule of speciality.

Article 5 – Renunciation of entitlement to the rule of speciality

Third Additional Protocol

Each State may declare, at the time of signature or when depositing its instrument of ratification, acceptance, approval or accession, or at any later time, that the rules laid down in Article 14 of the Convention do not apply where the person extradited by this State, in accordance with Article 4 of this Protocol:

a. consents to extradition; or

[241] **PC-OC (2006) 16**, *Summary report of the 52nd meeting of the PC-OC*, Strasbourg, 20 November 2006, pp. 7-8.
[242] **PC-OC (2006) 12**, *Summary report of the 51st meeting of the PC-OC*, Strasbourg, 6 October 2006, §32.
[243] **PC-OC (2006) 16** (…), p. 8.
[244] **PC-OC (2008) 16**, […], Appendix IV, p.21.
[245] **PC-OC (2008) 16**, […], p. 3.
[246] **PC-OC (2008) 16**, […], p. 3.

b. consents to extradition and expressly renounces his or her entitlement to the rule of speciality.

Explanatory report

Article 5 deals with the question of the application of the rule of speciality, enshrined in Article 14 of the Convention, to the simplified extradition procedure. Article 14, paragraph 1 (a) of the Convention allows the requested Party to consent to the extension of extradition to offences other than those for which the person was extradited.

The member States of the Council of Europe have a wide range of different practices with regard to giving such consent in simplified extradition cases. This article, while giving a legal basis for the non-application of Article 14 in the simplified extradition procedure, does not impose any obligations on the Parties in this respect. It provides that any Party may declare that the rule of speciality, as set out in Article 14 of the Convention, will not apply in the case of the simplified procedure. The main concern of the Protocol is thus one of ensuring that Parties are kept informed of this aspect of each other's national procedures.

To allow for the differences between legal systems, two declarations are possible: one to the effect that the rule of speciality will not apply when the person consents to her/his extradition, such consent automatically entailing renunciation of entitlement to the speciality rule; the other to the effect that the rule of speciality will not apply where the person who has consented to her/his extradition expressly and clearly renounces her/his entitlement to the rule of speciality.

Article 14 of the Convention continues to apply for those Parties, acting as requested States, who have not made a declaration under this article.

Article 6 – Notifications in case of provisional arrest

Third Additional Protocol

1. So that the requesting Party may submit, where applicable, a request for extradition in accordance with Article 12 of the Convention, the requested Party shall notify it, as soon as possible and no later than ten days after the date of provisional arrest, whether or not the person sought has given his or her consent to extradition.

2. In exceptional cases where the requested Party decides not to apply the simplified procedure in spite of the consent of the person sought, it shall notify this to the requesting Party sufficiently in advance so as to allow the latter to submit a request for extradition before the period of forty days established under Article 16 of the Convention expires.

Explanatory report

This article deals with situations where the simplified extradition procedure was initiated on the basis of a request for provisional arrest in accordance with Article 2, paragraph 1 of the Protocol. This implies naturally that its provisions do not apply when the requested Party has made a reservation to Article 2, paragraph 1 in accordance with Article 17 of the Protocol.

Paragraph 1

Immediate notification of consent is essential to ensure the smooth conduct of the simplified procedure where its starting-point is the provisional arrest of the person sought. The reason behind stricter time limits in these cases is the fact that Article 16, paragraph 4 of the Convention requires the requested Party to terminate provisional arrest if it does not receive the request for extradition and supporting documents within 40 days following the arrest.

The preparation of a request for extradition and other documents mentioned in Article 12 of the Convention, with the necessary translations, can be time-consuming and expensive. The drafters considered that early notification would enable the requesting Party to suspend preparation of the

documents required and save these resources, thereby increasing the added value of the Convention.

Paragraph 2

In the case of refusal of extradition under the simplified procedure decided on by the competent authority of the requested Party in spite of the consent of the person sought, the requesting Party will have – through a combination of the two periods provided for in Articles 6, paragraph 1 and Article 7 of the Protocol – at least ten days before the expiry of the 40-day provisional arrest period laid down in Article 16 of the Convention in which to submit a request for extradition in accordance with Article 12 of the Convention.

Considering that this might not always be sufficient for the preparation of the request and the supporting documents, the drafters decided to emphasise that such a refusal, despite the consent of the person sought, should be exceptional and should always leave a reasonable time for the requesting Party to revert to the ordinary extradition procedure as provided for in the Convention.

Similarly, in exceptional cases, Parties that have made a reservation to Article 2, paragraph 1 may apply the ordinary extradition procedure despite the consent of the person concerned.

Comments

The PC-OC Mod suggested deleting these provisions, but decided to leave it to the plenary to take the final decision. The deletion of this Article would imply that, following the notification of provisional arrest under Article 16, paragraph 3 of the Convention, the requesting State should in all cases proceed with the preparation of a request for extradition and the supporting documents required by Article 12 of the Convention, regardless of whether the person sought has consented.

Many delegations considered that this option would reduce the added value of the Protocol. Given that it is time-consuming and expensive to prepare a formal request and the necessary translations, they considered that it would be more efficient to know in advance that the person consented and that these resources can therefore be saved. In addition, the majority of delegations were in favour of including a short time limit (no longer than 10 days) for the notification of consent. The PC-OC decided therefore, at its 54th meeting, to keep this Article with such time limit, and also agreed that the explanatory report should make clear that this time limit only applies in those cases where the requested State is able to proceed on the basis of a request for provisional arrest, in accordance with Article 2 (1) of **AP3**[247].

Article 7 – Notification of the decision

Third Additional Protocol

Where the person sought has given his or her consent to extradition, the requested Party shall notify the requesting Party of its decision with regard to the extradition under the simplified procedure within twenty days of the date on which the person consented.

Explanatory report

This article seeks to speed up procedures by introducing a time limit for the requested Party to notify its decision with regard to the extradition under the simplified procedure. It provides that the extradition decision taken by the competent authority of the requested Party must be notified within twenty days from the day on which the person consented. This time limit applies regardless of whether the simplified extradition procedure was initiated on the basis of a request for provisional arrest or a request for extradition.

Of course, this is a maximum period and it is desirable that, where there appears to be no obstacle to extradition, just as in the case where there appears to be a major obstacle, any decision,

[247] **PC-OC (2008) 16**, (…), p. 3 and Appendix IV, p. 22.

positive or negative, should be notified as soon as possible after the person concerned has consented.

In some member States, a positive decision on extradition is not considered final until the time limit provided in domestic legislation for appealing against it has lapsed. As the simplified extradition procedure is based on the consent of the person concerned, any action by the person challenging a positive extradition decision, such as an appeal, is to be considered as a revocation of consent for the purposes of the Protocol and the provisions of Article 4, paragraph 5 of the Protocol apply, if the requested Party made a declaration under that paragraph. The drafters considered that, where these States are the requested Parties, it would be appropriate for them to notify the initial decision which is subject to appeal within the deadline of 20 days, in order to avoid legal uncertainty for the requesting Party, in particular where the 40-day limit of Article 16 of the Convention is applicable. Thus, even if the initial positive extradition decision is appealed against, due to the fact that the period between the date of consent and of its revocation is not taken into account for the purposes of Article 16, the requesting Party would have enough time to use the ordinary procedure by submitting a request for extradition and the supporting documents in accordance with Article 12 of the Convention.

Comment

The PC-OC Mod decided not to include a deadline for the notification of the consent of the person sought and to foresee a deadline for the notification of the final decision on simplified extradition that would apply regardless of the presence or absence of a request for provisional arrest[248].

Article 8 – Means of communication

Third Additional Protocol

For the purpose of this Protocol, communications may be forwarded through electronic or any other means affording evidence in writing, under conditions which allow the Parties to ascertain their authenticity, as well as through the International Criminal Police Organisation (Interpol). In any case, the Party concerned shall, upon request and at any time, submit the originals or authenticated copies of documents.

Explanatory report

Article 8 does not replace Article 12, paragraph 1 of the Convention (as modified by the Second Additional Protocol to the Convention). It completes Article 12 of the Convention in that it provides for the use of modern means of communication as well as communication through the Interpol, in order to ensure efficient communication in the context of the simplified extradition procedure.

This article provides a legal basis for speedy communication while ensuring a written record and its authenticity. The Parties may also request to obtain the original document or an authenticated copy, in particular by mail.

Comments

The PC-OC Mod agreed that the question of the definition of competent authorities goes beyond the scope of this Protocol and should be addressed in the framework of the modernisation of the Convention in general. The present wording is based on Article 4, paragraph 9 of the Second Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters, with the addition of the Interpol channel[249].

[248] **PC-OC (2008) 16**, (…), Appendix IV, p. 22.
[249] **PC-OC (2008) 16**, (…), Appendix IV, p. 22.

Article 9 – Surrender of the person to be extradited

Third Additional Protocol

Surrender shall take place as soon as possible, and preferably within ten days from the date of notification of the extradition decision.

Explanatory report

While the provisions of the Convention concerning surrender (Article 18) remain applicable in the simplified extradition procedure, this article, in accordance with the spirit of the Protocol, highlights the importance of a speedy surrender when there is consent to extradition. The use of modern means of communication, in accordance with Article 8 of the Protocol, is an important element in the context of surrender.

While the drafters considered it unrealistic to set a mandatory deadline for surrender in simplified extradition cases, they nonetheless thought it necessary to send a strong signal to the Parties regarding the need to ensure surrender as quickly as possible. Accordingly, they agreed that surrender within ten days of the receipt of notification of the extradition decision by the requesting Party would be a reasonable and practicable goal in the great majority of cases.

As the Protocol does not regulate the issue of postponed or conditional surrender, and in accordance with its Article 12, paragraph 1, the possibility of postponed or conditional surrender remains open in accordance with Article 19 of the Convention in cases where extradition was granted following the simplified procedure.

Comments

While most delegations agreed that a time limit for surrender would represent a clear added value for this Protocol, a wide variety of opinions was expressed regarding the precise time limit. The proposals ranged from 10-15 days, up to 90 days. Twenty days was considered a compromise solution by the majority of delegations. Most delegations agreed that, in the vast majority of cases, 20 days following the notification of the extradition decision would be sufficient for surrender, although a few feared it might be too short. It was stressed during the 54th meeting that, notwithstanding the time limit for the surrender, Article 18 of the Convention would continue to apply in practice. This implies that, in exceptionally difficult cases where 20 days would not be sufficient for surrendering or taking over the person to be extradited, the Parties can arrange a new date for surrender, in accordance with paragraph 5 of Article 18 of the Convention[250].

At the same meeting, the PC-OC decided to redraft this provision. It also agreed that the explanatory report should clarify the relationship between the Convention and the Protocol, in particular as regards the flexibility provided in case one of the Parties is not able to surrender or take over the extradited person within the given time frame. It also made reference to the need of using modern means of communication (Article 8 of **AP3**) in this context[251].

Article 10 – Consent given after expiry of the deadline laid down in Article 6

Third Additional Protocol

Where the person sought has given his or her consent after expiry of the deadline of ten days laid down in Article 6, paragraph 1, of this Protocol, the requested Party shall apply the simplified

[250] **PC-OC (2008) 16**, (…), Appendix IV, p. 23.
[251] **PC-OC (2008) 16**, (…), pp. 3-4 and Appendix IV, p. 23.

procedure as provided for in this Protocol if it has not yet received a request for extradition within the meaning of Article 12 of the Convention.

Explanatory report

This article concerns the legal arrangements applicable where the person consents independently of the conditions laid down in Articles 2 to 9 of the Protocol and in particular after the ten-day period following provisional arrest specified in Article 6 has expired. It therefore does not concern the States which have made a reservation to Article 2, paragraph 1 of the Protocol.

This article applies to cases where the person consents after the expiry of the initial ten-day period but before the expiry of the forty-day period stipulated in Article 16 of the Convention and before the requesting Party has submitted a formal request for extradition. It provides that the requested Party shall apply the simplified procedure provided for in the Protocol. If no consent has been given when the initial ten-day period expires, the requesting Party will of course have to prepare the request for extradition without waiting for the person to consent at a later stage in order to ensure that that request can be made within the maximum period of forty days.

Article 11 – Transit

Third Additional Protocol

In the event of transit under the conditions laid down in Article 21 of the Convention, where a person is to be extradited under a simplified procedure to the requesting Party, the following provisions shall apply:

a. the request for transit shall contain the information required in Article 2, paragraph 1, of this Protocol;

b. the Party requested to grant transit may request supplementary information if the information provided for in sub-paragraph a is insufficient for the said Party to decide on transit.

Explanatory report

This article follows on from the simplification operated by Article 2 of the Protocol. It simplifies the conditions applicable to transit as laid down by Article 21 of the Convention. It is important to underline that the new means of communication pursuant to Article 8 of the Protocol also apply in the case of transit.

By way of derogation from Article 21, paragraph 3 of the Convention, a request for transit may be made through electronic or any other means affording evidence in writing (such as fax or electronic mail), and the decision of the Party requested to grant transit may be made known by the same method.

The request does not have to be accompanied by the documents referred to in Article 12, paragraph 2 of the Convention. It is important to note that the information contained under Article 2, paragraph 1 of the Protocol may be considered sufficient in general for the purposes of granting transit, regardless of whether the Parties in question made a reservation in accordance with Article 17, paragraph 2 of the Protocol. Nevertheless, in exceptional cases where this information is not sufficient for the State of transit to reach a decision on granting transit, paragraph 2 allows for the possibility of requesting supplementary information from the Party requesting transit.

The drafters considered that Article 11 of the Protocol could also cover cases where only the requesting Party and the Party requested to grant transit are Parties to the Protocol. In this case, the Party requested to grant transit can ask for additional information in accordance with Article 11(b), for example in relation to safeguards foreseen in Article 4, paragraphs 1 and 2 of the Protocol.

Comments

The PC-OC Mod agreed that the new means of communication pursuant to Article 8 of the Protocol should apply in the case of transit. In principle, the Party granting transit should respect the agreement between the requested and requesting Parties. As for the information required, even those delegations which would not proceed only on the basis of a request for provisional arrest and the information contained under Article 2, paragraph 1 for the purposes of simplified extradition, agreed that this information would be sufficient for the purposes of granting transit[252].

Article 12 – Relationship with the Convention and other international instruments

Third Additional Protocol

1. The words and expressions used in this Protocol shall be interpreted within the meaning of the Convention. As regards the Parties to this Protocol, the provisions of the Convention shall apply, *mutatis mutandis*, to the extent that they are compatible with the provisions of this Protocol.

2. The provisions of this Protocol are without prejudice to the application of Article 28, paragraphs 2 and 3, of the Convention concerning the relations between the Convention and bilateral or multilateral agreements.

Explanatory report

This article clarifies the relationship between the Protocol on the one hand, and the Convention and other international agreements on the other hand.

Paragraph 1 ensures uniform interpretation of the Protocol and the Convention by providing that the words and expressions used in the Protocol shall be interpreted within the meaning of the Convention. The Convention should be understood as the European Convention on Extradition of 1957 (ETS No. 24), as amended between Parties concerned by the Additional Protocol (ETS No. 86) and/or the Second Additional Protocol (ETS No. 98) thereto.

Paragraph 1 further clarifies the relationship between the provisions of the Convention and those of the Protocol, i.e. as between the Parties to the Protocol, the provisions of the Convention shall apply to the extent that they are compatible with the provisions of the Protocol, in accordance with general principles and norms of international law.

Paragraph 2 clearly states that the Protocol does not alter the relation between the Convention and subsequent bilateral or multilateral agreements (Article 28, paragraph 2 of the Convention) or the possibility for Parties to regulate their mutual relations with regard to extradition exclusively in accordance with a system based on a uniform law (Article 28, paragraph 3 of the Convention).

This implies in particular that declarations made by EU member States in relation with the European Union Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between member States (2002/584/JHA) would automatically apply to the Protocol and would make it unnecessary for the States concerned to make new declarations to that effect.

Article 13 – Friendly settlement

Third Additional Protocol

The European Committee on Crime Problems of the Council of Europe shall be kept informed regarding the application of this Protocol and shall do whatever is necessary to facilitate a friendly settlement of any difficulty which may arise out of its interpretation and application.

Explanatory report

[252] **PC-OC (2008) 16**, (…), pp. 3-4 and Appendix IV, p. 24.

This article makes the European Committee on Crime Problems the guardian over the interpretation and application of the Protocol and follows the precedents established in other European conventions in the criminal justice field. It also follows Recommendation (99) 20 of the Committee of Ministers, concerning the friendly settlement of any difficulty that may arise out of the application of the Council of Europe conventions in the penal field. The reporting requirement which it lays down is intended to keep the European Committee on Crime Problems informed about possible difficulties in interpreting and applying the Protocol, so that it may contribute to facilitating friendly settlements and proposing amendments to the Convention and its Protocols which might prove necessary.

Comments

Despite the fact that this is a standard provision included in all conventions concerning criminal matters, at the 54th meeting of the PC-OC one delegation stated that it had a reservation *vis-à-vis* this article[253].

Article 14 – Signature and entry into force

Third Additional Protocol

1. This Protocol shall be open for signature by the member States of the Council of Europe which are a Party to or have signed the Convention. It shall be subject to ratification, acceptance or approval. A signatory may not ratify, accept or approve this Protocol unless it has previously ratified, accepted or approved the Convention, or does so simultaneously. Instruments of ratification, acceptance or approval shall be deposited with the Secretary General of the Council of Europe.

2. This Protocol shall enter into force on the first day of the month following the expiration of a period of three months after the deposit of the third instrument of ratification, acceptance or approval.

3. In respect of any signatory State which subsequently deposits its instrument of ratification, acceptance or approval, this Protocol shall enter into force on the first day of the month following the expiration of a period of three months after the date of deposit.

Article 15 – Accession

Third Additional Protocol

1. Any non-member State which has acceded to the Convention may accede to this Protocol after it has entered into force.

2. Such accession shall be effected by depositing an instrument of accession with the Secretary General of the Council of Europe.

3. In respect of any acceding State, the Protocol shall enter into force on the first day of the month following the expiration of a period of three months after the date of the deposit of the instrument of accession.

Article 16 – Territorial application

[253] **PC-OC (2008) 16**, (…), pp. 3-4 and Appendix IV, p. 24.

Third Additional Protocol

1. Any State may, at the time of signature or when depositing its instrument of ratification, acceptance, approval or accession, specify the territory or territories to which this Protocol shall apply.

2. Any State may, at any later time, by declaration addressed to the Secretary General of the Council of Europe, extend the application of this Protocol to any other territory specified in the declaration. In respect of such territory the Protocol shall enter into force on the first day of the month following the expiration of a period of three months after the date of receipt of such declaration by the Secretary General.

3. Any declaration made under the two preceding paragraphs may, in respect of any territory specified in such declaration, be withdrawn by a notification addressed to the Secretary General of the Council of Europe. The withdrawal shall become effective on the first day of the month following the expiration of a period of six months after the date or receipt of such notification by the Secretary General.

Article 17 – Declarations and reservations

Third Additional Protocol

1. Reservations made by a State to any provision of the Convention or the two Additional Protocols thereto shall also be applicable to this Protocol, unless that State otherwise declares at the time of signature or when depositing its instrument of ratification, acceptance, approval or accession. The same shall apply to any declaration made in respect or by virtue of any provision of the Convention or the two Additional Protocols thereto.

2. Any State may, at the time of signature or when depositing its instrument of ratification, acceptance, approval or accession, declare that it avails itself of the right not to accept wholly or in part Article 2, paragraph 1, of this Protocol. No other reservation may be made.

3. Any State may, at the time of signature or when depositing its instrument of ratification, acceptance, approval or accession, or at any later time, make the declarations provided for in Article 4, paragraph 5, and in Article 5 of this Protocol.

4. Any State may wholly or partially withdraw a reservation or declaration it has made in accordance with this Protocol, by means of a declaration addressed to the Secretary General of the Council of Europe, which shall become effective as from the date of its receipt.

5. Any Party which has made a reservation to Article 2, paragraph 1, of this Protocol, in accordance with paragraph 2 of this article may not claim the application of that paragraph by another Party. It may, however, if its reservation is partial or conditional, claim the application of that paragraph in so far as it has itself accepted it.

Comments

PC-OC Mod discussed different alternatives for reservations, namely: mentioned only under Article 17, paragraph 2; or specified explicitly in the text next to the relevant provisions; or specified explicitly in the text and summarised under Article 17. One delegation suggested introducing an obligatory review clause for reservations (e.g. confirmation of reservations every 5 years), but this was considered problematic by another delegation[254].

Article 18 – Denunciation

[254] **PC-OC (2008) 16**, (…), pp. 3-4 and Appendix IV, p. 25.

Third Additional Protocol

1. Any Party may, in so far as it is concerned, denounce this Protocol by means of a notification addressed to the Secretary General of the Council of Europe.

2. Such denunciation shall become effective on the first day of the month following the expiration of a period of six months after the date of receipt of the notification by the Secretary General of the Council of Europe.

3. Denunciation of the Convention automatically entails denunciation of this Protocol.

Article 19 – Notifications

Third Additional Protocol

The Secretary General of the Council of Europe shall notify the member States of the Council of Europe and any State which has acceded to this Protocol of:

a. any signature;

b. the deposit of any instrument of ratification, acceptance, approval or accession;

c. any date of entry into force of this Protocol in accordance with Articles 14 and 15;

d. any declaration made in accordance with Article 4, paragraph 5, Article 5, Article 16 and Article 17, paragraph 1, and any withdrawal of such a declaration;

e. any reservation made in accordance with Article 17, paragraph 2, and any withdrawal of such a reservation;

f. any notification received in pursuance of the provisions of Article 18 and the date on which denunciation takes effect;

g. any other act, declaration, notification or communication relating to this Protocol.

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

Done at Strasbourg, this 10th day of November 2010, in English and in French, both texts being equally authentic, in a single copy which shall be deposited in the archives of the Council of Europe. The Secretary General of the Council of Europe shall transmit certified copies to each member State of the Council of Europe and to the non-member States which have acceded to the Convention.

Explanatory report

Articles 14 to 19 are based both on the "Model final clauses for conventions and agreements concluded within the Council of Europe" which were approved by the Committee of Ministers at the 315th meeting of their Deputies in February 1980, and the final clauses of the Convention.

Since Article 16 concerning territorial application is mainly aimed at overseas territories, it was agreed that it would be clearly against the philosophy of the Protocol for any Party to exclude parts of its main territory from the application of this instrument, and that there would be no need to lay this down explicitly in the Protocol.

It is underlined that under the provisions of Article 17, paragraph 1, reservations and declarations made by a State with regard to any provision of the Convention or the two Additional Protocols thereto shall also be applicable to this Protocol, unless that State declares otherwise. In

accordance with Article 17, paragraph 2, only reservations made to Article 2, paragraph 1 are admitted under the Protocol.

PART II – THE RIGHTS OF INDIVIDUALS IN EXTRADITION PROCEEDINGS

States have the obligation to respect, protect and fulfil human rights. This means that State authorities must, on the one hand, refrain from acting in such a way that violates human rights; on the other hand, that they must protect individuals and groups against human rights abuses committed by other individuals or groups; and also that they must create the necessary conditions so that every person within its jurisdiction may enjoy his or her human rights to the maximum possible extent.

Concurrently, given the steady increase in transnational crime, organized or other, States increasingly need to resort to activities and tools of international cooperation in criminal matters, such as extradition. These activities are governed by the principle of the widest possible cooperation between States, in accordance with relevant international instruments and agreements and domestic legislation on the matter. Accordingly, when ratifying a Convention, States undertake to provide extensive cooperation to each other and to minimize impediments. This principle applies to any form of cooperation in criminal matters, and is enshrined in most relevant treaties.

Measures taken in connection with requests for cooperation in criminal matters in general, and extradition in particular, may have a significant impact on human rights. For example, States may have a duty not to extradite an individual to another State if he or she would face a real risk of being subjected to inhuman or degrading treatment in that State, or a duty to provide certain assistance to another State within the framework of criminal proceedings, for example if such assistance is necessary so that a victim of a human rights violation might obtain compensation. Appropriate conditions of detention, protecting the rights of suspects and accused persons and respecting the right of persons under investigation to protection against arbitrary interference in their privacy, family, home or correspondence, are other examples of basic human rights considerations that the authorities need to take into account when providing and requesting international cooperation in criminal matters in general, and extradition in particular.

The ECtHR does not accept the argument that failure to extradite would interfere with ***other international obligations*** of the requested State, eg. under bilateral or multilateral extradition treaties. It underlines that the **ECHR** is intended to safeguard rights that are "practical and effective" and a respondent State is liable under the Convention regardless of treaty commitments entered into before or after the entry into force of this Convention. It is not open to a Contracting State to enter into an agreement with another State which conflicts with its obligations under the Convention. The Court also rejects arguments to the effect that an extradition was "unavoidable" given the imminent expiry of the person's period of detention and the absence of any alternatives to release, as well as based on the legal framework in force in the State, its deficiencies or difficulties encountered by the authorities in seeking to achieve their legislative and regulatory objectives[255].

Consequently, when initiating or executing any measures of international cooperation in criminal matters, prosecutors, judges and central authorities must comply with human rights standards set out in international and regional human rights treaties, as well as with the provisions of national law.

At the UN level, the key human rights instruments with relevant provisions in extradition-related matters are, in addition to the **Universal Declaration of Human Rights**, the **International Covenant on Civil and Political Rights** (ICCPR) and the **Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment** (CAT). Although, due to the

[255] ECtHR, Case ***Rrapo v. Albania***, No. 58555/10, Judgment of 25 September 2012, §§86-87.

interrelatedness and interconnection of all human rights, any of the remaining seven core human rights treaties[256] contains applicable provisions in this regard.

The implementation of each of these core treaties is monitored by a specialized committee of independent experts who, *inter alia*, examine State reports and complaints alleging violation of any of the rights set forth in the respective treaty, and adopt interpretations of certain treaty provisions or matters covered by the relevant treaty in order to assist States Parties in their implementation efforts.

At the CoE level, the main treaty is, of course, the **European Convention on Human Rights** (ECHR) and additional protocols thereto, whose implementation is monitored by the **European Court of Human Rights** (ECtHR), seated in Strasbourg. But also relevant in this regard is, for example, the **European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment** and the work of the body created thereby – the **European Committee for the Prevention of Torture** (CPT), as well as that of the **Commissioner for Human Rights**.

The European Union (EU), for its part, has adopted the **Charter of Fundamental Rights in the EU** (CFREU), entered into force on 1 December 2009, simultaneously with the Treaty of Lisbon. The EU has equally adopted a number of other relevant instruments in the field of extradition, including Directives on the right to interpretation and translation in criminal proceedings (**Directive 2010/64/EU**), the right to information in criminal proceedings (**Directive 2012/13/EU**), minimum standards on the rights, support and protection of victims of crime (**Directive 2012/29/EU**), the right to a lawyer in criminal proceedings and in EAW proceedings (**Directive 2013/48/EU**), strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings (**Directive (EU) 2016/343**), procedural safeguards for children who are suspects or accused persons in criminal proceedings (**Directive (EU) 2016/800**) and legal aid for suspects and accused persons in criminal proceedings and for requested persons in EAW proceedings (**Directive (EU) 2016/1919**).

The main treaties on the so-called civil and political rights (**ICCPR**, **ECHR** and **CFREU**), although not identical, provide for several similar rights clearly relevant in the field of extradition, such as the right to equality and prohibition of discrimination, the right to life, the prohibition of torture and of inhuman or degrading treatment or punishment, the prohibition of slavery and forced labour, the right to liberty and security, the right to a fair trial, including the presumption of innocence and guarantees in criminal proceedings, the principle of legality, the right to private and family life, home and correspondence, and the right to an effective remedy against human rights violations.

State obligations in relation to the respect, protection and fulfilment of human rights entail both positive and negative obligations. Negative obligations place a duty on State authorities to refrain from acting in a way that unjustifiably interferes with human rights. Positive obligations place a duty on State authorities to take active steps in order to safeguard human rights. Therefore, a right can be violated by a State's action or by its failure or omission to act. While the boundaries between the State's positive and negative obligations do not lend themselves to precise definition, the applicable principles are nonetheless similar. In both contexts, regard must be had in particular to the fair balance between the competing private and public interests.

The primary responsibility for implementing and enforcing human rights lies with national authorities. Thus, the authorities responsible for international cooperation in criminal matters also have an obligation to assess whether the measure sought, namely detention and extradition, may breach human rights. It should be borne in mind that, while some human rights are **absolute** and cannot be subject to any **restrictions or limitations**, under any circumstances whatsoever, (eg.

[256] **International Convention on the Elimination of All Forms of Racial Discrimination** (CERD, 1965); **International Covenant on Economic, Social and Cultural Rights** (ICESCR, 1966); **Convention on the Elimination of All Forms of Discrimination against Women** (CEDAW, 1979); **Convention on the Rights of the Child** (CRC, 1989); **International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families** (ICMW, 1990); **International Convention for the Protection of All Persons from Enforced Disappearance** (CPED, 2006); and **Convention on the Rights of Persons with Disabilities** (CRPD, 2006).

the prohibition of torture and ill-treatment), others can, as provided for in the relevant instruments of international law. If this is the case and the measure sought may constitute an "interference" with the exercise of substantive rights, the authorities dealing with requests for international cooperation in criminal matters (*maxime*, extradition) must ensure that such a measure is **justified** and, namely, that it fulfils the following requirements: it is applied ***in accordance with the law*** (must have some basis in domestic law and be compatible with the rule of law); pursues a ***legitimate aim*** (for instance, public safety, prevention of disorder or crime, or the protection of the rights and freedoms of others); and is ***necessary in a democratic society*** to pursue such legitimate aim (it shall be deemed so if it is proportionate to the legitimate aim pursued and if the reasons adduced by the national authorities to justify it are "relevant and sufficient").

Therefore, before requesting or providing extradition – or any other form of international cooperation in criminal matters – the authorities of the States involved should ensure compliance with international standards and obligations, including on human rights. To this end, three concrete steps must be taken:

1. **Identify the legal basis**: ensure that there is a multilateral (eg. the **ECE**) or bilateral treaty, legal instruments or provisions of national law that can serve as a basis for extradition between the requesting and requested States;
2. **Check the scope** of the applicable legal instruments, including the availability of the measures that may be required in the particular case, any declarations or reservations the States involved may have entered, safeguards or conditions to be observed, and relevant country information;
3. Consider whether the measure sought may affect human rights and, if so, whether it is **justified and proportionate** to the aim pursued[257].

Part II aims at exploring the human rights and related requirements in the context of extradition proceedings. It includes the three following chapters: Chapter 1, on the "Rights of the individual during extradition" dealing mostly with the rights of defence of the requested person; Chapter 2, on the "Procedural aspects of extradition" dealing with those rights that most directly impact on the procedural aspects of extradition; and Chapter 3, specifically devoted to the human rights guarantees as grounds for the refusal of extradition. Inevitably, all these rights and the contents of each chapter and sub-chapter overlap, to a certain extent, and complement each other.

The contents of this Part II are based mainly on the case law of the ECtHR and, to a lesser degree, of the CJEU. From the Strasbourg Court, in particular, emanates a wealth of jurisprudence, the faithful implementation of which is rather demanding to Contracting States and poses important challenges to judicial and other authorities called upon to decide such cases at the national level. It cannot be stressed enough that all formalistic solutions should be avoided and that, whatever the States involved and issues at stake, a case-by-case approach must be followed and all the particular circumstances of each case taken into account.

In its initial discussions on the need to modernize the European conventions on international cooperation in criminal matters, PC-OC has underlined the need to discuss issues pertaining to the protection of the rights and guarantees of individuals involved in transnational procedures, taking duly into account the case law of the ECtHR. It endorsed a proposal to promote the protection of the rights and fundamental freedoms of such persons[258] and suggested that the "minimum standards for the protection of the person subject to an extradition procedure" presented in the final report of the PC-TJ could constitute a useful reference in this regard[259]. Furthermore, the Committee pointed out the possible role of the ECtHR in cases involving human rights questions in application of the EAW[260]. It further underlined that the "current works devoted

[257] The above paragraphs are largely based on the contents of Module 1 (Introduction) of the **HELP online course on International Cooperation in Criminal Matters**, available online, for free, in the CoE portal and accessible as from the PC-OC webpage.
[258] **PC-OC (2006) 12**: 51st meeting report, §34.
[259] **PC-OC (2006) 08:** List of adopted decisions at the 51st meeting, §7 d).
[260] **PC-OC (2006) 12**: 51st meeting report, §23.

by the European Commission on minimum procedural rights as well as on conflicts of jurisdiction and *non bis in idem* should also be duly considered in this regard."[261]

In October 2006, the PC-OC formally decided that increasing the protection of individual freedoms and guarantees in extradition procedures was an important question and instructed its Restricted Group of Experts (PC-OC Mod) to work further on concrete suggestions, although several members observed that States were already bound to respect such rights and guarantees according to existing Conventions, notably the **ECHR** and developments in the case law of the Strasbourg Court, and that, in addition, due consideration would have to be given to the results of the discussions within the EU on a draft Framework Decision on procedural guarantees[262].

Two main issues have then been considered:

- The insertion of a "general clause on human rights" in the **ECE** – the Committee agreed that the "fundamental" rights (mainly the right to life and the rights not to be tortured nor subjected to inhumane or degrading treatment) are protected by the **ECHR** and by the UN **Convention against Torture**, and considered there was no need to amend the extradition Convention on this point and that the case law of the ECtHR provides sufficient guarantees in this regard. Notwithstanding, it admitted that a general clause on human rights could be envisaged, by which States were recalled that extradition treaties have to be implemented with full respect tof the obligations emanating from international human rights treaties, including the **ECHR**. Such provision would be addressed primarily to non-CoE member States. Experts considered that a general non-discrimination clause could also be envisaged, as foreseen in the preamble of the **EAW FD**.
- The insertion of "procedural safeguards" for persons involved in extradition procedures – the Committee agreed that these rights should be respected in the requested State, and further discussed. Such safeguards would include notably: obligation to inform, access to legal counsel, access to interpreter, right to expedient procedure, possibility to challenge the lawfulness of the detention, obligation to hear the person on his/her extradition, obligation to compensate. The safeguards applicable to a person who was tried *in absentia* should also be included.

In addition to considering that the insertion of such safeguards in the extradition treaties could be unnecessary, some experts feared such additional provisions could impede the efficiency of extradition procedures and thus be contrary to the main objective of the "modernisation" exercise, i.e. to increase the efficiency of international co-operation. It was also thought that, while working on possible legal developments, due consideration should be given to the difficulties that some States may have in acceding to any new legally binding instrument which would include such rights or safeguards in a mandatory manner, and a suggestion was made to possibly address the issue through, e.g. non-binding guidelines to States.[263]

It has also been suggested that extradition cases are good examples of instances that would justify third party interventions under **Article 36 (Third party intervention)** of the **ECHR**, which reads:

> *1. In all cases before a Chamber or the Grand Chamber, a High Contracting Party one of whose nationals is an applicant shall have the right to submit written comments and to take part in hearings.*
>
> *2. The President of the Court may, in the interest of the proper administration of justice, invite any High Contracting Party which is not a party to the proceedings or any person concerned who is not the applicant to submit written comments or take part in hearings.*

[261] **PC-OC (2006) 12**: 51st meeting report, §35.
[262] **PC-OC (2006) 15**: List of adopted decisions at the 52nd meeting, p. 5.
[263] **PC-OC (2006) 16**, pp. 13-14.

> *3. In all cases before a Chamber or the Grand Chamber, the Council of Europe Commissioner for Human Rights may submit written comments and take part in hearings.*

In his address to the PC-OC at its second Special Session on Extradition, Mr Jörg Polakiewicz, Director of the Directorate of Legal Advice and Public International Law, even admitted the possibility of governments of States non-Parties to the **ECHR** doing so[264].

[264] See Mr Jörg Polakiewicz, *Opening of the special session* [...], doc. **PC-OC (2018)05**, p. 13.

Chapter 1: Rights of the individual during extradition

The right not to be extradited is not, as such, included in the rights and freedoms recognized in the **ECHR** neither is extradition, *per se*, among the matters covered by this Convention or its protocols[265]. According to the ECtHR it is not possible to complain of a violation of the provisions of a treaty on extradition or of a violation of the conditions under which extradition may be granted[266]. Moreover, decisions regarding the entry, residence and deportation of aliens do not concern the determination of an applicant's civil rights or obligations, or of a criminal charge against him or her, within the meaning of **Article 6, paragraph 1**, of the **Convention**.[267] Also, extradition proceedings are not meant to determine the criminal charge(s) against the person sought, which is and remains within the exclusive remit of the competent judicial authorities of the requesting State.

The **European Convention on Extradition** (ECE) and its **Additional Protocols** unify the legal framework of the Contracting Parties as far as extradition is concerned, but they do not adopt any provision especially centred on the rights of the individual involved. Nevertheless, the provisions of the **ECE** have to be interpreted in the light of the **ECHR**. Also, the Committee of Ministers has adopted a package of principles to guide the member States in the practical application of the **ECE**, which in fact endorses the multidimensional character of the rights of defence in extradition proceedings[268].

This section will mainly examine the way eleven sets of individual rights applicable in the field of extradition are articulated in the context of the **ECHR**, as interpreted and applied by CoE bodies. They include the rights to liberty and security, the right to information and access to the file, the right to interpretation and translation, the right of access to a lawyer, the right to be heard, the right to an expedient procedure, the presumption of innocence, access to an interpreter, expedient procedure, to be heard and the right to an effective appeal, as well as the rights of foreign prisoners, children and whistleblowers. The comprehensive implementation of these rights will be considered through examples of jurisprudence, in order to highlight the interrelationship and overlap between them. Where applicable, similar provisions and case law regarding the execution of EAW at the EU level shall also be indicated.

1.1 The right to liberty and security

Extradition requires that, in a given moment, the requested person is taken into custody by the authorities of the requested State with the view to his or her surrender to the requesting State once a decision granting extradition is taken. The detention of the person to be extradited shall, as a rule, be effected once the extradition request is received, but Article 16 of **ECE** rules on the possibility of, in cases of urgency, a ***provisional arrest*** is requested by the authorities of the requesting State and effected subject to decision of the competent authorities of the requested State. In its **Recommendation no. R 80 (7)**, the Committee of Ministers of the CoE considers that the requesting authority should ask for the provisional arrest of the person sought only if there are strong reasons to suggest that otherwise the extradition cannot be effected.

Obviously, detention with the view to extradition (or deportation) collides with the right to liberty and security, provided for under major international human rights instruments, at the universal

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[265] ECtHR, Case ***Peñafiel Salgado v. Spain***, No. 65964/01, Decision of 16 April 2002, §1.
[266] ECtHR, *Case X v. Belgium*, 10 December 1976, DR 8, p. 161; and ***EGM v. Luxembourg***, 20 May 1994, Decisions and reports 77-B, p. 14.
[267] See ECtHR, Case ***Findikoglu v. Germany***, N.º 20672/15, Decision of 7 June 2016, §44; Case ***Vlas and Others v. Romania***, N.º 30541/12, Decision of 6 January 2015, §42; Case ***Ketchum v. Romania***, N.º 15594/11, Decision of 11 June 2013, §30; Case ***Al-Moayad v. Germany***, N.º 35865/03, Decision of 20 February 2007, §93; Case ***Mamatkulov and Askarov v. Turkey***, Judgement 4 February 2005, §82; Case ***Peñafiel Salgado v. Spain***, N.º 65964/01, Decision of 16 April 2002, §1; and Case ***Maaouia v. France***, N.º 39652/98, Judgment [GC] of 5 October 2000, §40.
[268] See below, for example, **Recommendation No. R (80) 7 concerning the practical application of the European Convention on Extradition**.

and regional level, including in Article 3 of the **UDHR**, Article 9 (1) of the **ICCPR** and Article 5 of the **ECHR**.

The ECtHR sees extradition mainly from the point of view of **Article 5 (1) (f)** of the **ECHR**, which establishes that: *Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law: (…)*

> *(f) the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or **extradition**.* (emphasis added)

Detention with the view to extradition therefore constitutes an admissible exception to the enjoyment of the right to liberty and security, which can only operate provided that such detention is ***lawful.*** This includes the condition of *compliance with a **procedure prescribed by law**. The Convention here refers back essentially **to national law**, but it also requires that any deprivation of liberty be in conformity with the **purpose of Article 5**, namely to protect individuals from **arbitrariness**.* In addition to this, deprivation of liberty for this purpose *will be justified only for as long as **extradition proceedings** are being conducted*. Consequently, *if such proceedings are not being prosecuted with due diligence, the detention will cease to be justified under Article 5 1 (f)*.[269]

Furthermore, the violation, by the authorities of the requested State, of procedural guarantees set forth in Articles 5 (2) and (4) and 13 of the **ECHR** (right of the arrested person to be promptly informed, in a language he or she understands, of the reasons for the arrest and of any charge against him or her and right to an effective remedy), namely by keeping the detained individual in ignorance as far as his or her future is concerned until the last minute, or subjecting the person to anxiety and uncertainty without good reason, are all factors which, combined, can create problems, including in the framework of Article 3 of the **Convention**.[270]

In its **Recommendation no. R (86) 3**, the Committee of Ministers of the CoE recommends that *time spent in custody pending extradition is deducted from the sentence* in the same way as time spent in custody pending trial. In addition, the person that suffered unjustified detention pending extradition should be able to claim *compensation* under the same conditions governing compensation for unjustified pre-trial detention, as established in Article 5 (5) of the **ECHR**.

1.1.1. The lawfulness of detention

As stated before, under Article 5 (1) (f) of the **ECHR**, deprivation of liberty with the view to deportation or extradition is one of the permissible exceptions to the right to liberty and security, which protects individuals against arbitrary deprivation of liberty. Such provision lays down a threefold requirement for the conditions of detention. Firstly, proceedings against the detainee must be ***ongoing*** with the view to his/her extradition or deportation. Secondly, the basis upon which the person is being detained must be ***lawful***. Thirdly, the procedures prescribed by domestic law must not be imposed ***arbitrarily***[271]. It should be noted that a bilateral or international treaty, being part of the domestic legal order, is capable of serving as a legal basis for extradition proceedings and for detention with a view to extradition.[272] However, Article 5 (1) (f) of the Convention always requires that the detention with a view to extradition be effected "in

[269] ECtHR, Case ***Quinn v. France***, No. 18580/91, Judgment of 22 March 1995, §§47-48.
[270] ECtHR, Case ***Shamayev and others v. Georgia and Russia***, N.º 36378/02, Judgment of 14 April 2005, §§381, 428, 432 and 457-461.
[271] Stanbrook, I. and Stanbrook, C., *Extradition law and practice*, 2nd edition, Oxford University Press, 2000, pp. 106-107.
[272] ECtHR, Case ***Gilanov v. the Republic of Moldova***, No. 44719/10, Judgment of 13 September 2022, §§58-60.

accordance with a procedure prescribed by law"[273]. For this reason, even if Article 16 (4) of the ECE establishes a maximum period of 40 days for the person to be released from provisional arrest in case no extradition request is received, it is still necessary to comply with such domestic rules as those which establish a maximum of 48 hours until an arrested individual is presented to a judge[274]. As a rule, international treaties provide for no particular procedure to be followed in the requested State which could offer safeguards against arbitrariness.

The requirement that any arrest or detention has a legal basis in domestic law is not merely formal, relating also to the **quality of the law** and requiring that it be compatible with the rule of law, a concept inherent in all articles of the Convention[275]. Quality in this sense will be examined with particular reference to the ***safeguards provided by the national system***. Where national law authorises deprivation of liberty, this must be, in itself, in conformity with the Convention, including the general principles expressed or implied therein (notably, the general principle of legal certainty). It must also be ***sufficiently accessible, precise and foreseeable in its application***, in order to avoid all risk of ***arbitrariness***.[276] In addition, to be lawful, the decision concerning one's detention or extension of detention must be taken before such detention effectively takes place or is extended. The Court considers that any decision authorizing *ex post facto* the continued detention of a person is incompatible with "the right to security" within the meaning of Article 5 of the Convention[277].

If the offence ceases to be punished by the legislation of the requesting State, the detention will become unlawful under the Convention. This is not the case when, for example, certain provisions of the Criminal Code are merely moved from one section of to another[278]. AS a rule, when assessing the "quality of the law", the ECtHR respects the interpretation given to such law, including criminal law, by ***domestic courts***[279], as well as the fact that such interpretation has become customary in domestic practice, provided that the interpretation is not considered arbitrary in itself, thus rendering the detention unlawful.[280]

The notion of **"arbitrariness"** in Article 5 (1) extends beyond lack of conformity with national law, so that deprivation of liberty may be lawful in terms of domestic law but still arbitrary, and thus contrary to the Convention. To avoid being branded as arbitrary, detention under Article 5 (1) (f) must be carried out in ***good faith*** and without an element of deception on the part of the authorities; it must be closely connected to the ***ground*** of detention relied on by the Government; the place and ***conditions of detention*** must be appropriate; and the ***length*** of the detention must not exceed that reasonably required for the purpose pursued[281]. Arbitrariness may also be detected when the authorities use domestic law in a way which contradicts the purpose of Article 5, thus constituting a ***misuse of power***, and in situations where the domestic authorities have neglected to attempt to apply the relevant legislation correctly; or where judicial authorities have

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[273] ECtHR, Case ***Mokallal v. Ukraine***, No. 19246/10, Judgment of 10 November 2011, §39; Case ***Soldatenko v. Ukraine***, No. 2440/07, Judgment of 23 October 2008, §112.
[274] ECtHR, Case ***Shchebet v. Russia***, No. 16074/07, Judgment of 12 June 2008, §§65-66.
[275] The notion of rule of law requires the government to act within legal frameworks and according to established processes. Steiner, H.J. and Alston, P., International human rights in context, Oxford University Press, 1995, pp. 111-112. Moreover, Article 3 of the **Statute of the Council of Europe** stipulates the rule of law as a criterion for membership. The Venice Commission of the CoE identifies six key principles which the rule of law must conform with: legality; legal certainty; prohibition of arbitrariness; access to justice before independent and impartial courts; respect for human rights; non-discrimination and equality before the law.
[276] ECtHR, Case ***Yefimova v.Russia***, No. 39786/09, Judgment of 19 February 2013, §255, Case ***Zokhidov v. Russia,*** No. 67286/10, Judgment of 5 February 2013, §150; Case ***Ismoilov and others v. Russia***, No. 2947/06, Judgment of 24 April 2008, §§136-137; Case ***Khudoyorov v. Russia***, No. 6847/02, Judgment of 8 November 2005, §§124-125, 137; Case ***Amuur v. France***, No. 19776/92, Judgment of 25 June 1996.
[277] ECtHR, Case ***Kalinichenko v. Russia***, No. 40834/11, Judgment of 9 July 2019, §§75-77.
[278] ECtHR, Case ***Gilanov v. the Republic of Moldova***, No. 44719/10, Judgment of 13 September 2022, §50.
[279] ECtHR, Case ***Ketchum v. Romania***, No. 15594/11, Decision of 11 June 2013, §§24-25.
[280] ECtHR, Case ***Stephens v. Malta (No. 1)***, No. 11956/07, Judgment of 21 April 2009, §63.
[281] ECtHR, Case ***Eshonkulov v. Russia***, N.º 68900/13, Judgment of 15 January 2015, §62; Case ***Azimov v. Russia***, N.º 67474/11, Judgment of 18 April 2013, §160; Case ***Umirov v. Russia***, No. 17455/11, Judgment of 18 September 2012, §141.

authorised detention for a prolonged period of time without giving any grounds for doing so in their decisions.[282]

Furthermore, the ***unrecorded detention*** of an individual – for whatever purpose – is "a complete negation of the fundamentally important guarantees contained in Article 5 of the Convention and discloses a most grave violation of that provision". The absence of a record of such matters as the date, time and location of detention, the name of the detainee, the reasons for the detention and the name of the person effecting it, must be seen as incompatible with the requirement of lawfulness and with the very purpose of Article 5 of the Convention[283].

Also, as reiterated by the ECtHR, an **interim measure**, indicated under Rule 39, preventing a person's extradition ***does not require or form a basis for the person's detention*** pending a decision on his or her extradition[284] and does not have any bearing on whether the deprivation of liberty to which that individual may be subjected complies with Article 5 (1). In other words, the domestic authorities must still act in strict ***compliance with domestic law***.[285] It should however be emphasized that, while extradition itself is prevented by the application of Rule 39, a decision thereon is not, and authorities continue to be bound by the requirement that action is taken, actively and diligently, so that detention remains lawful[286]. In a case where the subject remained in detention for 12 months and 18 days and the proceedings relating to his extradition were "suspended" for most of that period, the ECtHR did not accept that the fact that an interim measure had previously been indicated justified the indefinite detention a persons without resolving his or her legal status. As it did not appear that the applicant's detention was in fact justified by the pending extradition proceedings, in the absence of any such decision, exacerbated by the Court's conclusion that no proper evaluation of the applicant's allegations under Article 3 has taken place in the meantime, the Court found that there had been a violation of Article 5 (1) (f) of the Convention on account of the unlawful nature of the applicant's detention and the absence of the requisite diligence in the conduct of the proceedings[287].

On the other hand, the fact that the implementation of an interim measure temporarily prevents the pursuit of the expulsion procedure does ***not make a detention unlawful***, provided that expulsion is still being considered by the authorities (and therefore the deportation proceedings are considered in progress) and that the extension of detention is not unreasonable. Also, if the ordering of an interim measure has no incidence as such on the lawfulness of detention, the latter cannot be based on the ***likelihood*** of the Court's delivering its ruling within the time-limit laid down by the legislation of the expelling Party. In a case where the person was in detention pending expulsion, and the Court ordered that such expulsion be stayed under Rule 39 on the eve of removal, and despite the fact that the time-limit for detention had not been exceeded, the Court found a violation of Article 5 (1) (f) of the Convention, in light of the following circumstances: the authorities knew the applicant's identity and her fixed address, the person had always attended as instructed and she had taken steps to regularise her situation. Furthermore, the applicant was HIV-positive and her health condition had deteriorated during her detention. Therefore, the Court saw no link between the applicant's detention and the pursued objective of the Government to have her expelled[288].

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[282] ECtHR, Case ***Iskandarov v. Russia***, No. 17185/05, Judgment of 23 September 2010, §146.

[283] ECtHR, Case ***Iskandarov v. Russia***, No. 17185/05, Judgment, 23 September 2010, §§145-150; Case ***Shchebet v. Russia***, No. 16074/07, Judgment of 12 June 2008, §63.

[284] ECtHR, Case ***Molotchko v. Ukraine***, No. 12275/10, Judgment of 26 April 2012, §174; Case ***Gaforov v. Russia***, No. 25404/09, Judgment of 21 October 2010, §200; Case ***Dubovik v. Ukraine***, Nos. 33210/07 & 41866/08, Judgment of 15 October 2009, §60.

[285] ECtHR, Case ***Shcherbina v. Russia***, Nos. 41970/11, Judgment of 26 June 2014, §47; Case ***Umirov v. Russia***, No. 17455/11, Judgment of 18 September 2012, §140; Case ***Shakurov v. Russia***, No. 55822/10, Judgment of 5 June 2012, §168; Case ***Al Husin v. Bosnia and Herzegovina***, No. 3727/08, Judgment of 7 February 2012, §68.

[286] ECtHR, Case ***Molotchko v. Ukraine***, No. 12275/10, Judgment of 26 April 2012, §174.

[287] ECtHR, Case ***Ryabikin v. Russia***, No. 8320/04, Judgment of 19 June 2008, §132.

[288] ECtHR, Case ***Yoh-Ekale Mwanje v. Belgium***, No. 10486/10, Judgment of 20 December 2011, §§120, 123-125.

It must also be noted that ***Article 5 (1) (f) does not require that detention be reasonably considered necessary, for example, to prevent an individual from committing an offence or fleeing***[289]. In a case where detention on remand and detention pending extradition partly overlapped, the Court considered that, since the authorities of the requested State counted the custody against the sentence imposed by its courts in domestic criminal proceedings, the Court did not consider it to be custody for the purposes of extradition proceedings, and found no violation of Article 5 (1).[290] Also, in case the applicant argues that he has remained in detention on the basis of fabricated charges, the Court finds immaterial, for the purposes of Article 5 (1) (f) of the Convention, whether the underlying decision to expel or to extradite can be justified under national law or the Convention.[291]

It should be clarified that there is a **distinction** between the ***lawfulness of the detention*** with a view to extradition and the ***lawfulness of the extradition*** itself. Evidently, there may be cases where the review of the lawfulness of the detention will be dependent on the lawfulness of the extradition according to national law. The Court considers that the finding, by a domestic court, that the extradition procedure is illegal does not deprive the applicant of his claim to be a victim of a violation of the Convention by reason of his arrest. The Court has also accepted that the arguments concerning extradition can be barred because material human rights guarantees are covered by the right to a remedy enshrined in Article 13 of the **ECHR**, which in this respect functions in combination with the allegedly violated articles[292].

In case the person lodges an ***asylum request*** while detained under an ongoing expulsion procedure, detention would be in conformity with the Convention for as long as the authorities were ***considering expulsion*** and had ***a realistic perspective*** of achieving it in case the asylum application is denied. Detention on the basis on an order to leave the territory which refers to the need to obtain further information as to the persistence of the risks faced by the applicant in the event of expulsion to his country of nationality cannot be considered, in itself, "an action taken with a view to expulsion" within the meaning of Article 5 (1) (f). Also, an ***expulsion procedure*** cannot be considered as being underway when the authorities have ***no perspective*** of expelling the persons concerned during the time of their detention without exposing them to a real risk of ill-treatment, The situation changes from the moment authorities establish diplomatic contacts with a view to finding third State willing to welcome the applicant until the moment when the latter refuses to be removed to such State. Once a competent body finds that the person runs the risk of being exposed to ill-treatment in the event of expulsion to the prospective country, the steps taken to find a third State fail, and in the absence of any further efforts in this regard, the Court considers that it ceases to be a connection between the detention of the applicant and the possibility of removing him. The Court also recalls that detention on the sole ground of ***national security*** does not fit within the confines of Article 5 (1) (f) of the Convention.[293].

A treaty requirement that an extradition request includes "such information as would provide a reasonable basis to believe that the person sought committed the offence" is not a formality and can make custody unlawful in case the authorities of the requested State do not assess, when authorising the person's detention, whether reasonable suspicion existed that he or she committed the offences for which extradition is sought[294]. This conclusion might be similarly applicable to, for example, the requirement in some older treaties that extradition requests include actual copies of evidence[295].

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[289] ECtHR, Case ***Al Husin v. Bosnia and Herzegovina***, No. 3727/08, Judgment of 7 February 2012, §61.
[290] ECtHR, Case ***Kolompar v. Belgium***, No. 11613/85, Judgment of 24 September 1992, §36.
[291] ECtHR, Case ***Rustamov v. Russia***, No. 11209/10, Judgment of 3 July 2012, §155.
[292] ECtHR, Case ***Shamayev and others v. Georgia and Russia***, N.º 36378/02, Judgment of 14 April 2005.
[293] ECtHR, Case ***M. S. v. Belgium***, No. 50012/08, Judgment of 31 January 2012, §§150-155, 175, 177, 179.
[294] ECtHR, Case ***Čalovskis v. Latvia***, N.º 22205/13, Judgment of 24 July 2014 §§186 and 189-191.
[295] See Kubicek, *Recent trends* (…), in **PC-OC (2018) 05**, p. 30.

Within the framework of an extradition procedure, a requested State should be able to ***presume the validity*** of the legal documents issued by the requesting State and on the basis of which a deprivation of liberty is requested. The country requesting extradition must ensure that the request for detention and extradition is lawful, not only under national law, but also under the Convention. Thus, the international responsibility for a detention with the view to extradition, although performed in the requested State, lays with the requesting State[296].

Below are some examples that have been identified as **violations of the principle of lawfulness** in Article 5 (1) (f) of the **ECHR**:

- Detention of a person for the purpose of extradition in the presence of circumstances that under domestic law exclude the extradition of that person to the requesting State (eg. nationality, asylum status, statutory limitations); if authorities were *ab initio* aware of such circumstances, the Court considers that the procedural flaw in the order authorizing the person's custody was so fundamental as to render it arbitrary and *ex facie* invalid from the outset [297]
- Detention with the view to extradition which fails to abide by the substantive and procedural rules of national law, for instance as it concerns reference to the relevant national legislation governing the detention, indication of time-limits and enumeration of sufficient reasons for the continued detention[298];
- Deprivation of liberty before extradition or deportation proceedings are in progress, in the absence of clear legal provisions establishing the procedure for ordering and extending detention[299], without a sufficient legal basis[300], even if a voluntary departure period had previously been indicated and extradition or deportation proceedings are initiated at a later stage[301];
- Legal amendment introduced to provide a legal basis for extradition proceedings and detention in the context of extradition, but extension of detention on the basis of the domestic legislation previously in force; furthermore, asylum proceedings which could have barred the applicants' extradition were pending in respect of the applicants, and domestic authorities had the obligation to explore with due diligence this possibility, and no satisfaction was given for failing to do so.[302]
- Cases in which the poor "quality of the law" has tangibly prejudiced the applicant's substantive Convention rights[303], for instance due to the absence of clear legal provisions, precise and foreseeable in their application, establishing the procedure for ordering and extending detention with a view to extradition and setting time-limits for such detention: in these conditions, the ECtHR considers that such deprivation of liberty is not circumscribed by adequate safeguards against arbitrariness, as well as inconsistent and mutually exclusive positions of the domestic authorities in this regard[304];

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[296] ECtHR, Case ***Gilanov v. the Republic of Moldova***, No. 44719/10, Judgment of 13 September 2022, §43; Case ***Vasiliciuc v. the Republic of Moldova***, No. 15944/11, Judgment, 2 May 2017, §37.

[297] ECtHR, Case ***Shiksaitov v. Slovakia***, Nos. 56751/16 & 33762/17, Judgment of 10 December 2020, §68; Case ***Baz v. Ukraine***, No. 40962/13, Judgment of 5 November 2020, §37; Case ***Garkavyy v. Ukraine*** No. 25978/07, Judgment of 18 February 2010, §§70, 74; Case ***Eminbeyli v. Russia***, No. 42443/02, Judgment of 26 February 2009, §48; Case ***Garabayev v. Russia***, No. 38411/02, Judgment of 7 June 2008, §89.

[298] ECtHR, Case ***Elmuratov v. Russia***, No. 66317/09, Judgment of 3 March 2011, §§99-112; Case ***Kolesnik v. Russia***, No. 26876/08, Judgment of 17 June 2010, §86; Case ***Garabayev v. Russia***, No. 38411/02, Judgment of 7 June 2008, §§87-88.

[299] ECtHR, Case ***Tehrani v. Turkey***, Nos. 32940/08 & 41626/08 &43616/08, Judgment of 13 April 2010, §70.

[300] ECtHR, Case ***Dubovik v. Ukraine***, Nos. 33210/07 & 41866/08, Judgment of 15 October 2009, §§56-57.

[301] ECtHR, Case ***Al Husin v. Bosnia and Herzegovina***, No. 3727/08, Judgment of 7 February 2012, §62.

[302] ECtHR, Case ***Khamroev and Others v. Ukraine***, No. 41651/10, Judgment of 15 September 2016, §§88, 97-98; Case ***Molotchko v. Ukraine***, No. 12275/10, Judgment of 26 April 2012, §173.

[303] ECtHR, Case ***Bordovskiy v. Russia***, N.º 49491/99, Judgment of 8 February 2005, §49.

[304] ECtHR, Case ***Kislov v. Russia***, No. 3598/10, Judgment of 9 July 2019, §§147-148; Case ***Kholmurodov v. Russia***, No. 58923/14, Judgment of 1 March 2016, §87; Case ***Oshlakov v. Russia***, No. 56662/09, Judgment of 3 April 2014, §§109-111; Case ***Bakoyev v. Russia***, No. 30225/11, Judgment of 5 February

- Use of domestic law, by domestic authorities, in a way not in keeping with the purpose of Article 5 (the protection of the individual from arbitrary deprivation of liberty), which constitutes a misuse of power, for instance because the available proceedings to challenge the lawfulness of detention do not allow for an adequate control by the domestic courts[305];
- Deprivation of liberty, in the context of deportation proceedings, of persons, granted refugee status by the UNHCR, under legal provisions which establish that foreigners without valid travel documents or who cannot be deported are obliged to reside at places designated by the Ministry of the Interior (no rules regarding detention, its time-limits and/or conditions for ordering and extending it)[306];
- In the event of reliance on refugee status granted by another State, continuation of detention once a definitive confirmation of his or her refugee status in such State is received;[307]
- Kidnapping of an asylum seeker, after denial of extradition, by authorities of the requested State and unlawful removal to the requesting State;[308]
- Stated purpose of a detention differing from the real one, for instance because authorities of the requested State try to circumvent the maximum length of extradition custody provided for domestic law by changing the type of custody from extradition to expulsion custody: the Court found that this approach was not in good faith[309];
- Person arrested in his country of nationality on the basis of an international arrest warrant issued against him for the enforcement of a judgement rendered *in absentia* and remanded in custody for 40 days under the ECE, although his extradition was never requested; the Court of Appeal of the requested State, after examining the case, reclassified the request received for transfer of criminal proceedings (under the European Convention on the Transfer of Proceedings in Criminal Matters) to a request under the European Convention on the International Validity of Criminal Judgments (without being asked to do so, even though the requesting State was not a Party to this Convention and despite the fact that the requested Statae had entered a reservation in respect of judgements in absentia): the Court was not convinced that such solution chosen by the domestic courts met the requirements of foreseeability and lawfulness,[310];
- Repeated re-arrest of a person for the purpose of extradition when the Court of Appeal had previously considered there was no sufficient basis under domestic law to do so (eg. absence of certified copy of the extradition request, partially illegible, including parts containing the name of the person , official signatures and stamp), without any change in circumstances and impediment of the person's effective release by detaining him immediately upon pro forma release on the same grounds previously considered invalid by the Court of Appeal.[311]
- Failure to review the continuation of detention by a court at regular intervals; the Court concluded that, six months after the date of his placement in custody, the applicant was detained in breach of the relevant provisions of the requested State's Code of Criminal

2013, §149; Case ***Abdulkhakov v. Russia***, No. 14743/11, Judgment of 2 October 2012, §181; Case ***Gaforov v. Russia***, No. 25404/09, Judgment of 21 October 2010, §§190-199; Case ***Abdulazhon Isakov v. Russia***, No. 14049/08, Judgment of 8 July 2010, §§123-124; Case ***Ismoilov and others v. Russia***, No. 2947/06, Judgment of 24 April 2008, §140; Case ***Nasrulloyev v. Russia***, No. 656/06, Judgment of 11 October 2007, §§72-77.

[305] ECtHR, Case ***Chahal v. United Kingdom***, N.º 22414/93, Judgment [GC] of 15 November 1996.

[306] ECtHR, Case ***Abdolkhani and Karimnia v. Turkey (No. 1)***, No. 30471/08, Judgment of 22 September 2009, §133.

[307] ECtHR, Case ***Turdikhojaev v. Ukraine***, No. 72510/12, Judgment of 18 March 2021, §§50-51.

[308] ECtHR, Case ***Iskandarov v. Russia***, No. 17185/05, Judgment, 23 September 2010, §§145-150.

[309] ECtHR, Case ***Eshonkulov v. Russia***, N.º 68900/13, Judgment of 15 January 2015, §§75, 76; Case ***Azimov v. Russia***, N.º 67474/11, Judgment of 18 April 2013, §§164, 174.

[310] ECtHR, Case ***Garkavyy v. Ukraine***, No. 25978/07, Judgment of 18 February 2010, §§76-77.

[311] ECtHR, Case ***Karpenko v. Ukraine***, No. 23361/15, Judgment of 10 June 2021, §§35-37.

Procedure and, therefore, his detention pending extradition could not be considered "lawful" for the purposes of Article 5§1 of the Convention[312].

- Use of misleading stratagems, in particular to avoid access to effective remedies: service of a deliberately misleading notice inviting attendance at the police station, followed by the service therein of an order to leave the country, immediate arrest and transportation to a closed transit centre, in order to facilitate collective repatriation and without access to an effective remedy[313]; transfer of persons from one jurisdiction from another, on the day of detention, following a carefully planned joint operation of the secret services of both countries, without notification of any decision taken in relation to such persons, any choice as to the jurisdiction they wished to be expelled to, and in a manner clearly devised to take them by surprise and deprive them of any time or possibility to defend themselves[314].
- Asylum application lodged when the applicant was held in detention pending extradition which had already been approved and authorised by the competent authorities; since extradition could not take place because of the asylum request, and the time-limits applicable to asylum proceedings had been greatly exceeded (almost 17 months instead of the 6 months established by national law), this had an impact on the lawfulness of detention with the view to extradition, and the time-limits thereto had been exceeded as well, which could hardly be considered to be "in accordance with the law"[315].
- Delay of two days between the moment authorities received notification that the applicant's extradition was no longer required and effective release[316].
- Continuation of an individual's detention immediately after extradition and upon expiry the maximum period of pre-trial detention allowed by national law, based on a court decision adopted long before the person was placed in detention with the view to extradition abroad, and 6-month extension of such detention (on the basis of an applicable provision of national law) nearly two months after the person's extradition[317];
- Detention from midnight of one day until a new detention order was issued the following day, since no exceptions were permitted under national law to the principle that a detainee cannot continue to be held in detention once an authorised detention period has expired, no matter how short the duration of detention[318]; and continuation of detention for 11 hours after decision directing that he be released "forthwith", without such decision being notified to him or any move being made to commence its execution[319].

Notwithstanding the above, the ECtHR also recognizes that some delay in implementing a decision to release a detainee is understandable, and often inevitable in view of practical considerations relating to the running of the courts and the observance of particular formalities. However, it underlines the national authorities must attempt to keep this to a minimum and that administrative formalities connected with release cannot justify a delay of more than ***a few hours***. It is for the Contracting States to organise their legal system in such a way that their law-enforcement authorities can meet the obligation to avoid unjustified deprivation of liberty[320].

In the **Bozano** case (1984), the Commission censured France for deporting the applicant to Switzerland, a State which had arranged his transfer to Italy, in order to circumvent the French

[312] ECtHR, Case ***Khodzhayev v. Russia***, No. 52466/08, Judgment of 12 May 2010, §141.
[313] ECtHR, Case ***Čonka v. Belgium***, No. 51564/99, Judgment of 5 February 2002, §§40-46.
[314] ECtHR, Case ***Ozdil and Others v. the Republic of Moldova***, No. 42305/18, Judgment of 11 June 2019, §§39, 54-55, 57.
[315] ECtHR, Case ***Komissarov v. the Czech Republic***, No. 20611/17, Judgment of 3 February 2022, §§48-52.
[316] ECtHR, Case ***Mokallal v. Ukraine***, No. 19246/10, Judgment of 10 November 2011, §44.
[317] ECtHR, Case ***Kalinichenko v. Russia***, No. 40834/11, Judgment of 9 July 2019, §§75-77.
[318] ECtHR, Case ***Kozhayev v. Russia***, No. 60045/10, Judgment of 5 June 2012, §106;
[319] ECtHR, Case ***Quinn v. France***, No. 18580/91, Judgment of 22 March 1995, §42.
[320] ECtHR, Case ***Mokallal v. Ukraine***, No. 19246/10, Judgment of 10 November 2011, §44; Case ***Quinn v. France***, No. 18580/91, Judgment of 22 March 1995, §42.

courts' decision to refuse his extradition to Italy[321] due to fact that the person had been tried *in absentia*. Notwithstanding this, in relation to Switzerland, the Commission considered that a person's arrest for the purpose of extradition proceedings following expulsion from a third State that refused to extradite the same person to the requesting State does not violate the Convention if done in accordance with domestic law and not arbitrarily. [322]

Next, exemples are provided of situations where the Court **did not find any violation** of the principle of lawfulness in the context of detention with the view to extradition or deportation:

- Provisional arrest with the view to extradition to the USA of a Russian national who, while visiting Switzerland for family and business reasons, was summoned as a witness in a Swiss criminal case: no violation of Article 5 (1) was found in this case, as the applicant had travelled freely to Switzerland for private reasons, not for the specific purpose of testifying in a criminal proceeding and without invoking the guarantees deriving from the relevant instruments of inter-State mutual legal assistance; also, the Court noted that a detention is "arbitrary" when there has been an element of bad faith or trickery, but that it is not as such contrary to good faith that authorities resort to stratagems to fight crime, although not every trick may be justified. In this case, no element of trickery was involved[323].
- Applicant lured, by an undercover agent working for the USA, to travel from Yemen to Germany with the view to his extradition to the USA for the purposes of prosecution on charges of supporting and financing terrorism: the Court found no violation of Convention rights in this case, since it was not the respondent State or persons on its behalf that had taken extraterritorial measures on Yemen's territory aimed at inciting the applicant to leave that country; the case did not concern the use of force (which could give rise to an issue under Article 5 (1)); the cooperation between Germany and the US pursuant to the rules on mutual legal assistance in arresting and detaining the applicant did not give rise to any problem under Article 5 of the Convention; and Article 6 (1) of the Convention is not applicable to extradition proceedings since these do not concern a dispute over an applicant's civil rights or liability for any criminal offence[324].
- Detention of an applicant, in conformity with domestic law, while proceedings were pending in order to appeal against the decision to revoke his refugee status and to obtain subsidiary protection[325].
- Detention in a EU Member State, with the view to extradition to a non EU State, of an individual who had been granted refugee status in another EU Member State: the Court underlined that this did not mean that the applicant should should be considered a refugee elsewhere (even within the EU). Therefore, authorities of the requested State decided, in the course of standard extradition proceedings, to conduct their own inquiry into the danger of the applicant being persecuted in the requesting State and to contact the authorities of the State which had granted asylum in order to obtain the full facts of his case and dispel the risk of "fabricated charges". Thus, a preliminary investigation was justified and is intrinsic to actions "taken with a view to extradition" and detention while it is ongoing is compatible with Article 5 (1) (f), even if, in the end, extradition is declared inadmissible[326].
- Detention on the basis of an EAW for the purpose of serving a sentence rendered *in absentia*, with the applicant alleging that authorities had applied the mutual recognition mechanism automatically and mechanically, to the detriment of her fundamental rights.

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[321] Also in case ***Abdolkhani and Karimnia v. Turkey (No. 1)***, No. 30471/08, Judgment of 22 September 2009, the Court found that indirect removal of an alien to an intermediary country does not affect the responsibility of the expelling Contracting State to ensure that he or she is not, as a result of its decision to expel, exposed to treatment contrary to Article 3 of the Convention, §88.

[322] EComHR, Case ***Bozano v. Switzerland***, No. 9009/80, Decision (Partial) of 12 July 1984, pp. 69-70.

[323] ECtHR, Case ***Adamov v. Switzerland***, No. 3052/06, Judgment of 21 June 2011, §§52, 54, 56, 66-70.

[324] ECtHR, Case ***Al-Moayad v. Germany***, No. 35865/03, Decision of 20 February 2007, §§87-88, 93.

[325] ECtHR, Case ***Baz v. Ukraine***, No. 40962/13, Judgment of 5 November 2020, §36.

[326] ECtHR, Case ***Shiksaitov v. Slovakia***, Nos. 56751/16 & 33762/17, Judgment of 10 December 2020, §§69-74.

The Court found no element of bad faith on the part of the authorities of the requested State, having had initially believed that the applicant would benefit from a new trial, contrary to what was indicated in point 3.4 of the EAW form, namely that the applicant was simply informed of her right to a new procedure. According to the ECtHR, such a misunderstanding did not mean that the second detention of the applicant, ordered at the end of the proceedings relating to the EAW, with a view to her surrender to the requesting authorities, was unlawful or that the title ordering the deprivation of liberty was *prima facie* invalid[327].

- Partial overlap of pre-trial custody and custody pending the extradition;[328];
- Placement in preliminary detention at the request of prosecutor (and not of the requesting State): Article 16 of the ECE merely requires that provisional detention be decided by the requested Party in accordance with its own law; the Constitutional Court of this Party unequivocally stated that the only condition for the applicant's placement in preliminary detention was that a request be lodged by the prosecutor and considered that Article 16 ECE could not be interpreted to mean that such a request had to be lodged by the State requesting extradition[329];
- Detention with the view to extradition, for the purpose of prosecution, of an asylum seeker: the ECtHR, in view of the fact that detention was authorised and extended by a court of the requested State, rather than by a foreign court or a non-judicial authority, in compliance with the time-limits set in its Code of Criminal Procedure, found no violation of Article 5 (1) (f)[330].
- Detention examined by two degrees of jurisdiction of the requested State (on the applicant's appeal), which concluded that the applicant was lawfully detained under the relevant legislation; the Court saw no reason to challenge that interpretation of domestic law;[331]
- Extradition proceedings lasting some nine months, with no substantiation of any significant unjustified delays or period of inaction attributable to the State, and detention extended for specific periods of time: the Court considered that such proceedings were "in progress" all this time[332].
- Request for the extension of detention submitted by the prosecutor less than seven days before the expiry of the previous detention order, in breach of the relevant provisions of domestic law: this "irregularity" was not considered sufficiently serious as to entail a breach of Article 5§1 of the Convention, particularly in view of the fact that the proceedings by which the applicant's detention was ordered and extended amounted to a form of periodic review of a judicial character.[333]
- One year of detention for the purpose of extradition in a case where the courts specified the time-limits in the detention orders, relying on the provisions of domestic and international law, and assessed the lawfulness and various circumstances which were considered to be relevant to the applicant's detention, including the progress of the extradition proceedings and the person's refugee applications, was considered lawful for the purposes of Article 5 (1); although extradition proceedings were suspended for over three months pursuant to the request made by the Court under Rule 39, they have nevertheless been in progress and in compliance with the domestic law[334].

However, a violation of Article 5 (4) – the right to a speedy review of detention – was found in the case above, given that the major part of the delays (about 10 and 30 days) related to the period

[327] ECtHR, Case ***De Sousa v. Portugal***, No. 28/17, Decision of 7 December 2021, §§80-84, 88.
[328] ECtHR, Case ***Shamayev and others v. Georgia, and Russia***, No. 36378/02, Judgment of 14 April 2005, §400, 406-407.
[329] ECtHR, Case ***Shiksaitov v. Slovakia***, Nos. 56751/16 & 33762/17, Judgment of 10 December 2020, §64, 67.
[330] ECtHR, Case ***K. v. Russia***, No. 69235/11, Judgment of 23 May 2013, §84.
[331] ECtHR, Case ***Ketchum v. Romania***, No. 15594/11, Decision of 11 June 2013, §§24-25, 27.
[332] ECtHR, Case ***Khodzhamberdiyev v. Russia***, No. 64809/10, Judgment of 5 June 2012, §§90, 109.
[333] ECtHR, Case ***Soliyev v. Russia***, No. 62400/10, Judgment of 5 June 2012, §38.
[334] ECtHR, Case ***Shakurov v. Russia***, No. 55822/10, Judgment of 5 June 2012, §§163-172.

of time when the case file was being transferred from the first-instance court to the appeal court. Apparently, the domestic legislation did not set out any relevant time-limit for this purpose and the entire length of the appeal proceedings is attributable to the domestic authorities. The Court found no complex issues involved in the determination of the lawfulness of the applicant's detention and no additional information was required. The Court reiterated that it is incumbent on the respondent State to organise its legal system in such a way as to allow for a speedy examination of detention-related issues (see further details in the sub-section below).[335]

In 2018, the PC-OC developed and approved **Guidelines on the provision of information regarding the detention or other measures of restriction imposed in extradition proceedings**, given the importance of the exchange of information for a smooth running of extradition proceedings and to ensure that the person sought is surrendered to the requesting State as soon as the decision to extradite is taken. Suh information may also help to inform victims and organize their protection, when necessary[336]. For the purpose of these guidelines, the term 'detention' is to be understood as holding a person in custody at any stage of the extradition proceedings until surrender.

Although provisional detention is a rule in extradition proceedings, the use of alternatives to detention is becoming increasingly important. The above guidelines also apply to alternative measures of restriction imposed during the same time-frame.[337] See more information on these guidelines under Convention Article 16 (Comments and Recommendations) and sub-section 1.1.4 (Restrictive measures alternative to detention).

European Arrest Warrant[338]

On what concerns **deprivation of liberty on the basis of an EAW**, it must be underlined that detention pending trial must be based on a ***"reasonable suspicion"*** that the person concerned has committed an offence, ordered for the purpose of bringing the person concerned before a ***"competent legal authority"*** and ***lawful***. When the authorities order the detention of an individual pending trial on the grounds of his or her failure to appear before them when summoned, they should make sure that the individual in question has been given adequate notice and sufficient time to comply and take reasonable steps to verify that he or she has in fact absconded[339].

In 2007, the validity of the **EAW FD** was challenged on two grounds, namely the legal basis and the principle of equality and non-discrimination. The CJEU dismissed both arguments and upheld the validity of the **EAW FD**[340]. In 2021, the CJEU once again upheld the validity of the **EAW FD**, dismissing challenges brought on a fundamental rights ground, namely of an alleged infringement of the right of the accused to information[341].

In relation to the requirement of an **arrest warrant**[342] (Article 8 (1) (c) **EAW FD**), the CJEU held that if no ***national arrest warrant***, ***separate*** from the EAW, exists, the EAW does not satisfy the requirements of lawfulness laid down in Article 8 (1) of the **EAW FD** and the executing judicial

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[335] ECtHR, Case ***Shakurov v. Russia***, No. 55822/10, Judgment of 5 June 2012, §§184-186.
[336] **PC-OC (2018)02rev3**, *PC-OC Guidelines on the provision of information regarding the detention or other measures of restriction imposed in extradition proceedings*, adopted by PC-OC at its 75th meeting, November 2018, p. 2.
[337] **PC-OC (2018)02rev3,** p. 2.
[338] Eurojust, ***Case-law by the Court of Justice of the EU on the European Arrest Warrant***, updated until 1 December 2021, p. 10.
[339] ECtHR, Case ***B.A.A. v. Romania***, No. 70621/16, Decision of 26 March 2019, §20; Case ***Merabishvili v. Georgia***, Nº. 72508/13, Judgment [GC] of 28 November 2017, §§184-186.
[340] CJEU, Case **C-303/05, *Advocaten voor de Wereld***, Judgment of 3 May 2007.
[341] CJEU, Case **C-649-19, *Spetsializirana prokuratura (Déclaration des droits)***, Judgment of 28 January 2021.
[342] Eurojust, ***Case-law by the Court of Justice of the EU on the European Arrest Warrant***, updated on 1 December 2021, p. 15.

authority ***must refuse*** to give effect to it[343]. The notion of **[national] arrest warrant or any other enforceable judicial decision having the same effect** refers to a national measure which, even if it is not referred to as a *national arrest warrant*, allows for the ***research and arrest*** of a person with a view to his or her appearance before a court for the purpose of conducting criminal proceedings. It is for the national court in the issuing Member State to determine, in the light of national law, what ***consequences*** the absence of a valid national arrest warrant may have on the decision to keep the surrendered person in provisional detention[344].

The CJEU also clarified that the requirement of ***effective judicial protection***, that must be afforded to a person who is the subject of an EAW for the purpose of **criminal prosecution**, presupposes that either the EAW or the national arrest warrant on which it is based be subject to ***judicial review*** by a court in the issuing Member State prior to the surrender of the requested person[345].The CJEU specified that EAWs issued by the Swedish National Police Board and the Ministry of Justice of the Republic of Lithuania were not "judicial decisions" for the purposes of the **EAW FD**.[346] By contrast, EAWs issued by a public prosecutor can fall within that concept, despite the fact that such public prosecutors are exposed to the risk of being subject, directly or indirectly, to directions or instructions in a specific case from the executive, provided that those arrest warrants are subject to endorsement by a court that reviews them independently and objectively, having access to the entire criminal file to which any specific directions or instructions from the executive are added, the conditions of issue and the proportionality of those arrest warrants, thus adopting an autonomous decision which gives them their final form[347]. The confirmation, by the public prosecutor's office, of a national arrest warrant previously issued by a police service also constitutes a *judicial decision* for the purposes of such Framework Decision.[348].

Therefore, the Court considers that if, in the issuing Member State, the competence to issue an EAW ***for the purpose of prosecution*** does not lie with a court but with another authority participating in the administration of justice, an ***effective judicial protection*** requires[349] that the decision to issue the EAW and the proportionality of such a decision must be capable of being the subject, in the issuing Member State, of court proceedings which meet in full the requirements inherent to an effective judicial protection. It is for the Member States to ensure that their legal orders effectively safeguard the required level of judicial protection by means of the procedural rules that they implement. These rules may vary from one Member State to another. Introducing a separate right of appeal against a public prosecutor's decision to issue an EAW is one possibility, but Member States can also opt for other mechanisms[350]. For instance, national procedural rules whereby the court that adopted the national arrest warrant reviews the decision of the public prosecutor's office to issue an EAW before or practically at the same time as that decision is adopted, or subsequently, including after the requested person's surrender, would meet the required threshold[351]. Where national law does not provide for a separate remedy, neither before, concomitantly or subsequently to the issuing of the EAW by a public prosecutor, a court, called upon to decide on the lawfulness of the provisional detention of a person surrendered in execution of an EAW, must declare its jurisdiction to indirectly review the validity of such EAW in light of EU law[352]. Where both the EAW and the national arrest warrant on which

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[343] CJEU, Case **C-241/15, *Bob-Dogi***, Judgement of 1 June 2016.
[344] CJEU, Case **C-414/20 PPU, *MM***, Judgment of 13 January 2021.
[345] CJEU, Case **C-206/20, *Prosecutor of the regional prosecutor's office in Ruse, Bulgaria***, Order of 22 June 2021; Case **C-648/20 PPU, *PI***, Judgment of 10 March 2021.
[346] CJEU, Case **C-452/16 PPU, *Poltorak***, Judgment of 10 November 2016; Case **C-477/16 PPU, *Kovalkovas***, Judgment of 10 November 2016.
[347] CJEU, **Case C-489/19 PPU, *NJ***, Judgment of 9 October 2019.
[348] CJEU, Case **C-453/16 PPU, *Özçelik***, Judgment of 10 November 2016.
[349] Eurojust, ***Case-law by the Court of Justice of the EU on the European Arrest Warrant***, updated until 1 December 2021, p. 24.
[350] CJEU, **Joined Cases C-566/19 PPU, *JR*, and C-626/19 PPU, *YC***, Judgment of 12 December 2019; Case **C-625/19 PPU, *XD***, Judgment of 12 December 2019.
[351] CJEU, **Joined Cases C-566/19 PPU, *JR*, and C-626/19 PPU, *YC***, Judgment of 12 December 2019; Case **C-625/19 PPU, *XD***, Judgment of 12 December 2019.
[352] CJEU, Case **C-414/20 PPU, *MM***, Judgment of 13 January 2021.

the former is based are issued by a public prosecutor, the requirement of effective judicial protection that must be afforded to a person who is the subject of an EAW for the purpose of criminal prosecution presupposes that either of them are subject to judicial review by a court in the issuing Member State prior to the surrender of the requested person[353].

However, if the EAW is issued for the purposes of ***executing a sentence***, the Member State is not required to provide, in its legislation, for a separate judicial remedy against the decision of an authority which, despite participating in the administration of justice, is not itself a court[354].

In relation to the meaning of ***judicial authority***[355], the CJEU underlined that this term constitutes an autonomous concept of EU law and it is capable of including authorities that, although not necessarily judges or courts, participate in the administration of justice. Again, for the CJEU, authorities such as the Swedish National Police Board and the Ministry of Justice of the Republic of Lithuania do not constitute ***issuing judicial authorities*** within the meaning of Article 6 (1) **EAW FD**[356]. The concept also does not include public prosecutors who are exposed to the risk of being subject, directly or indirectly, to directions or instructions from the executive in a specific case, such as the Minister of Justice, in connection with the the decision to issue an EAW[357]. However, it does include public prosecutors who, while institutionally independent from the judiciary, are responsible for the conduct of criminal prosecutions and whose legal position, in that Member State, affords them a guarantee of ***independence from the executive*** in connection with the issuing of an EAW[358]. The concept of ***executing judicial authority*** was interpreted within the meaning of Articles 6(2), 27(3)(g) and 27(4) of the **EAW FD**. The CJEU considered that its abovementioned case-law on the concept of *issuing judicial authority* (participation in the administration of criminal justice, objectivity and independence) and requirements concerning an effective judicial protection could be transposed to the execution phase of EAWs[359].

Concerning the requirement to **mention the *penalty imposed if there is a final judgment***' (Article 8 (1) (f) **EAW FD**), the CJEU clarified that a failure to indicate in an EAW an additional sentence of conditional release does not necessarily preclude the enforcement of that additional sentence[360].

The CJEU also pointed out that a notification by a Member State of its **intention to withdraw from the EU** does not have the consequence that the execution of an EAW issued by that Member State must be refused or postponed.[361]

1.1.2 Length of the detention pending extradition

As stated before, and despite fact that Article 5 (1) (f) does not require domestic law to set a time limit for detention pending extradition proceedings, the length of such detention has a direct impact on its lawfulness, since the exception provided for in Article 5 (1) (f) will only operate for as long as deportation or extradition proceedings are ***in progress***. If such proceedings are not undertaken with ***due diligence***, the detention will cease to be lawful under Article 5 (1) (f) of the Convention.[362] The ECtHR has repeatedly stated that, when an extradition request concerns a person facing ***criminal charges*** in the requesting State, the requested State is required to act

[353] CJEU, Case **C-648/20 PPU, *PI***, Judgment of 10 March 2021.
[354] CJEU, Case **C-627/19 PPU, *ZB***, Judgment of 12 December 2019.
[355] Eurojust, ***Case-law by the Court of Justice of the EU on the European Arrest Warrant***, updated until 1 December 2021, pp. 23-24.
[356] CJEU, Case **C-452/16 PPU, *Poltorak***, Judgment of 10 November 2016; Case **C-477/16 PPU, *Kovalkovas***, Judgment of 10 November 2016.
[357] CJEU, **Joined Cases *C-508/18, OG, and C-82/19 PPU, PI***, Judgment of 27 May 2019.
[358] CJEU, **Joined Cases C-566/19 PPU, *JR*, and C-626/19 PPU, *YC***, Judgment of 12 December 2019; Case **C-509/18, *PF***, Judgment of 27 May 2019.
[359] CJEU, Case **C-510/19, *Openbaar Ministerie (Faux en écritures)***, Judgment of 24 November 2020.
[360] CJEU, Case **C-551/18 PPU, *IK***, Judgment of 6 December 2018.
[361] CJEU, Case **C-327/18 PPU, *RO***, Judgment of 19 September 2018.
[362] ECtHR, ***Chahal v. United Kingdom***, No. 22414/93, Judgment [GC] of 15 November 1996, §113.

with ***greater diligence*** than when an extradition is sought for the purposes of enforcing a sentence, in order to secure the protection of the rights of the person concerned[363]. The diligence requirements set in Article 5 (1) (f) start applying once the competent authority of the requesting State presents a valid extradition request and the person is taken into custody by the authorities of the requested State.

If provisional arrest is requested and granted, in accordance with Article 16 (4) of **ECE**, it may be terminated if, within a period of 18 days after arrest, the extradition request and supporting documents are not received; and, in any case, it may not exceed 40 days from the date of arrest. In its **Recommendation R (80) 7**, the Committee of Ministers of the CoE specifically recommends that the period of provisional arrest be kept as short as possible, exceeding 18 days only in cases of necessity, particularly where the requesting authority indicates difficulties in submitting the documents within such deadline. It also states that, with a view to expediting extradition, consideration should be given to the use of a summary procedure enabling the rapid surrender of the person sought, provided that this person consents to it. Once the extradition request is granted, both States shall agree on a place and date of surrender, and Article 18 of **ECE**requires that the person is released within 15 days if he or she is not taken over in the appointed date, and in any case within 30 days. If circumstances beyond its control prevent a Party from surrendering or taking over the requested person, both Parties shall agree on a new date for surrender and the above deadlines will continue to apply (Article 18 (4) and (5) **ECE**).

The ECtHR considers that, in the absence of ***clear legal provisions*** establishing the procedure for ordering and extending detention with a view to extradition and setting ***time-limits*** for such detention, the deprivation of liberty is not circumscribed by adequate safeguards against arbitrariness[364]. The existence or absence of time-limits is thus one of a number of factors which the Court might take into consideration in its overall assessment of whether domestic law was "sufficiently accessible, precise and foreseeable" (in other words, whether there existed "sufficient procedural safeguards against arbitrariness"). Where fixed time-limits exist, a failure to comply with them may be relevant to the question of "lawfulness", as detention exceeding the period permitted by domestic law is unlikely to be considered to be effected "in accordance with the law"[365]. Whether the domestic judicial decisions ordering the detention pending expulsion contain an analysis of the particularities of the cases as regards the need for detention and set some time-limits for review of the continued validity of the detention are decisive elements that should be scrutinized by the domestic courts to ensure compliance with what was reasonably required for the purpose pursued and, therefore, with Article 5 (1) (f) of the **ECHR**[366]. Detention cannot exceed the time reasonably required for the purpose pursued[367].

As already stated, according to the Court's well-established case law, extradition proceedings, although temporarily suspended pursuant to the request made by the Court under Rule 39 (***interim measures***), are nevertheless considered to be in progress for the purpose of Article 5 (1) (f) of the Convention[368], provided that the authorities still envisage expulsion at a later stage, and on condition that the detention is not unreasonably prolonged[369]. In its assessment, the Court finds relevant that detention after the detention order becomes enforceable has complied with the procedure and time-limits established under domestic law and that after the expiry of the maximum detention period permitted under domestic law, the person is immediately released[370].

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[363] ECtHR, Case ***Shiksaitov v. Slovakia***, Nos. 56751/16 & 33762/17, Judgment of 10 December 2020, §70.
[364] ECtHR, Case ***Abdulazhon Isakov v. Russia***, No. 14049/08, Judgment of 8 July 2010, §124.
[365] ECtHR, Case ***Komissarov v. the Czech Republic***, No. 20611/17, Judgment of 3 February 2022, §50.
[366] ECtHR, Case ***S.S. and Others v. Russia***, Nos.: 2236/16, 64042/17, 81344/17 & 4067/18, Judgment of 25 June 2019, §§32-33; Case ***B.U. and Others v. Russia***, Nos. 59609/17, 74677/17 & 76379/17, Judgment of 22 January 2019, §§34-35.
[367] ECtHR, Case ***Liu v. Poland***, No. 37610/18, Judgment of 6 October 2022, §§101-103.
[368] ECtHR, Case ***Bakoyev v. Russia***, No. 30225/11, Judgment of 5 February 2013, §§58-160, 162, 164-165.
[369] ECtHR, Case ***Abdulkhakov v. Russia***, No. 14743/11, Judgment of 2 October 2012, §189.
[370] ECtHR, Case ***K. v. Russia***, No. 69235/11, Judgment of 23 May 2013, §92.

And, if extradition proceedings are still in progress, the fact that an interim measure has been ordered cannot absolve the respondent Government from its obligation to conduct those proceedings with the same proper diligence as all extradition proceedings entailing detention and has no bearing on the legality of such detention[371].

Although it is indisputable that the submission of **asylum** requests while the person is in custody with the view to extradition or deportation does have a bearing on the length of these procedures, the Court always emphasizes that ***decisions on detention and on extradition or expulsion are separate issues.*** Therefore, the question as to when the decision on extradition is going to be taken is considered of no relevance to the Court for the purpose of examining the lawfulness and length of detention. The Court also takes into account the possibility of domestic to annul the measure of restraint or to change it to a more lenient one while extradition is under consideration[372].

The Court accepts that the period of "**pre-trial detention**" under Article 5 (1) (c) starts counting as from the moment when a person is handed over to the authorities of the requesting State. Therefore, an arrest warrant constitutes a sufficient basis for the sought person's arrest and detention in the requested State for the purpose of extradition, and it continues to provide such a basis until such person is handed over to the authorities of the requesting State, at which point the maximum period of detention under domestic law begins to run. Only after the authorities of the requesting State have the person under their control can they assume the full spectrum of obligations towards him or her in the context of his pre-trial detention under Article 5 (1) (c) of the Convention, including those provided for in paragraphs 3 and 4 of Article 5 (notwithstanding the fact that the person should be able to take proceedings within the meaning of paragraph 4 to contest the detention order while still in the requested State). A different interpretation would mean, for example, that the arrest warrant issued by the requesting State would have to be extended at regular intervals, without the authorities ever seeing the person involved, and that, in case the duration of the extradition procedure exceeds the maximum period of pre-trial detention under the law of the requesting State, its authorities would have to request the authorities of the requested State to release the person, without the courts ever having the possibility of questioning him or her[373].

However, one cannot stress enough that the ***exhaustion of domestic remedies*** is a requirement that must be fulfilled in all cases: a complaint alleging that three years and eight months of custody pending extradition was excessive led the Commission to consider that a person who complains of the length of his/her custody should have drawn up – and at least reasonably renewed – a request for release.[374] The same applies to less restrictive measures, such as house arrest[375].

Examples of cases in which the Court found <u>no violation</u> regarding the length of detention with the view to extradition or deportaion

- Detention with a view to **deportation** for approximately ***three and a half years*** during which various decisions in domestic proceedings have been taken. The Court has had to examine the ***length of each of these proceedings***: decisions taken by the Secretary of State to refuse asylum - the Court did not consider that the periods at stake (approximately 7 months each) were excessive, bearing in mind the detailed and careful consideration required for the applicant's request for political asylum and the opportunities afforded to the latter to make representations and submit information; judicial review proceedings before the national courts (four months for decision on the first application and less than seven for the second); eight months for the court of appeal to dismiss the appeal against this last decision and refused leave to appeal to the House

[371] ECtHR, Case ***Liu v. Poland***, No. 37610/18, Judgment of 6 October 2022, §§101-103.
[372] ECtHR, Case ***Khudyakova v. Russia***, No. 13476/04, Judgment of 8 January 2009, §74.
[373] ECtHR, Case ***Gilanov v. the Republic of Moldova***, No. 44719/10, Judgment of 13 September 2022, §§51-57.
[374] EComHR, Case ***Lynas v. Switzerland***, No. 7317/75, Decision of 6 October 1976, §§167-168.
[375] ECtHR, Case ***Ermakov v. Russia***, No. 43165/10, Judgment of 7 November 2013, §262.

of Lords; less than five months for the House of Lords to similarly refuse leave to appeal. In light of this, and taking into account that the case involved considerations of an "extremely serious and weighty nature" and that it was not in anybody's interest that such decisions be taken hastily, without due regard to all the relevant issues and evidence, the ECtHR concluded that none of the periods complained of could be regarded as excessive, taken either individually or in combination;[376]

- Detention for ***two years and seven months***: the first two years concomitantly in respect of the extradition proceedings and under pre-trial detention for criminal charges broght against him in the requested State (under Article 5 (1) (c) of the Convention); upon expiry of the maximum limit for pre-trial custody, he remained in detention for the purpose of extradition one month and six days (under Article 5 (1) (f)), until he was convicted to eight years of imprisonment by a court of the requested State, and remained in custody under the conditions provided for in Article 5 (1) (a) of the Convention (i.e. "after conviction by a competent court"). While he was serving this sentence, the authorities of the requested State decided to temporarily surrender him their counterparts of the requesting State, and enforced this decision 28 days later: the ECtHR therefore concluded that the applicant was in custody for the purposes of extradition, under the conditions provided for in Article 5§1(f) of the Convention, for two periods only: one month and six days in 1999 and 28 days in 2001, and considered that these periods could not be regarded as unreasonable[377];
- Periods of detention of ***one year and ten months***, and slightly more than ***eleven months***, respectively, pending deportation on the grounds of a threat to national security, following the indication of an interim measure by the Court[378].
- Period of ***18 months*** of detention pending extradition, the maximum permitted by domestic law, including a ***one year*** delay due to the submission of a request for temporary asylum[379].
- Period of ***16 months*** of detention, from the moment a court ordered the extension of the applicant's (previously unlawful) detention to his release due to the expiry of the maximum time limit for detention under the domestic law of the requesting State, during which time various appeals have been lodged and detention upheld by courts, the extradition proceedings were pending and the extradition order was issued and reviewed by courts of two levels of jurisdiction with no evidence of delays; in parallel, the applicant's application for refugee status was also ongoing and was examined by the authorities and equally by courts of two levels of jurisdiction; after the domestic extradition proceedings were terminated, the applicant remained in custody for a further two months and 26 days in compliance with the interim measure indicated by the Court, a measure that did not seem to it to be "unreasonably prolonged"[380];
- Periods of approximately ***one year*** of detention pending extradition, provided that there were no significant unjustified periods of inaction attributable to the State during the person's detention and that related proceedings were "in progress" all that time; it was also relevant that any extensions in detention were made for fixed periods of time[381].
- A subsequent period of detention of ***up to eight months*** due to the implementation of an interim measure requested by the Court is also admitted, provided that the authorities still envisage extradition at a later stage, and on condition that the detention is not

[376] ECtHR, ***Case Chahal v. United Kingdom***, No.: 22414/93, Judgment [GC] of 15 November 1996, §§114-117.
[377] ECtHR, Case ***Raf v. Spain***, No. 53652/00, Judgment of 17 June 2003, §§55-62, 64-65.
[378] ECtHR, Case ***K. v. Russia***, No. 69235/11, Judgment of 23 May 2013, §92; Case ***Al Husin v. Bosnia and Herzegovina***, No. 3727/08, Judgment of 7 February 2012, §§67-69; Case ***Al Hanchi v. Bosnia and Herzegovina***, No. 48205/09, Judgment of 15 November 2011, §§49-50;
[379] ECtHR, Case ***Rustamov v. Russia***, No. 11209/10, Judgment of 3 July 2012, §165.
[380] ECtHR, Case ***Abdulkhakov v. Russia***, No. 14743/11, Judgment of 2 October 2012, §§24-32, 184-191.
[381] ECtHR, Case ***Ermakov v. Russia***, No. 43165/10, Judgment of 7 November 2013, §§251; Case ***K. v. Russia***, No. 69235/11, Judgment of 23 May 2013, §92; Case ***Khodzhamberdiyev v. Russia***, No. 64809/10, Judgment of 5 June 2012, §§90, 109.

unreasonably prolonged. The Court also considers relevant, in this regard, detention during this period is in compliance with the procedure and time-limits established under domestic law and that after the expiry of the maximum detention period permitted by law, the person is immediately released[382].

- Slightly less than ***five months*** of detention after the extradition order entered into force, despite the fact that certain procedural formalities could have been completed by the authorities in advance while the applicant was still serving a prison term in the requested State; however, the fact that the applicant did not submit an application for refugee status, the outcome of which could have been decisive for que question of extradition, until a month before the end of his prison term, and that asylum proceedings lasted for approximately ten months, including examinations of the application at the regional and federal levels and subsequently by courts at two levels of jurisdiction, led the Court to conclude that action was "being taken with a view to extradition"; the extradition order was then issued less than two months after the application for refugee status was rejected at final instance, and afterwards the applicant remained in custody for about five months in implementation of an interim measure requested by Court, which did not find evidence of any significant delays in the conduct of the extradition proceedings[383].

Upon examining a complaint that the Courts of the requesting State had refused to consider the time that the applicant had spent in custody in the requested State pending extradition as a part of his detention on remand in the requesting State, the Court stated that neither Article 5 (3) nor any other provision of the Convention creates a general obligation for a State Party to take into account the length of a pre-trial detention suffered in a third State[384]. Notwithstanding this, in its **Recommendation (86) 13**, the Committee of Ministers recommends to CoE Member States *time spent in custody pending extradition be deducted from the sentence in the same manner as time spent in custody pending trial*. Furthermore, *where the requested party considers that the duration of detention pending extradition is* ***disproportionate*** *to the sentence to be enforced or the penalty likely to be incurred upon conviction, it should consult the requesting party with a view to ascertaining whether the request for extradition is maintained.*

Examples of cases in which the Court found violations of the duty of diligence in the conduct of proceedings in the context of detention with the view to extradition or deportation

- Adoption of an interim in a case where the final judgment of the Supreme Court was delivered two years after the interim measure had been indicated, at a time when the applicant had already been detained for a considerable period of time (namely, ***three years and two months***)[385].
- Detention with a view to extradition lasting ***two years, one month and fifteen days*** with excessive delays at various stages of proceedings (eg. over one month for listing the *habeas corpus* application, adjournment of one week requested by Government one day before the date scheduled for the hearing, for failure to submit its observations on time, delays before the Supreme Court, 23 days for the dismissal of appeal by the Supreme Court, continuation of detention for two months and 20 days), and suspension of extradition proceedings, due to the Covid-19 pandemic, without a clear understanding as to when the surrender would be possible and in the absence of an agreed surrender date (as required by Article 18 (3) of ECE), which deprived the applicant of the procedural guarantees available to him under this provision[386];

[382] ECtHR, Case ***Ermakov v. Russia***, No. 43165/10, Judgment of 7 November 2013, §§251-254; Case ***K. v. Russia***, No. 69235/11, Judgment of 23 May 2013, §§88, 91, 93-94; Case ***Abdulkhakov v. Russia***, No. 14743/11, Judgment of 2 October 2012, §190.
[383] ECtHR, Case ***Kasymakhunov v. Russia***, No. 29604/12, Judgment of 14 November 2013, §§ 168-169, 171-172.
[384] ECtHR, Case ***Zandbergs v. Latvia***, No. 71092/01, Judgment of 20 December 2011, §63.
[385] ECtHR, Case ***Liu v. Poland***, No. 37610/18, Judgment of 6 October 2022, §§101-103.
[386] ECtHR, Case ***Khokhlov v. Cyprus***, No. 53114/20, Judgment of 13 June 2023, §§96-101.

- Detention for ***two years***, without any request for extension, in a case where the detention order did not set any time-limit for the applicant's detention, and the relevant provisions of domestic law fixed it at two months, extendable up to six months by a judge.[387].
- Detention for ***almost two years***, a period "unusually long", in a case where, at the different stages of the extradition proceedings, there were delays of sufficient length to render the total duration of those proceedings excessive: first decision on the merits (preliminary) given three months after placement in detention pending extradition; extradition order delivered ten months after the Indictment Division's favourable opinion; the remedies of which the applicant availed himself over this period (three appeals on points of law against the decisions dismissing applications for release and one appeal on points of law against the Indictment Division's opinion were not considered to have significantly delayed the proceedings; continuation of detention with a view to extradition for seven months after the adoption of the extradition order[388];
- Detention for ***one year, nine months and eighteen days*** with the Court finding that nothing prevented the courts from reaching a final decision on the admissibility of the applicant's extradition much earlier than they in fact did and that the grounds for the applicant's detention did not remain valid for the whole period concerned since the authorities failed to proceed in an active and diligent manner when gathering all necessary information and adjudicating the legal challenges raised.[389];
- Continuation of detention for more than ***one year and nine months*** after the interim measure had been applied, during which time no steps were taken to find alternative solutions[390];
- Detention of ***over 14 months*** pending extradition: Government's allegations that the applicant and his/her lawyer were responsible for the prolongation of detention given that an asylum request had been lodged and self-incriminating statements produced in relation to a crime committed in the requested State, that domestic authorities were under the obligation to examine, were considered by the Court "neither relevant, nor reasonable". The Court stressed that detention is a different issue from extradition, therefore the question as to when the decision on extradition was going to be taken was considered of no relevance to the Court for the purpose of examining the lawfulness and length of the applicant's detention. The Court also noted that the domestic courts had a possibility to annul the measure of restraint or to change it to a more lenient one during the time the question of the applicant's extradition was under consideration, which was not done[391].
- Detentions for ***over a year*** after the authorities became aware that the requesting State had failed to submit sufficient information about the acts of which the applicants were suspect, without any steps to request the necessary additional information or any doubts about the essential character of such information; the fact that asylum requests were pending during such period was found irrelevant in this case, since the absence of sufficient information constituted, on its own, an obstacle to extradition[392];
- Detention for ***at least one year***, with the person placed in a temporary detention centre for aliens and his detention was extended several times pending deportation. The Court considered that nothing in the available materials or the parties' submissions indicated that the authorities pursued the proceedings with requisite diligence, what kind of progress was achieved in the proceedings or what steps were taken by the authorities at

[387] ECtHR, Case ***Abdulazhon Isakov v. Russia***, No. 14049/08, Judgment of 8 July 2010, §124.
[388] ECtHR, Case ***Quinn v. France***, No. 18580/91, Judgment of 22 March 1995, §§47-49.
[389] ECtHR, Case ***Shiksaitov v. Slovakia***, Nos. 56751/16 & 33762/17, Judgment of 10 December 2020, §§82-84.
[390] ECtHR, Case ***Keshmiri v. Turkey (No. 2)***, No. 22426/10, Judgment of 17 January 2012, §34.
[391] ECtHR, Case ***Khudyakova v. Russia***, No. 13476/04, Judgment of 8 January 2009, §74.
[392] ECtHR, Case ***Khamroev and Others v. Ukraine***, No. 41651/10, Judgment of 15 September 2016, §§17, 25, 36, 93-98.

reasonable intervals to justify continuing detention, and therefore that such detention was compliant with what was reasonably required for the purpose pursued[393];

- Detention for five months due to delays originated by conflicts of competence ratione loci and contradictory decisions thereon, forcing the applicant to withdraw his first appeal[394];

A case involving a ***one year detention for the purpose of extradition***, with asylum application lodged and a ***3-month suspension*** pursuant to a Court order under Rule 39 was considered lawful for the purposes of Article 5 (1) (f), but failed to meet the standard of speediness and due diligence imposed by Article 5 (4). The Court considered that the major part of the delays (about 10 and 30 days) related to the period of time when the case file was being transferred from the first-instance court to the appeal court. Apparently, the domestic legislation did not set out any relevant time-limit for this purpose and the entire length of the appeal proceedings is attributable to the domestic authorities. No complex issues were involved in the determination of the lawfulness of the applicant's detention and no additional information was required. The Court reiterated that it is incumbent on the respondent State to organise its legal system in such a way which allows for the speedy examination of detention-related issues.[395]

However, the time requirement must not be pursued to such an extent so as to render the rest of the rights provided for under the ECHR void and ineffective, especially the right to the judicial review of detention (see sub-chapter below). Emphasizing that it is not its task to determine *in abstracto* the time that should elapse between the adoption of an extradition order and its enforcement, the Court has stated that, notwithstanding, when the authorities of a State hasten to hand over an individual to another State two days after the date on which the order was issued, they have a duty to act with even greater promptness and expedition to enable the person concerned to have his or her complaint under Articles 2 and 3 submitted to independent and rigorous scrutiny and have enforcement of the impugned measure suspended. The Court finds it unacceptable for a person to learn that he is to be extradited only moments before being taken to the airport, when his reason for fleeing the receiving country has been his fear of treatment contrary to Article 2 or Article 3 of the Convention, and therefore found that, by acting in this manner, the h competent authorities unjustifiably hindered the exercise of the right of appeal that might have been available to the applicants, at least theoretically.[396]

European Arrest Warrant

When a person is arrested on the basis of an EAW, the executing judicial authority shall take a decision on whether the requested person should remain in detention, in accordance with the law of the executing Member State. It may also be released provisionally at any time in conformity with the domestic law of the executing Member State, provided that the competent authority of the said Member State takes all the measures it deems necessary to prevent the person absconding (Article 12 of the **EAW FD**).

Due to urgent nature of EAW-related proceedings, decisions regarding their execution must be taken within tight deadlines: ten days if the person consents to surrender; 60 days upon arrest in other cases, with the possibility of a 30-day extension if such deadlines cannot be met (Article 17 (1) to (4)) of the **EAW FD**). Surrender must then take place as soon as possible on a date agreed between the authorities concerned, and no later than ten days after the final decision on the execution of the EAW. If circumstances beyond the control of any of the Member States prevent surrender, a new date shall immediately be agreed upon by such authorities and surrender shall take place within ten days. The surrender may exceptionally be temporarily postponed for serious humanitarian reasons, for example if there are substantial grounds for believing that it would

[393] ECtHR, Case ***U.A. v. Russia***, No. 12018/16, Judgment of 22 January 2019, §§41-42.
[394] ECtHR, Case ***M. S. v. Belgium***, No. 50012/08, Judgment of 31 January 2012, §165.
[395] ECtHR, Case ***Shakurov v. Russia***, No. 55822/10, Judgment of 5 June 2012, §§184-186.
[396] ECtHR, Case ***Shamayev and others v. Georgia and Russia***, No. 36378/02, Judgment of 14 April 2005, §§460-461.

manifestly endanger the requested person's life or health. In this case, it shall take place as soon as such reasons have ceased, again within ten days of the new date agreed by authorities. Upon expiry of the time-limits for surrender, f the person is still being held in custody he or she shall be released (Article 23 **EAW FD**).

The issuing Member State shall deduct all periods of detention arising from the execution of an EAW from the total period of detention to be served in the issuing Member State as a result of a custodial sentence or detention order being passe (Article 26 **EAW FD**).The CJEU has considered that measures such as a 9-hour night-time curfew, in conjunction with the monitoring of the person concerned by means of an electronic tag, an obligation to report to a police station at fixed times on a daily basis or several times a week and a ban on applying for foreign travel documents are not, in principle, having regard to the type, duration, effects and manner of implementation of all those measures, so restrictive as to give rise to a deprivation of liberty comparable to that arising from imprisonment and thus to be classified as "detention" within the meaning of Article 26 **EAW FD**. It is nevertheless for the referring court to ascertain this.[397]

1.1.3 Judicial review of detention

Article 5 (4) of the **ECHR** establishes that:

> *Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.*

It should be noted from the outset that the deprivation of liberty under Article 5 (1) (f) of the Convention ([…] *with a view to deportation or extradition*) differs from the one provided for under subparagraph (c) of the same Article 5 (1) ([…] *for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so*."). While in the former case authorities are under the obligation to bring the person "promptly" before a judge", the same does not apply to the latter situation: here, it is the applicant who has a right to **"take proceedings"** before a court and actively seek his release under Article 5 (4) of the Convention[398]. Paragraph 4 of Article 5 concerns the review of lawfulness of ***detention itself***, and not of extradition. The lawfulness of the extradition issue is assessed within the framework of the ECE and, as far as it may constitute a violation of other material rights enshrined in the **ECHR**, is examined by the Court in the context of Article 13[399]. The provision of Article 5 (4) constitutes ***lex specialis*** in relation to the more general requirements of Article 13[400].

In accordance with the consolidated case law of the ECtHR, the purpose of this paragraph is to secure to persons who are arrested and detained the right to ***judicial supervision*** of the ***lawfulness*** of the measure to which they are thereby subjected. A remedy must be made available during a person's detention to allow that person to obtain ***speedy judicial review*** of the lawfulness of such detention, capable of leading, where appropriate, to his or her ***release***. The existence of the remedy required by Article 5 (4) must be sufficiently ***certain***, not only in theory but also in practice, failing which it will lack the ***accessibility*** and ***effectiveness*** required for the purposes of that provision[401]. The accessibility of a remedy implies, *inter alia*, that the circumstances voluntarily created by the authorities must be such as to afford detainees a ***realistic possibility*** of using it[402]. This also imples that Contracting States must, at least, foresee

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[397] CJEU, Case **C-294/16 PPU, *JZ***, Judgement of 28 July 2016, ruling.
[398] ECtHR, Case ***Shcherbina v. Russia*** Nos. 41970/11, Judgment of 26 June 2014, §64.
[399] ECtHR, Case ***Shamayev and others v. Georgia and Russia***, No. 36378/02, Judgment of 14 April 2005, §466.
[400] ECtHR, Case ***Chahal v. United Kingdom***, No. 22414/93, Judgment [GC] of 15 November 1996, §126.
[401] ECtHR, Case ***Khaydarov v. Russia***, No. 21055/09, Judgment of 20 May 2010, §137.
[402] ECtHR, Case ***R.K. v. Russia***, No. 30261/17, Judgment of 8 October 2019, §§62-65; Case ***Kim v. Russia***, No. 44260/13, Judgment of 17/ July 2014, §§41-43; Case ***Abdulazhon Isakov v. Russia***, No.

and adopt provisions of judicial review when celebrating inter-State treaties concerning extradition.

Although it is not always necessary that a procedure under Article 5 (4) be attended by the same **guarantees** as those required under Article 6, it must have a judicial and adversarial character, ensure "equality of arms" between the parties, be conducted with ***due dilligence*** and provide guarantees appropriate to the type of deprivation of liberty in question[403]. The judicial nature of the required review implies that "the person concerned should have ***access to a court*** and the opportunity to be ***heard*** either in person or, where necessary, through some form of ***representation***, failing which he will not have been afforded the fundamental guarantees of procedure applied in matters of deprivation of liberty"[404]. The possibility to claim ***compensation*** in the event of wrongful detention is ***no substitute*** for this requirement.[405]. Recognizing, however, that extradition, by its very nature, involves a State's international relations, the Court considers it is understandable that the executive should have an opportunity to express its views on a measure likely to have an influence in such a sensitive area, and does not find that an intervention of the government in an early stage of proceedings, for examination and issuing of an Opinion thereon, impedes the person's access to a domestic court or limits the latter's power of review. But it also finds that Article 5 (4) requires the State to provide, in some way or another, the person whose extradition is sought with the benefit of an ***adversarial procedure***, namely by giving him or her the possibility of submitting written comments on the State's Opinion[406].

Furthermore, in accordance with **Article 5 (2)** of the **ECHR**:

> *Everyone who is arrested shall be informed **promptly**, in a language which he understands, of the reasons for his arrest and of any charge against himt.*

The Court therefore considers that anyone entitled to take proceedings to have the lawfulness of his or her detention speedily decided cannot make effective use of that right unless he or she is ***promptly and adequately informed*** of the reasons relied on for such deprivation of liberty. In this connection, a delay of four days has been found "incompatible with the constraints of time imposed by the notion of ***promptness*** in Article 5 (2)". While this provision does not require that the case file in its entirety be made available to the person concerned, the latter must nonetheless receive sufficient information so as to be able to apply to a court for the review of lawfulness provided for in Article 5 (4). In case persons are not informed that they are being detained pending extradition and have no access to material from the case file, the Court considers that, these facts, in themselves, mean that their right to appeal against their detention is deprived of all substance.[407].

The Court has admitted that "the extradition issue forms the backcloth to the requests for release" and necessarily influences the consideration of the matter; and that, whenever a foreign State's request for extradition does not, at the outset, appear unacceptable to the authorities of the requested State, custody is the rule and release the exception. The fact nevertheless remains that the applicant is entitled to a speedy decision – whether affirmative or negative – on the lawfulness of his custody"[408].

14049/08, Judgment of 8 July 2010, §129; Case ***Abdolkhani and Karimnia v. Turkey (No. 1)***, No. 30471/08, Judgment of 22 September 2009, §139; Case ***Kaboulov v. Ukraine***, No. 41015/04, Judgment of 19 November 2009, §151; Case ***Khudyakova v. Russia***, No. 13476/04, Judgment of 8 January 2009, §89; Case ***Soldatenko v. Ukraine***, No. 2440/07, Judgment of 23 October 2008, §125.
Case ***Ryabikin v. Russia***, No. 8320/04, Judgment of 19 June 2008, §137; Case ***Čonka v. Belgium***, No. 51564/99, Judgment of 5 February 2002, §§ 46, 55.

[403] ECtHR, Case ***Molotchko v. Ukraine***, No. 12275/10, Judgment of 26 April 2012, §149.

[404] ECtHR, Case ***Sanchez-Reisse v. Switzerland***, No. 9862/82, Judgment of 21 October 1986, §51.

[405] ECtHR, Case ***Soldatenko v. Ukraine***, No. 2440/07, Judgment of 23 October 2008, §126; Case ***Öcalan v. Turkey***, No. 46221/99, Judgment [GC] of 12 May 2005, §66, 71.

[406] ECtHR, Case ***Sanchez-Reisse v. Switzerland***, No. 9862/82, Judgment of 21 October 1986, §§45, 51.

[407] ECtHR, Case ***Shamayev and others v. Georgia and Russia***, No. 36378/02, Judgment of 14 April 2005, §413, 416, 427.

[408] ECtHR, Case ***Sanchez-Reisse v. Switzerland***, No. 9862/82, Judgment of 21 October 1986, §57.

Article 5 (4) also proclaims one's right, following the institution of proceedings to challenge the lawfulness of his or her detention, to a ***speedy judicial decision*** on that matter and to a court order terminating such detention if proven unlawful. The Court considers that this involves two aspects: firstly, the opportunity for legal review must be provided ***soon after*** the person is taken into custody; secondly, the review proceedings must be conducted with ***due diligence***[409].There is a special need for a swift decision determining the lawfulness of detention in cases where a ***trial is pending***, because the defendant should benefit fully from the presumption of innocence. The same logic may be applicable to ***detention pending extradition*** when the investigation is pending[410]. When the decision is made by a court at the close of judicial proceedings, the supervision required by Article 5 (4) is incorporated in the decision. But such remedy must also be made available during a person's detention so that such person may obtain a speedy judicial review of its lawfulness at "reasonable intervals[411]", namely taking into account changes in circumstances that may possibly occur.

Article 5 (4) does not compel the Contracting States to set up a ***second level of jurisdiction*** for the examination of the lawfulness of detention. However, where domestic law provides for an appeal, the appellate body must also comply with the requirements of Article 5 (4), for instance as it concerns the ***speediness of the review in appeal proceedings***. Accordingly, in order to determine whether the requirement that a decision be given "speedily" has been complied with, it is necessary to undetake an overall assessment in case the proceedings have been conducted at more than one level of jurisdiction. At the same time, the standard of "speediness" is less stringent when it comes to proceedings before a court of appeal, on condition that the procedure followed by this court has a judicial character and gives the detainee appropriate procedural guarantees[412]. The number of days taken by the relevant proceedings is obviously an important element to consider, but it is not in itself necessarily decisive for assessing whether a decision has been taken with the requisite speed. What is taken into account is the ***diligence*** shown by the authorities, the delay attributable to the applicant and any factors causing delay for which the State cannot be held responsible, such as the complexity of the case or the need to collect additional observations and documents. Also, the Court considers that the State cannot be held responsible for the delays to which the applicant's conduct gave rise and that the latter cannot validly complain of a situation which he or she largely created.[413] Thus, the question of knowing whether the right to a speedy decision has been respected must be determined in the light of ***all the circumstances of each case***[414].

In cases where it is unclear when the detainee would be able to ***initiate*** the procedure for review of detention, national authorities have the obligation to ensure, without delay and through the relevant judicial procedure of review, that the his or her continued detention is in compliance with the regulations in force. Regarding the ***detainee's participation*** in the review, the Court has found sufficient that the person, ***assisted by lawyers***, has the opportunity, throughout the proceedings, to comment on requests for his or her continued detention and to convey and defend his or her arguments before the courts at the ordinary and appeal levels of jurisdiction. According to the Court, the non-participation in the appeal hearings does not undermine the "equality of arms" between the parties or otherwise render the proceedings unfair. The Court is not of the view that the national courts deciding on the applicant's detention are required to carry out a separate inquiry into the applicant's objections against his extradition, but should examine

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[409] ECtHR, Case ***Khudyakova v. Russia***, No. 13476/04, Judgment of 8 January 2009, §97.
[410] ECtHR, Case ***Khudyakova v. Russia***, No. 13476/04, Judgment of 8 January 2009, §92.
[411] ECtHR, Case ***Ermakov v. Russia***, No. 43165/10, Judgment of 7 November 2013, §261.
[412] ECtHR, Case ***Khamrakulov v. Russia***, No. 68894/13, Judgment, 16 April 2015, §77; Case ***K. v. Russia***, No. 69235/11, Judgment of 23 May 2013, §99; Case ***Khudyakova v. Russia***, No. 13476/04, Judgment of 8 January 2009, §93.
[413] ECtHR, Case ***Kolompar v. Belgium***, No. 11613/85, Judgment of 24 September 1992, §42.
[414] ECtHR, Case ***Khamrakulov v. Russia***, No. 68894/13, Judgment of 16 April 2015, §78; Case ***Nizomkhon Dzhurayev v. Russia***, No. 31890/11, Judgment of 3 October 2013, §§176-177; Case ***Abdulkhakov v. Russia***, No. 14743/11, Judgment of 2 October 2012, §199; Case ***Khudyakova v. Russia***, No. 13476/04, Judgment of 8 January 2009, §95.

whether the length of detention exceedes what is reasonably required for the completion of the inquiry. [415]

The notion of **"lawfulness"** under paragraph 4 of Article 5 has the same meaning as in paragraph 1, so the detainee is entitled to a review of his detention in light, not only of the ***requirements of domestic law,*** but also of the text of the ***Convention***, the general principles embodied therein and the aim of the restrictions permitted by Article 5 (1). The Court emphasizes that the scope of the obligations under Article 5 (4) is not identical for every kind of deprivation of liberty and that this applies notably to the extent and forms of the required judicial review, which may vary from one domain to another, and will depend on the type of deprivation of liberty at stake. It is clear that Article 5 (4) does not guarantee a right to judicial review of such breadth as to empower the court, on all aspects of the case including questions of pure expediency, to substitute its own discretion for that of the decision-making authority. Nor does it impose an obligation to address every argument contained in the detainee's submissions. The review should, however, be wide enough to bear on the procedural and substantive conditions which are essential for the "lawful" detention of a person according to Article 5 (1), and the examining judge must take into account concrete facts invoked by the detainee that are capable of putting in question the existence of such conditions[416]. The reviewing "court" must have the competence to "decide" the "lawfulness" of the detention and to ***order release*** if the detention is unlawful[417].

The requirement of procedural fairness under Article 5 (4) does not impose a uniform, unvarying standard to be applied irrespective of the context, facts and circumstances[418], and the Court considers it is not its task to enquire into what the most appropriate system in the sphere under examination would be. It is not excluded that a system ***of automatic periodic review*** of the lawfulness of detention by a court may ensure compliance with the requirements of Article 5 (4). However, where such automatic system has been established, the decisions on the lawfulness of detention must be taken at **"reasonable intervals"**, so that new factors which possibly have emerged and are likely to affect the lawfulness of detention may be examined withoiut "unreasonable delay". The *rationale* is that a detainee should not run the risk of remaining in detention long after the time when his deprivation of liberty has become unjustified[419]. But the ECtHR has not taken upon itself to rule as to the maximum period of time between reviews which should automatically apply to a certain category of detainees, and finds that the question of whether intervals comply with the requirements of Article 5 (4) must be determined in the light of the circumstances of each case, varying from one domain to another and depending on the type of deprivation of liberty at stake. The Court's case-law shows that the "speediness" requirement of Article 5 (4) is not necessarily the same as the "promptness" requirement of Article 5 (3).[420].

It is, however, important, to take into account the type of **official body** which authorised the detention. Where the original detention order was imposed by a ***court***, i.e. by an independent and impartial judicial body in a procedure offering appropriate guarantees of due process, and where the domestic law provides for a system of appeal, the Court is prepared to tolerate longer periods of review in the proceedings before the second instance court (eg. of 10, 11 and 16 days), on condition that the procedure followed by that court had a judicial character and afforded to the detainee the appropriate procedural guarantees.[421].

In case the original detention order for the purpose of extradition is imposed by a non-judicial (eg. administrative) authority, if the domestic law so authorises, Article 5 (4) obliges the Contracting

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[415] ECtHR, Case ***Molotchko v. Ukraine***, No. 12275/10, Judgment of 26 April 2012, §§172, 175, 188-189.
[416] ECtHR, Case ***Ermakov v. Russia***, No. 43165/10, Judgment of 7 November 2013, §264.
[417] ECtHR, Case ***Mukhitdinov v. Russia***, No. 20999/14, Judgment of 21 May 2015, §86; Case ***Ermakov v. Russia***, No. 43165/10, Judgment of 7 November 2013, §264; Case ***Chahal v. United Kingdom***, No. 22414/93, Judgment [GC] of 15 November 1996, §127.
[418] ECtHR, Case ***Rustamov v. Russia***, No. 11209/10, Judgment of 3 July 2012, §175.
[419] ECtHR, Case ***Nabid Abdullayev v. Russia***, No. 8474/14, Judgment of 15 October 2015, §88; Case ***Abdulkhakov v. Russia***, No. 14743/11, Judgment of 2 October 2012, §209.
[420] ECtHR, Case ***Nabid Abdullayev v. Russia***, No. 8474/14, Judgment of 15 October 2015, §§85-86; Case ***Ermakov v. Russia***, No. 43165/10, Judgment of 7 November 2013, §269, 272.
[421] ECtHR, Case ***Sidikovy v. Russia***, No. 73455/11, Judgment of 20 June 2013, §§164-165, 185.

States to make available to the person detained a right of recourse to a court, and the question of how much time may elapse from the moment an application for release is lodged until such court takes a decision on the lawfulness of detention becomes more prominent. A delay of 16 days, which may have been considered acceptable if the order had been imposed by a judge or other judicial officer, was found "excessive" in a case where such order was imposed by a prosecutor who was not a part of the judiciary. The Government's allegation that part of the delay was due to an objectively necessary adjournment of the case, was considered irrelevant in this instance, since it was still "imputable to the authorities". According to the ECtHR, the prosecutor's decision-making process from which resulted the original detention order did not offer the ***guarantees of due process***: the decision was taken *in camera* and without any involvement of the applicant; as established by the reviewing court, the prosecutor acted *ultra vires* and had no powers to order the applicant's detention; the applicant's case was not very complex and the courts should have had all necessary information to deal with it; there was no evidence that after the lodging of the application for release, the applicant contributed in any way to the duration of the detention proceedings and to the delay in the judicial review. In view of all this, the Court considered that, in this concrete case, the standard of "speediness" of judicial review under Article 5 (4) of the Convention came closer to the standard of "promptness" under Article 5 (3)[422].

By contrast, in a case where the applicant alleged that the urgent application proceedings had not been conducted with ***due diligence*** on the part of the authorities, who had waited 3 and 5 months, respectively, to file their submissions at first instance and on appeal, the Court took into account the following: that the applicant had not availed himself of the possibility of compelling the State to lodge its submissions within a time-limit fixed by the judge, and therefore consented to an extension of the time-limit fixed by statute; that, by requesting the Court of Appeal to postpone the hearing of the case, he had in any event shown that he was not the least interested in the speedy conduct of the proceedings; that the applicant expressly requested a stay in the execution of the extradition order, expecting that the period spent in detention pending extradition would be deducted from his prison sentence in the requesting State and preferring, up to a given moment, to stay in the requested State rather than be handed over. For these reasons, the Court concluded that the requested State could not be held responsible for the delays to which the applicant's conduct gave rise, and the latter could not validly complain of a situation which he largely created. No violation of Article 5 (1) was therefore found.[423]

In cases where it is unclear when the applicant would be able to initiate the procedure for review of detention, national he authorities have the obligation to ensure, without delay and through the relevant judicial procedure of review, that the applicant's continued detention is in compliance with the regulations in force. Regarding the applicant's participation in the review, the Court has found sufficient that the person, assisted by lawyers, has the opportunity, throughout the proceedings, to comment on requests for his or her continued detention and to convey and defend his or her arguments before the courts at the ordinary and appeal levels of jurisdiction. According to the Court, the non-participation in the appeal hearings does not undermine the "equality of arms" between the parties or otherwise render the proceedings unfair. The Court is not of the view that the national courts deciding on the applicant's detention are required to carry out a separate inquiry into the applicant's objections against his extradition, but should examine whether the length of detention exceedes what is reasonably required for the completion of the inquiry. [424]

In a case of detention with a view to deportation involving issues of ***national security***, the Court recalled that Article 5 (4) does not require that the domestic courts should have the power to review whether the underlying decision to expel could be justified under national or Convention law. It was called upon to decide whether the available proceedings to challenge the lawfulness of detention in this case and to seek bail provided an adequate control by the domestic courts. Given the ***confidential*** nature of many issues of national security, the Court considered that

[422] ECtHR, Case ***Shcherbina v. Russia***, Nos. 41970/11, Judgment of 26 June 2014, §§63-70.
[423] ECtHR, Case ***Kolompar v. Belgium***, No. 11613/85, Judgment of 24 September 1992, §§38, 42-43.
[424] ECtHR, Case ***Molotchko v. Ukraine***, No. 12275/10, Judgment of 26 April 2012, §§172, 175, 188-189.

domestic courts were not in a position to review whether the decisions to detain the applicant and to keep him in detention were justified on such grounds. Recognizing that the use of confidential material may be unavoidable where national security is at stake, the Court however refused an interpretation according to which national authorities can be free from effective control by the domestic courts whenever they choose to assert that national security and terrorism are involved. In this case, an existing procedure before an advisory panel provided some degree of control. However, the detainee was not entitled to legal representation before such panel; he was only given an outline of the grounds for the notice of intention to deport; the panel had no power of decision and its advice to the Home Secretary was not binding and was not disclosed. For these reasons, the panel could not be considered as a "court" within the meaning of Article 5 (4) and the ECtHR therefore concluded that neither the proceedings for *habeas corpus* and for judicial review of the decision to detain the applicant, nor the advisory panel procedure, satisfied the requirements of Article 5 (4), an issue all the more significant given that the person had been deprived of liberty for a long period of time (approximately three and a half years)[425].

Below are more examples of **violations** found by the Court on account of the ***absence of judicial review*** of the applicant's detention pending extradition or deportation:

- National legislation does not confer on persons awaiting extradition the right to a procedure to have the lawfulness of their detention examined by a court[426];
- National criminal law does not recognize a formal standing to the detainee to challenge the lawfulness of his or her detention before a court, on the pretext that no criminal case runs against him or her in the requested State[427];
- Inability of those detained with a view to extradition to initiate proceedings for examination of the lawfulness of the detention in the absence of a request by a prosecutor for an extension of the custodial measure[428];
- Unavailability of any effective, accessible and certain judicial procedure for the review of the lawfulness of one's detention or continued detention pending extradition[429];
- Inability to obtain a judicial review of the initial detention after a certain lapse of time, thereby precluding the examination of new issues affecting the lawfulness of detention that might have arisen since the initial decision[430];
- One year of unsuccessful attemps to obtain the judicial review his detention, with domestic courts repeatedly refusing to examine the complaint on its merits; subject was finally released by the same court which had refused to review the case, directly on the basis of the Convention itself and not of domestic legislation[431];

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[425] ECtHR, Case ***Chahal v. United Kingdom***, No. 22414/93, Judgment [GC] of 15 November 1996, §§128-133.

[426] ECtHR, Case ***Kolesnik v. Russia***, No. 26876/08, Judgment of 17 June 2010, §88; Case ***Soldatenko v. Ukraine***, No. 2440/07, Judgment of 23 October 2008, §126.

[427] ECtHR, Case ***Yefimova v.Russia***, No. 39786/09, Judgment of 19 February 2013, §299; Case ***Zokhidov v. Russia***, No. 67286/10, Judgment of 5 February 2013, §185; Case ***Ryabikin v. Russia***, No. 8320/04, Judgment of 19 June 2008, §139; Case ***Shchebet v. Russia***, No. 16074/07, Judgment of 12 June 2008, §78; Case ***Nasrulloyev v. Russia***, No. 656/06, Judgment of 11 October 2007, §§89-90.

[428] ECtHR, Case ***Elmuratov v. Russia***, No. 66317/09, Judgment of 3 March 2011, §§116, 120; Case ***Khaydarov v. Russia***, No. 21055/09, Judgment of 20 May 2010, §§139-142; Case ***Ismoilov and others v. Russia***, No. 2947/06, Judgment of 24 April 2008, §151.

[429] ECtHR, Case ***R.K. v. Russia***, No. 30261/17, Judgment of 8 October 2019, §§62-65; Case ***S.S. and Others v. Russia***, Nos. 2236/16, 64042/17, 81344/17 & 4067/18, Judgment of 25 June 2019, §32; Case ***B.Z. v. Russia***, No. 79223/17, Judgment of 11 June 2019, §§37-40; Case ***Kim v. Russia***, No. 44260/13, Judgment of 17 July 2014, §§41-43; Case ***Oshlakov v. Russia***, No. 56662/09, Judgment of 3 April 2014, §124; ECtHR, Case ***Dubovik v. Ukraine***, Nos. 33210/07 & 41866/08, Judgment of 15 October 2009, §§63-66, 68; Case ***Kaboulov v. Ukraine***, No. 41015/04, Judgment of 19 November 2009, §§152-154; Case ***Abdolkhani and Karimnia v. Turkey (No. 1)***, No. 30471/08, Judgment of 22 September 2009, §§140, 142.

[430] ECtHR, Case ***U. N. v. Russia***, No. 14348/15, Judgment of 26 July 2016, §§45-46; Case ***Kadirzhanov and Mamashev v. Russia*** Nos. 42351/13 & 47823/13, Judgment of 17 July 2014, §§135-139; Case ***Azimov v. Russia***, No. 67474/11, Judgment of 18 April 2013, §151; Case ***Gaforov v. Russia***, No. 25404/09, Judgment of 21 October 2010, §176; Case ***Khaydarov v. Russia***, No. 21055/09, Judgment of 20 May 2010, §138; Case ***Dubovik v. Ukraine***, Nos. 33210/07 & 41866/08, Judgment of 15 October 2009, §67.

[431] ECtHR, Case ***Ryabikin v. Russia***, No. 8320/04, Judgment of 19 June 2008, §§138, 140.

- Complaint to an investigating judge not considered to be a sufficiently certain remedy available to the applicant to institute proceedings for the examination of the lawfulness of his detention[432];
- Detention pending extradition not authorised by a domestic court, in violation of the relevant domestic provisions, and complaints concerning the lawfulness of such detention never examined by any court despite the appeals lodged[433];
- Detention pending extradition ordered by a prosecutor, in violation of of domestic law, but failure of the court to remedy this violation on appeal, instead ordering the prosecutor to do so, in proceedings which took nearly two months;[434],
- Inability to benefit from a procedure as required by Article 5 (4), even if provided for under national law[435] (eg. persons caught in a vicious circle of shifted responsibility where no domestic court, whether civil or criminal, is capable of reviewing the alleged unlawfulness of their detention[436]);
- Failure of the authorities, during detention pending extradition (for more than ten months) to provide detailed information on the avenues available for challenging the lawfulness of such detention (mere reference to the possibility of applying to a court or prosecutor) and domestic law silent in this regard: the existence of the invoked remedies was not considered sufficiently certain in theory and in practice and such remedies lacked the requisite accessibility and effectiveness[437];
- Absence of information about the reasons for the deprivation of liberty and denial of access to legal assistance during detention in police headquarters: these factors, in themselves, mean that the applicants' right to appeal against detention is deprived of all effective substance; a request to national authorities for release cannot provide a remedy possessing the guarantees required by Article 5 (4)[438];
- Manifestly inadequate scope of review: eg. failure of courts to address the detention issue at all, despite examining extradition; or failure to address the arguments advanced by the person against the continuation of extradition; and release only 70 days after detention ceased to be lawful[439];
- New relevant factor arisen in the interval between periodic reviews and capable of affecting the lawfulness of his detention assessed by a reviewing court only three months later;[440]
- Person held under police custody for eight days before being presented to a judge, in a country where, in similar situations, domestic courts never ordered the prisoner's release, not even when they found that the statutory period had expired or the public prosecutor had failed to order the prisoner's continued detention (they merely referred the persons concerned to the judge responsible for pre-trial detention); also, in no case did the person detained appear before the court; judge's review carried out solely on the basis of papers; furthermore, the conditions in which the applicant was held and notably the fact that he was kept in total isolation prevented him from using the remedy personally (he possessed no legal training and had no possibility of consulting a lawyer while in police custody, therefore could not reasonably be expected under such conditions to be able to challenge the lawfulness and length of his detention without legal assistance)[441].
- Review of the lawfulness of detention with the view to extradition not incorporated in the detention orders issued by the requesting State, which concerned criminal proceedings

[432] ECtHR, Case ***Čalovskis v. Latvia***, No. 22205/13, Judgment of 24 July 2014, §227.
[433] ECtHR, Case ***Abdulazhon Isakov v. Russia***, No. 14049/08, Judgment of 8 July 2010, §§130-131.
[434] ECtHR, Case ***Kislov v. Russia***, No. 3598/10, Judgment of 9 July 2019, §§37-38, 149.
[435] ECtHR, Case ***Garabayev v. Russia***, No. 38411/02, Judgment of 7 June 2008, §97.
[436] ECtHR, Case ***Ismoilov and others v. Russia***, No. 2947/06, Judgment of 24 April 2008, §147.
[437] ECtHR, Case ***Khodzhayev v. Russia***, No. 52466/08, Judgment of 12 May 2010, §§122, 126, 128-129.
[438] ECtHR, Case ***Abdolkhani and Karimnia v. Turkey (No. 1)***, No. 30471/08, Judgment of 22 September 2009, §141.
[439] ECtHR, Case ***Mukhitdinov v. Russia***, No. 20999/14, Judgment of 21 May 2015, §87; ECtHR, Case ***Ermakov v. Russia***, No. 43165/10, Judgment of 7 November 2013, §267.
[440] ECtHR, Case ***Abdulkhakov v. Russia***, No. 14743/11, Judgment of 2 October 2012, §§216-217.
[441] ECtHR, Case ***Öcalan v. Turkey***, No. 46221/99, Judgment [GC] of 12 May 2005, §§68-70.

against the same persons in the latter State; having been recognised as enforceable in the requested State, such orders represented, together with the extradition request, the legal basis for the applicants' detention pending extradition; as the procedure provided for in Article 5 (4) requires that the individual concerned be given guarantees appropriate to the kind of deprivation of liberty in question, those orders, issued for the purposes of Article 5 (1) (c), cannot be construed as including a review, under the law of the requested State, of the lawfulness of the applicants' detention pending extradition[442];

- Purpose of the appeal was not to obtain a decision on the lawfulness of detention, but on the imposition of criminal penalties against the prison director and a prison guard;[443]

And here are a few examples of cases in which the Court found **no violation** of Article 5 (4) on account of ***lack of judicial review*** of detention with the view to extradition or deportation:

- Review of deprivation of liberty, on its merits, by ***two degrees of jurisdiction*** (first instance and on appeal), with the applicant having the ability to raise the various ***arguments*** relating to his detention he considered appropriate, and domestic courts taking such arguments into consideration;[444];
- Detention for approximately one year originally imposed by a court for a ***fixed period*** and extended twice, in accordance with domestic law, at the request of public prosection, while extradition proceedings were in progress and a number of steps were taken, and without any specific argument contesting the effectiveness of the available proceedings or substantiating any unfairness in them[445].
- ***Failure to pursue a judicial remedy*** against his/her custody when such remedy was available to him/her.[446]

Below are examples of **violations** of Article 5 (4) on account of the ***speediness of review***:

- Delays, not attributable to the applicant's conduct and not justifiable by circumstances out of the State's control, of ***17 to 48 days*** for the examination of detention orders by one level of jurisdiction and of ***26 to 115 days*** for two levels of jurisdiction[447];
- Period of approximately ***five months*** from the lodging of the application for release to the final judgment, with 11-weeks interval until the date of the first hearing (due to the transfer of the case file to the prosecution authorities and back to court) and more than two months until the final decision; furthermore, there were conflicting decisions of the domestic courts on the issues of avenues of review to be followed by those detained with a view to extradition[448];
- Review by the administrative court lasted ***42 days in a deportation case***, with the person held in detention for an ***extra 30 days before release***, and other applicants approximately five months after their request[449];

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[442] ECtHR, Case ***Shamayev and others v. Georgia and Russia***, No. 36378/02, Judgment of 14 April 2005, §431.

[443] ECtHR, Case ***Pianese v. Italy and the Netherlands***, No. 14929/08, Decision (Final) of 27 September 2011.

[444] ECtHR, Case ***Ketchum v. Romania***, No. 15594/11, Decision of 11 June 2013, §27; Case ***Rustamov v. Russia***, No. 11209/10, Judgment of 3 July 2012, §177.

[445] ECtHR, Case ***Sidikovy v. Russia***, No. 73455/11, Judgment of 20 June 2013, §§164-165, 185.

[446] EComHR, Case ***Lynas v. Switzerland***, No. 7317/75, Decision of 6 October 1976, p. 141.

[447] ECtHR, Case ***S.S. v. Russia***, No. 35332/17, Judgment of 11 June 2019, §36; Case ***Nabid Abdullayev v. Russia***, No. 8474/14, Judgment of 15 October 2015, §§82-84; Case ***Khamrakulov v. Russia***, No. 68894/13, Judgment of 16 April 2015, §80; Case ***Kadirzhanov and Mamashev v. Russia***, Nos. 42351/13 & 47823/13, Judgment of 17 July 2014, §126; Case ***Gayratbek Saliyev v. Russia***, No. 39093/13, Judgment of 17 April 2014, §79; Case ***Nizomkhon Dzhurayev v. Russia***, No. 31890/11, Judgment of 3 October 2013, §§176-177; Case ***Abdulkhakov v. Russia***, No. 14743/11, Judgment of 2 October 2012, §§200-202; ECtHR, ***Tehrani and Others v. Turkey***, Nos. 32940/08 & 41626/08 & 43616/08, Judgment of 13 April 2010, §§77-80; Case ***Khudyakova v. Russia***, No. 13476/04, Judgment of Date: 8 January 2009, §§94, 99-101; Case ***Sanchez-Reisse v. Switzerland***, No. 9862/82, Judgment of 21 October 1986, §§54-60.

[448] ECtHR, Case ***Eminbeyli v. Russia***, No. 42443/02, Judgment of 26 February 2009, §§66-69.

[449] ECtHR, ***Tehrani and Others v. Turkey***, Nos. 32940/08 & 41626/08 & 43616/08, Judgment of 13 April 2010, §§77-80.

- Judicial proceedings for the examination of the lawfulness of three detention orders with durations ranging from ***20 days to one month***, in violation of domestic law and entirely attributable to the authorities[450];
- Appeal proceedings lasting ***eleven months without a hearing taking place*** (which led the applicant to withdraw his appeal and agree to his extradition to bring to an end his indefinite detention): the Court considered that, while a three-month delay in court proceedings on account of the Covid-19 pandemic could be understandable, extra three months of delay after the Covid-19 restrictions came to an end, with no substantial progress being made in the meantime, was excessive; furthermore, before the Covid-19 measures were adopted, the Supreme Court had extended the deadline for the submission of written outlines by the parties, although none of them had so requested; and certain urgent applications (including appeals) continued to be examined during the pandemic; the Court's conclusions that the proceedings had not been conducted "speedily" was not affected by the fact that the applicant's behaviour also contributed to the duration of such proceedings (by changing lawyers, amending the grounds for appeal and failing to object to the adjournment of the case)[451];
- Upon entering into force of ***new regulations***, no review took place for six days, no justification was given for the delay and the authorities, despite seeming to have sufficient information for taking a decision on the person's extradition, kept the inquiry ongoing for 12 months, in violation of the one-month time-limit set by new regulations [452].

And, finally, a few examples of **no violation** of Article 5 (4) on account of the ***speediness*** of the review of detention:

- Periods of ***15 and 11 days*** (of which nive and eight days, respectively, attributable to the authorities), between first-instance detention orders and appeal decisions[453];
- Total duration of proceedings of ***41 days for two levels of jurisdiction***, in a case where the applicant had requested leave to appear in person at the appeal court, and because of that the court had had to adjourn the proceedings for one week[454];
- Intervals between periodic reviews of detention ranging from ***two to six months***, without demonstration that any new, relevant factors requiring the review of the lawfulness of the applicant's detention had actually arisen in-between [455];
- In a case of automatic review of the legality of detention and the emergence of a new factor likely to affect such lawfulness in-between reviews, delay of slightly over **one month** until the prosecutor, *ex officio*, assessed such new relevant factor and ordered the applicant's release[456].

European Arrest Warrant

The expiry of the time limits to take a decision on the execution of an EAW (a maximum of **90 days**, in accordance with Article 17 of the **EAW FD**) does not exempt the competent courts from their obligation to adopt a decision in that regard. It does not preclude, in itself, keeping the requested person in custody where there is a very serious risk of this person absconding and such risk cannot be reduced to an acceptable level by the imposition of appropriate measures, in

[450] ECtHR, Case ***K. v. Russia***, No. 69235/11, Judgment of 23 May 2013, §§101-102.
[451] ECtHR, Case ***Khokhlov v. Cyprus***, No. 53114/20, Judgment of 13 June 2023, §79.
[452] ECtHR, Case ***Molotchko v. Ukraine***, No. 12275/10, Judgment of 26 April 2012, §§172, 175, 188-189.
[453] ECtHR, Case ***Kadirzhanov and Mamashev v. Russia***, Nos. 42351/13 & 47823/13, Judgment of 17 July 2014, §§121-122.
[454] ECtHR, Case ***Khudyakova v. Russia***, No. 13476/04, Judgment of 8 January 2009, §94.
[455] ECtHR, Case ***Oshlakov v. Russia***, No. 56662/09, Judgment of 3 April 2014, §129; Case ***Ermakov v. Russia***, No. 43165/10, Judgment of 7 November 2013, §272-273; Case ***Soliyev v. Russia***, No. 62400/10, Judgment of 5 June 2012, §§ 57-62; Case ***Khodzhamberdiyev v. Russia***, No. 64809/10, Judgment of 5 June 2012, §§§§ 108-114.
[456] ECtHR, Case ***Nabid Abdullayev v. Russia***, No. 8474/14, Judgment of 15 October 2015, §§91-93.

accordance with the law of the executing Member State, even if the total duration of the person's detention exceeds those time-limits. However, such duration may not be excessive in light of the characteristics of the procedure followed in the main proceedings, which is a matter to be ascertained by the national court. [457]

Also, the requested person may not be kept in detention beyond such 90-day deadline on the basis of an ***interpretation of national law*** according to which that period is suspended when the executing judicial authority decides to refer a question to the CJEU for preliminary ruling, to wait for the reply to a request for preliminary ruling made by another executing judicial authority, or to postpone the decision on surrender on the grounds that there could be, in the issuing Member State, a real risk of inhuman or degrading conditions of detention, in so far as it does not ensure that the provision of national law is interpreted in conformity with **EAW FD** and may entail variations that could result in different periods of continued detention.[458]

If the executing judicial authority decides to bring the requested person's custody to an end, it must attach to the his or her provisional release any ***measures it considers necessary*** to prevent such person from absconding and to ensure that the material conditions necessary for his or her effective surrender remain fulfilled, for as long as no final decision is taken on the execution of the EAW[459].

In a case relating to an Italian national arrested in Belgium and surrendered to Italy on the basis of an EAW issued for the purpose of serving a sentence of 14 years of imprisonment for drug trafficking imposed in his absence in 1998, the applicant alleged, *inter alia*, that the documents relating to the means used by the Belgian police officers to locate and arrest the applicant (interception of telephone communication, localisation of mobile telephone numbers and observation, pursuant to a request for mutual legal assistance) were not included in the prosecution's file and that this made it impossible to check the legality and regularity of the operations prior to his arrest. Therefore, he considered that his arrest had not been effected by legal means within the meaning of Article 5 (1) of the Convention. The Court recalled that, in accordance with the system established by the **EAW FD**, it was up to the judicial authority which issued the EAW and to which the applicant was to be surrendered to assess the legality and regularity of the EAW. As far as Belgium was concerned, the Belgian public prosecutor's office had no discretion as to the appropriateness of the arrest, and the competent Belgian courts could only refuse enforcement on the grounds laid down by the Belgian law on the EAW. Furthermore, the Belgian courts considered themselves to be in no position to examine, in the context of the execution of the EAW, the investigative duties carried out on the basis of a mutual assistance request with the view to locate the applicant and arrest him. The ECtHR considered that the applicant's complaint was not supported by factual evidence of abusive conduct on the part of the police. Thus, the lawfulness of the deprivation of the applicant's liberty did not depend, in the absence of any indication of arbitrariness, on the lawfulness of the prior operations with a view to locating and arresting him, and no violation of Article 5 has been found.[460]

1.1.4 Restrictive measures alternative to detention

As stated above, although detention of the sought person is the rule in extradition proceedings, the many factors that can be at play therein (eg. appeals, potential parallel domestic prosecution(s), parallel requests, parallel asylum proceedings, the application of the **Petruhhin judgment**) tend to increase the duration of such proceedings, and therefore pose legality issues in many jurisdictions. For this reason, the use of alternatives to detention is becoming increasingly important. PC-OC agrees that a combination of measures of restriction is probably the most

[457] CJEU, Case **C-237/15 PPU, *Lanigan***, Judgement of 16 July 2015, ruling; Case **C-492/18 PPU, *TC***, Judgement of 12 February 2019, ruling.
[458] CJEU, ***Case C-492/18 PPU, TC***, Judgement of 12 February 2019, ruling.
[459] CJEU, ***Case C-237/15 PPU, Francis Lanigan***, Judgement of 16 July 2015, ruling; ***Case C-492/18 PPU, TC***, Judgement of 12 February 2019, ruling.
[460] ECtHR, Case ***Pirozzi v. Belgium***, No. 21055/11, Judgment of 17 April 2018, §§49, 66.

efficient way to avoid escape. Such measures may include, among others: bail, house arrest, electronic monitoring, travel ban, handing over of the passport and the obligation to report regularly to law enforcement authorities[461].

In 2018, the PC-OC approved **Guidelines on the provision of information regarding the detention or other measures of restriction imposed in extradition proceedings**, which apply to alternative measures of restriction imposed at any stage of the extradition proceedings until surrender.[462] See more information on these guidelines under Convention Article 16 (Comments and Recommendations).

A related issue concerns the applicability of Article 5 of the **ECHR** to house arrest. In a case where, pursuant to a national court's order, the person was prohibited from leaving his place of residence at a specific address, as well as from using any means of communication, a measure which remained in force for approximately one month and two weeks, the Court found that it amounted to a deprivation of liberty within the meaning of Article 5 of the Convention, which was thus applicable. It added that in order to determine whether someone has been "deprived of his liberty" within the meaning of Article 5 (1), the starting point must be his concrete situation and account must be taken of a whole range of criteria such as the type, duration, effects and manner of implementation of the measure in question. The difference between deprivation of and restriction upon liberty is one of degree or intensity, and not of nature or substance[463].

The CJEU, for its part, has ruled that measures which consist in the electronic monitoring of the whereabouts of the subject of the warrant in conjunction with a curfew, obligation to report at the police station and a ban on applying for foreign travel documents are not, in principle, so restrictive as to give rise to a deprivation of liberty comparable to that arising from imprisonment and thus to be classified as "detention" within the meaning of Article 26 of the **EAW FD.**[464]

1.1.5 Mutual recognition of decisions on extradition

The consequences of deprivation of liberty across borders, by means of extradition requests or EAW, on the rights of those affected, have given cause for concern. This is, for instance, the case of EU (and other) citizens subject to arrest and detention pursuant to INTERPOL red notices, extradition requests or EAW proceedings in one of the EU Member States and that, despite having won their cases by obtaining a court decision refusing extradition or surrender, find themselves confined within the territory of that Member State, lacking access to effective remedies to avoid repeated arrest and detention throughout the EU. As a result, individuals having successfully defended themselves against extradition in one Member State nevertheless face potential extradition in all remaining countries and are therefore deprived of their right to freedom of movement within the EU. For these reasons, in 2022 the European Criminal Bar Association (ECBA) issued a statement advocating for the establishment of legal remedies and rights in the EU to address this problem, calling on EU member States to "consider certain categories of extradition decisions to be binding and to introduce procedural safeguards to determine this certainty."[465]

The CJEU has pronounced itself on this problem in **Case C-505/19 *WS***, relating to a German citizen (WS), the criminal proceedings against whom were terminated in Germany, triggering *ne bis in idem* under Article 50 of the **CFREU** and Article 54 of the **Convention implementing the Schengen Agreement** (CISA). According to this Court:

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[461] **PC-OC (2018)02rev3,** p. 2.
[462] **PC-OC (2018)02rev3,** p. 2.
[463] **PC-OC (2018)02rev3,** p. 2 and, Case ***Ermakov v. Russia***, No. 43165/10, Judgment of 7 November 2013, §§138, 237.
[464] CJEU, Case **C-294/16 PPU, *JZ***, Judgement of 28 July 2016, ruling.
[465] ECBA, ***Statement on mutual recognition of extradition decisions***, 2022, pp 1-2.

> "In order to ensure, in such a situation, the effectiveness of Art.54 of the CISA and of Art.21 (1) TFEU, read in the light of Art. 50 of the Charter, the Member States and the Contracting States must ensure the availability of legal remedies enabling the persons concerned to obtain a final judicial decision establishing that the *ne bis in idem* principle applies […]."

As mentioned by ECBA, the CJEU "implies that the final judicial decision by one Member State on *ne bis in idem* can be binding on other Member States and prevent arrest and extradition in that other Member State. […] If one accepts this as a general principle, certain extradition decisions should have binding effect within the European Union and the Schengen area in order to ensure the effective exercise of the right to freedom of movement. However, not every decision can have such binding effect since national law is not harmonised within the EU and further, the grounds for refusal of extradition can vary significantly in nature. Further, certain reasons for refusal are temporary by nature; the requested person cannot trust that he/she is no longer sought following such a decision."[466]

It should, however, be noted that Article 54 of the CISA, Article 50 of the **CFREU** and Article 21(1) TFEU do not preclude the provisional arrest of a person who is the subject of an Interpol red notice where it has not been established that that person's trial has been finally disposed of by a State that is a party to the Schengen Agreement or by a Member State in respect of the same acts as those forming the basis of the red notice and that, consequently, the *ne bis in idem* principle applies. Where the application of the *ne bis in idem* principle remains uncertain, provisional arrest may be an essential step in order to carry out the necessary checks while avoiding the risk that the person concerned may abscond. That measure may therefore be justified by the legitimate objective of preventing impunity for the person concerned, *provided that it is essential for the purpose of those checks* […]. By contrast, as soon as it has been established by a final judicial decision that the *ne bis in idem* principle applies, both the mutual trust between the States that are parties to the CISA and the right to free movement prohibit that person from being provisionally arrested or from being kept in custody. The Member States and the Contracting States of the **CISA** must ensure the availability of legal remedies enabling the person concerned to obtain such a final judicial decision establishing that the *ne bis in idem* principle applies[467].

ECBA proposes that decisions taken by a **judicial authority** of a Member State are made ***binding*** upon the authorities of another Member State and as such prevent arrest and extradition or surrender if the court has found a ***permanent reason for refusing extradition*** (violation of the principle of *ne bis in idem*, prosecution for a discriminatory reason – based on sex, race, religion, ethnic origin, nationality, language, political opinions or sexual orientation - or disproportionality). If the decision by a judicial authority of a Member State has found a ***non-permanent but fundamental reason for refusing extradition*** (risk of ill-treatment or of flagrant denial of justice), the decision should be binding upon the authorities of another Member State as long as it has not been established that the requesting State has taken steps to remedy this risk. Procedural reasons for refusing extradition (eg. lack of formalities or failure to meet deadlines) should not, according to ECBA's proposal, be binding upon other Member States. Furthermore, ECBA proposes that an independent, harmonised mechanism be created at the EU level in order to regulate the issuance and subsistence of alerts in the SIS (and the execution and continued effects of an INTERPOL alert within the EU) and to provide effective procedural safeguards at the national and European levels with regard to the access to, and effective remedies against, alerts[468].

PC-OC discussed this statement and proposals contained therein at its 82nd meeting, in November 2022, and experts were of the view that that a mechanism of the kind envisaged in

[466] ECBA, ***Statement on mutual recognition of extradition decisions***, 2022, §§ 5.1-5.3.
[467] EC, **Guidelines on Extradition to Third States**, p. 12.
[468] ECBA, ***Statement on mutual recognition of extradition decisions***, 2022, pp. 12-17.

such statement was not practicable in the context of the **ECE**[469].

1.2 Right to information and access to the file

Article 5, paragraph 2, of the **ECHR** stipulates that:

> *Everyone who is arrested shall be informed promptly, in a language, which he understands, of the reasons for his arrest and of any charge against him*.

Recommendation R (80) 7, of the Committee of Ministers adds to the interpretation of this provision, specifying that, irrespective of the administrative or judicial nature of the extradition proceedings, the person concerned should be informed, promptly and in a language which he or she understands, of the extradition request and the facts on which it is based, of the conditions and the procedure of extradition, and, where applicable, of the reasons for his arrest.

Also, in accordance with Article 3 of **AP3** (emphasis added):

> *Where a person sought for the purpose of extradition is arrested in accordance with Article 16 of the Convention, the competent authority of the requested Party shall inform that person, in accordance with its law and without undue delay, of the request relating to him or her and of the possibility of applying the* ***simplified extradition procedure*** *in accordance with this Protocol.*

Paragraph 2 of Article 5 of the **ECHR** applies to all the cases mentioned in paragraph 1 of the same Article including, naturally, the arrest or detention of a person against whom action is being taken with a view to deportation or extradition, as prescribed in Article 5 (1) (f). According to the ECtHR, Article 5 (2) contains the elementary safeguard according to which any person arrested should know why he or she is being deprived of liberty, which constitutes a ***minimum safeguard against arbitrary treatment*** and is an integral part of the scheme of protection afforded by Article 5. By virtue of Article 5 (2), any person arrested must be told, in ***simple***, ***non-technical language*** that can be easily understood, the essential legal and factual grounds for the arrest, so as to be able, if he or she sees fit, to apply to a court to challenge the lawfulness of such arrest, in accordance with Article 5 (4). Whilst this information must be conveyed "**promptly**" (in French: *dans le plus court délai*), it need not be related in its entirety by the arresting officer at the very moment of the arrest[470]. Although the provision of Article 5 (2) refers in principle to the first arrest, in the case of ***continued detention*** it also applies if the grounds for detention change or new relevant facts emerge[471].

For similar reasons as above, and while Article 5 (2) does not require that the ***case file*** be made available in its entirety to the person concerned and/or his or her lawyer, they must nonetheless receive sufficient information so as to be able to apply to a court for the review of lawfulness provided for in Article 5 (4). The Court does not accept the argument that, since the right not to be extradited is not guaranteed by the **ECHR**, domestic authorities do not have to grant access to the case files concerning their extradition and the need the authorities of the requested State to carry out a detailed examination of the documents submitted by the requesting State does not, in itself, justify refusing persons all access to documents with direct repercussions on their rights,

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[469] **PC-OC (2022) 05**, *List of decisions taken at the 82nd meeting of the PC-OC*, Strasbourg, 17 November 2022, §§1-2.
[470] ECtHR, Case ***Zokhidov v. Russia***, No. 67286/10, Judgment of 5 February 2013, §169; Case ***Eminbeyli v. Russia***, No. 42443/02, Judgment of 26 February 2009, §54; Case ***Abdolkhani and Karimnia v. Turkey (No. 1)***, No. 30471/08, Judgment of 22 September 2009, §136; Case ***Shamayev and others v. Georgia and Russia***, No. 36378/02, Judgment of 14 April 2005, §§413-414; Case ***Čonka v. Belgium***, No. 51564/99, Judgment of 5 February 2002, §50.
[471] EComHR, Case X v. The United Kingdom, Judgement of 16 July 1982, B 41, p. 34.

especially in view of the close relationship between access to the file and exercise of the remedies contained in Article 5 (4) and Article 13 in combination with Articles 2, 3, 6, 8 of the Convention[472].

The Court also considers that, when a person is arrested on suspicion of having committed a crime, Article 5 (2) neither requires that the necessary information be given in a ***particular form***, nor that it consists of a ***complete list*** of the charges held against him or her. This reasoning applies, *mutatis mutandis*, to the arrest of persons with a view to their extradition. And, although the information provided to these persons may be ***less complete*** than the information which must be provided to persons arrested on suspicion of having committed a crime – since the insufficiency of information in this case may be relevant to the right to a fair trial under Article 6 of the Convention – the detainee must still receive it ***promptly and in an adequate manner***, so that he or she becomes aware of the reasons relied on to justfy the deprivation of liberty. If not, the arrested person cannot make effective use of his or her right to appeal against such arrest, and such right will effectively be ***deprived of all substance***. Whether the content and promptness of the information conveyed are sufficient is to be assessed in each case according to its ***special features***[473]. A violation of Article 5 (2) of the Convention may therefore entail also a violation of Article 5 (4). No request for release submitted to national authorities can provide a remedy with the guarantees required by Article 5 (4)[474].

In a Grand Chamber judgement of 2005, in which the applicants alleged they did not had a fair hearing in the criminal court that ruled on the request for their extradition, since they had been unable to gain access to all the material in the case file or to put forward their arguments concerning the characterization of the offences they were alleged to have committed, the ECtHR reiterated its view that decisions regarding the entry, stay and expulsion of aliens do not concern the determination of one's ***civil rights or obligations or of a criminal charge*** against him or her, within the meaning of **Article 6 (1) of the Convention** and, consequently, that this paragraph is ***not applicable to extradition proceedings***[475].

The Court has ruled that it was sufficient, for the purposes of Article 5 (2), that the applicant had been told, in the course of his arrest, that he was wanted by the authorities of the requesting State[476], and also that the arrest warrant contained an indication of the offence the sought person was suspected of and that his arrest had been ordered for the purpose of his extradition to requesting State[477].

Recalling cases in which, in relation to detention under Article 5 (1) 1(c) of the Convention, the Court has accepted as **"prompt"** that the applicants were given the reasons for their arrest within a maximum of seven hours after such arrest, but violations of Article 5 (2) were found on the basis of delays of 76 hours and ten days in providing the reasons for detention,[478], the Court has found a violation of this same provision in a case in which the applicant alleged that he found out the real reasons for his detention (i.e., that he was wanted by the authorities of the requesting State) more than 20 days after his detention, and the Government failed to provide reliable evidence of its allegation that the notification had been effected about 40 minutes after the applicant's

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[472] ECtHR, Case ***Shamayev and others v. Georgia and Russia***, No. 36378/02, Judgment of 14 April 2005, §§427, 460-461.
[473] ECtHR, Case ***Kaboulov v. Ukraine***, No. 41015/04, Judgment of 19 November 2009, §144; Case ***Eminbeyli v. Russia***, No. 42443/02, Judgment of 26 February 2009, §55; Case ***Khudyakova v. Russia***, No. 13476/04, Judgment of 8 January 2009, §§79-80; Case ***Shamayev and others v. Georgia and Russia***, No. 36378/02, Judgment of 14 April 2005, §413, 416, 427; EComHR, Case ***K. v. Belgium***, No. 10819/84, Decision of 5 July 1984, p. 231.
[474] ECtHR, Case ***Abdolkhani and Karimnia v. Turkey (No. 1)***, No. 30471/08, Judgment of 22 September 2009, §141.
[475] ECtHR, Case ***Mamatkulov and Askarov v. Turkey***, Nos. 46827/99 & 46951/99, Judgment [GC] of 4 February 2005, §82.
[476] ECtHR, Case ***Bordovskiy v. Russia***, No. 49491/99, Judgment of 8 February 2005, §§57-58.
[477] EComHR, Case ***K. v. Belgium***, No. 10819/84, Decision of 5 July 1984, p. 231.
[478] ECtHR, Case ***Kaboulov v. Ukraine***, No. 41015/04, Judgment of 19 November 2009, §145.

detention[479]. An interval of four days has also been found incompatible with the constraints of time imposed by the notion of promptness in Article 5 (2)[480].

What is relevant for the purpose of a State fulfilling its obligations under, inter alia, Article 5 (2) of the Convention is whether the relevant information has been provided by ***State authorities***. Learning about his own detention, or reasons therero, through ***rumors, newspapers or journalists***, is no substitute for this. For the Court, "the issue is not whether the applicants concluded or could have concluded from various clues that extradition proceedings were pending against them, or whether [a private] ought to have shown zeal in the context of a favour which he was providing unofficially to a State employee. The issue is whether that employee himself, instructed by his hierarchical superiors to perform a specific task, properly informed the applicants of the fact that they were being held on account of a request for extradition"[481].

In a case where arrest and interview records contained a reference to the fact that the person was wanted by the authorities of the requesting State, but failed to outline, even briefly, the reasons therefor; and that the person's lawyer, who could have explained to him the implications of those documents, stepped into the proceedings only one month later, the Court considered that the applicant was not promptly provided with sufficient information concerning his arrest and detention and the charges brought against him, in violation of Article 5 (2)[482].

The Court also finds it unacceptable that a person learns of his or her extradition only moments before being taken to the airport, when the reason for fleeing the receiving country has been a fear of treatment contrary to Article 2 or Article 3 of the Convention. In a case where only the prison governor and three other employees of the prison administration were aware of the surrender (extradition) which was being prepared, the Court considered that such an enforcement procedure could not be regarded as transparent and hardly demonstrated that the competent authorities took steps to protect the applicants' right to be informed of the extradition measure against them. In order to challenge an extradition order, the applicants or their lawyers would have had to have sufficient information, served officially and in good time by the competent authorities, which did not happen. Accordingly, the Court considered that these authorities unjustifiably hindered the exercise of the right of appeal that might have been available to the detainees, at least theoretically, and that the Government had no grounds for criticising the applicants' lawyers for failing to lodge an appeal against a measure whose existence they learned of only through a leak from inside the State administration.[483] A violation of Article 5 (2) was equally found in a case where the applicants were not informed either during their transfer to prison or subsequently that they had been arrested with a view extradition, thus being deprived of the possibility to challenge the lawfulness of their arrest[484].

By contrast, the Court found **no violation** of Article 5 (2), for example, in the following cases:

- Applicant signed a written statement, on the day of his arrest, saying that he had studied at least some investigative documents concerning the criminal case instituted against him in the requesting State and claimed that he had not committed the crimes he had been charged with;[485]
- Applicant's lawyer informed of detention one day in advance, but no indication that, upon receiving such information, he requested access to the material in order to prepare for the hearing; the Court recognized that a period of 30 minutes might be insufficient to

[479] ECtHR, Case ***Kaboulov v. Ukraine***, No. 41015/04, Judgment of 19 November 2009, §§146-147.
[480] ECtHR, Case ***Shamayev and others v. Georgia and Russia***, No. 36378/02, Judgment of 14 April 2005, §416.
[481] ECtHR, Case ***Shamayev and others v. Georgia and Russia***, No. 36378/02, Judgment of 14 April 2005, §416, 425.
[482] ECtHR, Case ***Zokhidov v. Russia***, No. 67286/10, Judgment of 5 February 2013, §§170-175.
[483] ECtHR, Case ***Shamayev and others v. Georgia and Russia***, No. 36378/02, Judgment of 14 April 2005, §§ 453-454, 458, 460-461.
[484] ECtHR, Case ***Shamayev and others v. Georgia and Russia***, No. 36378/02, Judgment of 14 April 2005, §§426, 428.
[485] ECtHR, Case ***Khodzhayev v. Russia***, No. 52466/08, Judgment of 12 May 2010, §116.

study the material, but noted that, notwithstanding, the applicant and his lawyer were able to present their argument with regard to the contents of the extradition request; also, the applicant said he had read all the documents and neither he nor his lawyer asked the investigating judge for any additional time for preparation;[486].

- Persons served with the decision ordering their arrest on the arrival at the police station (in the presence of an interpreter to inform them of the contents of the verbal and written communications they received); document handed to them for that purpose stated the legal basis and objective of their arrest, and a note thereon mentioned an appeal to the committals division of the criminal court as being an available remedy against the detention order: these elements were considered sufficient to satisfy the requirements of Article 5 (2) despite the fact that, in the particular case and in practice, they were not in themselves sufficient to allow the applicants to lodge an appeal[487].
- Applicant not served with a copy of the arrest warrant issued by the authorities of the requesting State at the time of his arrest: despite considering this "regrettable", the Court found sufficient, for the purposes of Article 5 (2), the information provided to the applicant by the authorities of the requested State (indication that he was wanted by the authorities of the requesting State and direct reference in the report of arrest to the arrest warrant issued against him); account was also taken of the fact that, on the day following the arrest, the local representation of UNHCR lodged a complaint on the applicant's behalf concerning his arrest and, shortly after the arrest warrant was executed, the applicant was served with a translation thereof[488];
- Signature, by the applicant, of a copy of the arrest warrant, containing brief information on the charges against her and legal basis for the arrest, information that the Court considered "clear"; despite the allegation that the person had been unable to understand the implications of the warrant and that no further explanations were given to her, the Court considered that the information provided was sufficient, taking also into account that she had met with her lawyer, who could have explained what the warrant implied[489].

The right of access to the file and to be informed has also been established in other international instruments dealing with criminal matters. For example, Article 55 (2) (a) of the **Rome Statute of the International Criminal Court** stipulates the right of the suspect to be informed, prior to being questioned – either by the prosecutor or by the national authorities pursuant to a request by the court to co-operate – that there are grounds to believe that he or she has committed a crime within the jurisdiction of the court.

European Arrest Warrant

In accordance with Article 11 of the **EAW FD**, when a requested person is arrested, the executing competent judicial authority shall, in accordance with its national law, inform that person of the EAW and of its contents, and also of the possibility of consenting to surrender to the issuing judicial authority. The person hall have a right to be assisted by a legal counsel and by an interpreter in accordance with the national law of the executing Member State.

The CJEU upheld the validity of the **EAW FD** in 2021, ruling that Article 4 (in particular Article 4(3)), Article 6(2) and Article 7(1) of **Directive 2012/13/EU** of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings, must be interpreted as meaning that the rights referred to therein ***do not apply*** to persons who are arrested for the purposes of the execution of an EAW[490].

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[486] ECtHR, Case ***Čalovskis v. Latvia***, No. 22205/13, Judgment of 24 July 2014, §201.
[487] ECtHR, Case ***Čonka v. Belgium***, No. 51564/99, Judgment of 5 February 2002, §§51-52.
[488] ECtHR, Case ***Eminbeyli v. Russia***, No. 42443/02, Judgment of 26 February 2009, 57.
[489] ECtHR, Case ***Khudyakova v. Russia***, No. 13476/04, Judgment of 8 January 2009, §81.
[490] CJEU, Case **C-649-19, *Spetsializirana prokuratura (Déclaration des droits)***, Judgment of 28 January 2021.

The rights conferred to persons arrested in execution of an EAW are expressly governed by **Article 5** of the above Directive, which establishes that these persons shall be promptly provided with an appropriate ***Letter of Rights*** containing information on their rights according to the law implementing **Framework Decision 2002/584/JHA** in the executing Member State. This Letter of Rights shall be drafted in simple and accessible language. An indicative model Letter of Rights is set out in Annex II, different from that under Article 4 set out in Annex I[491], and containing the following elements:

> **A. INFORMATION ABOUT THE EUROPEAN ARREST WARRANT**
>
> *You have the right to be informed about the content of the European Arrest Warrant on the basis of which you have been arrested.*
>
> **B. ASSISTANCE OF A LAWYER**
>
> *You have the right to speak confidentially to a lawyer. A lawyer is independent from the police. Ask the police if you need help to get in contact with a lawyer, the police shall help you. In certain cases the assistance may be free of charge. Ask the police for more information.*
>
> **C. INTERPRETATION AND TRANSLATION**
>
> *If you do not speak or understand the language spoken by the police or other competent authorities, you have the right to be assisted by an interpreter, free of charge. The interpreter may help you to talk to your lawyer and must keep the content of that communication confidential. You have the right to a translation of the European Arrest Warrant in a language you understand. You may in some circumstances be provided with an oral translation or summary.*
>
> **D. POSSIBILITY TO CONSENT**
>
> *You may consent or not consent to being surrendered to the State seeking you. Your consent would speed up the proceedings. [Possible addition of certain Member States: It may be difficult or even impossible to change this decision at a later stage.] Ask the authorities or your lawyer for more information.*
>
> **E. HEARING**
>
> *If you do not consent to your surrender, you have the right to be heard by a judicial authority.*

Before surrender, the ***issuing judicial authority*** is under no obligation to forward to the person who is the subject of an EAW the national decision on his or her arrest and information on the possibilities of challenging that decision.[492]

1.3 Right to interpretation and translation

It should be emphasized that, although the Court does not consider that the information required by Article 5 (2) of the **ECHR** be given in any particular form[493], it must be provided "in a **language which [the person] understands**" (emphasis added).

Although the language requirements in **ECE** (Article 23) concern mostly the use, in extradition proceedings, of the language of one of the Parties (as a rule, one of the languages used in the

[491] CJEU, Case **C-649-19, *Spetsializirana prokuratura (Déclaration des droits)***, Judgment of 28 January 2021, §§48-52.
[492] CJEU, Case **C-105/21, *IR* (Spetsializirana procuratura)**, Judgement of 30 June 2022.
[493] ECtHR, Case ***Zokhidov v. Russia***, No. 67286/10, Judgment of 5 February 2013, §170.

diplomatic correspondence between the two Parties) and give the requested Party the right to request a translation into one of the official languages of the CoE, concern for the use of a language undertood by the requested person is echoed in Committee of Ministers' **Recommendation R (80) 7**, which states that, irrespective of the administrative or judicial nature of the extradition proceedings, the person concerned *should be informed, promptly and* ***in a language which he understands****, of the extradition request and the facts on which it is based, of the conditions and the procedure of extradition, and, where applicable, of the reasons for his arrest* (emphasis added).

AP3, however, establishes that, if the person wishes to consent to be subject to the ***simplified extradition procedure*** and, where appropriate, to renounce to the ***rule of speciality***, he or she has the right to legal counsel and, if necessary, to the assistance of an interpreter, in order to ensure that such consent and renunciation are expressed voluntarily and in full awareness of their legal consequences (**AP3**, Article 4 (2)).

In a case where the applicant complained, inter alia, that the extradition proceedings were unfair by reason of several irregularities, including deficiencies in the English translation during hearings, the ECtHR reiterated that an extradition procedure does not involve a challenge to an applicant's civil rights and obligations nor does it relate to the merits of a criminal charge against him or her. Moreover, the applicant had not alleged that he would be likely to face a flagrant denial of justice in the event of extradition. Therefore, the Court concluded that ***Article 6 (1) of the Convention did not apply*** to the case at hand[494].

In a case where the applicant complained that he was not provided with written translations of the prosecutors' detention orders, having the domestic courts considered that he had a poor command of the national language, and consequently appointed for him interpreters who participated in all the hearings concerning his detention, the Court took into account that, notwithstanding his shortcomings, the applicant had stated that he was able to ***understand and answer in the national language basic questions*** concerning his arrival in the country, his family and his employment situation, which was supported by the arrest and interview records. These contained a reference to the fact that he was wanted by the authorities of the requesting State and it was their failure to outline, even briefly, the reasons for the arrest, as well as the fact that his lawyer was not present to explain to him the implications of such warrant, that gave rise to a violation of Article 5 (2), rather than language considerations.[495].

Another element of relevance to determine compliance with the requirements of Article 5 (2), in a case of expulsion where the applicants were arrested at the police station, was the ***presence therein of an interpreter***, notably for the purposes of informing the aliens of the content of the verbal and written communications which they received, in particular, the document ordering their arrest[496]. And, in a case of extradition for the purpose of prosecution, the fact that shortly after the arrest the applicant was served with a ***translation of the arrest warrant***[497].

When a violation of Article 5 (2) was found, account was also taken of the fact that ***no interpreter was present*** at a meeting when the applicants could have received (but did not) information about their extradition, having refused to provide any explantions if their lawyer(s) and an interpreter were not present. When a freelance interpreter was hired and agreed to provide a one-off interpretation service to one of the applicants, having failed to do so on account of the way interrogation was conducted and the applicant's refusal to participate in it, the Court found that "the issue is not whether [the interpreter] ought to have shown zeal in the context of a favour which he was providing unofficially to a State employee. The issue is whether that employee himself, instructed by his hierarchical superiors to perform a specific task, properly informed the applicants of the fact that they were being held on account of a request for extradition". Without overlooking the fact that it was impossible for the trainee prosecutor in attendance to assess the

[494] ECtHR, Case ***Ketchum v. Romania***, No. 15594/11, Decision of 11 June 2013, §30.
[495] ECtHR, Case ***Zokhidov v. Russia***, No. 67286/10, Judgment of 5 February 2013, §§170-175.
[496] ECtHR, Case ***Čonka v. Belgium***, No. 51564/99, Judgment of 5 February 2002, §52.
[497] ECtHR, Case ***Eminbeyli v. Russia***, No. 42443/02, Judgment of 26 February 2009, §57.

accuracy of the impugned interpretation, in the light of the responsible task entrusted to him and the serious objections that the question of extradition could have provoked among the applicants, it was incumbent on him to ***phrase his interpretation request with meticulousness and precision***, which the Court considered was not the case.[498]

European Union

In accordance with Article 11 (2) of the **EAW FD**, a requested person who is arrested for the purpose of the execution of an EAW shall have a ***right to be assisted by an interpreter*** in accordance with the national law of the executing Member State.

In 2010, **Directive 2010/64/EU**, on the right to interpretation and translation in criminal proceedings, was adopted, applying also to proceedings for the execution of an EAW, within the limits set forth therein (PP15). In these proceedings, the executing Member State shall ensure that its competent authorities provide ***interpretation*** to persons subject to them who do not speak or understand the language of such proceedings (Article 2, §7). These persons are also entitled to be provided, by the executing Member State, with a written ***translation of the EAW***, in case they do not understand the language in which the EAW was drawn up, or into which it has been translated by the issuing Member State (Article 3, §6). Interpretation and translation must be of a ***quality*** sufficient to safeguard the fairness of the proceedings (Articles 2, §8 and 3, §9).

The ***costs*** of interpretation and translation for the benefit of the requested persons who do not speak or understand the language of the proceedings should be borne by the executing Member States (PP15).

Persons subject to proceedings for the execution of an EAW should have the ***right to challenge the finding that there is no need for interpretation***, in accordance with procedures in national law. However, there is no need for Member States to provide for a separate mechanism or complaint procedure for this purpose and it should not prejudice the time limits applicable to the execution of an EAW (PP25).

Under the implementation of the ***Petruhhin consultation mechanism***, an official language of the State of nationality is proposed as the language regime for documents transmitted between the requested State and the State of nationality.

As stated in the above sub-chapter, the **Letter of Rights** which should be provided to all persons arrested in execution of an EAW should make reference to the right to interpretation and translation, for example in the following terms:

> *If you do not speak or understand the language spoken by the police or other competent authorities, you have the right to be assisted by an interpreter, free of charge. The interpreter may help you to talk to your lawyer and must keep the content of that communication confidential. You have the right to a translation of the European Arrest Warrant in a language you understand. You may in some circumstances be provided with an oral translation or summary.*

1.4 Right of access to a lawyer

The fact that Article 6 (3) (d) of the Convention – *the right of everyone charged with a criminal offence to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so*

[498] ECtHR, Case ***Shamayev and others v. Georgia and Russia***, No. 36378/02, Judgment of 14 April 2005, §§421-425.

require – does not apply to extradition procedures[499], nor to procedures concerning the entry, stay and expulsion of aliens, is no reason to deny a detainee awaiting extradition access to a lawyer. On the contrary, access to a lawyer and legal counsel is an essencial element for the effective enjoyment of one's rights to ***challenge the lawfulness of detention*** and to claim ***compensation*** if this violates the Convention (Article 5 (4) and (5) of the **ECHR)** to an effective remedy as guaranteed by Article 13, combined with other provisions of the Convention.

The Committee of Ministers of the CoE has adopted the same view, stating in its **Resolution 75 (12)** – on Article 22 of the Convention, dealing with the extradition procedure – that the Contracting Parties, whilst providing for a *speedy extradition procedure*, shall ensure that the person whose extradition has been requested has the *right to be heard* by a judicial authority and to be ***assisted by the lawyer of his own choosing*** and shall submit to a judicial authority the control of his custody for the purpose of extradition as well as the conditions of his extradition. **Recommendation R (80) 7** strengthens the former, stating that, irrespective of the administrative or judicial nature of the extradition proceedings, the person concerned should have the ***possibility to be assisted in the extradition procedure***; and that, if he or she has not sufficient means to pay for the assistance, it should be given ***for free***.

In fact, according to the ECtHR, the assistance of a lawyer in extradition proceedings affords an important guarantee to the person whose extradition is sought and who is, by definition, a foreigner in the country in question and, therefore, often unfamiliar with its legal system[500]. The denial of access to legal assistance during detention in police headquarters is a factor which, in itself, deprives the person's **right of appeal against detention** (Article 5 (4) of the Convention) from all effective substance, which no request to national authorities for release can substitute[501]. This should be viewed in connection with the need to ensure ***procedural fairness*** in judicial review proceedings, which must be adversarial and ensure equality of arms, and therefore require, inter alia, that the person has the opportunity to be heard in court either in person or, where necessary, through some form of representation[502].

Furthermore, as indicated in the previous sub-chapter, States Parties to **AP3** should inform all persons arrested under Article 16, in accordance with their domestic law and without undue delay, of the request against them and of the possibility to apply the ***simplified extradition procedure***. If the person wishes to consent to it and, where appropriate, to renounce to the ***rule of speciality***, he or she has the right to legal counsel and, if necessary, to the assistance of an interpreter, in order to ensure that such consent and renunciation are expressed voluntarily and in full awareness of their legal consequences (**AP3**, Articles 3 and 4 (2)).

The absence of a lawyer (and of an interpreter) at a meeting on extradition with the persons sought, when they have so requested, as well as the denial to appointed lawyers of access to extradition files, are factors taken into consideration by the ECtHR to determine whether a violation of **Article 5 (4)** has occurred[503]. The belated communication to the detainee's lawyer of documents relevant to challenge the lawfulness of detention may also hinder the exercise of the right to judicial review of detention as provided for under Article 5 (4)[504].

The fact that, throughout the proceedings, the applicant, assisted by lawyers, had the opportunity to comment on the prosecutor's requests for his continued detention and to convey and defend his arguments before the courts at the ordinary and appeal levels of jurisdiction, and that either he or his lawyer were always duly notified of all court hearings concerning his detention, are also important to ensure compliance with Article 5 (4). The Court has considered that the fact that an

[499] ECtHR, Case ***H. v. Spain***, No. 10227/82, Decision of 15 December 1983
[500] ECtHR, Case ***Sanchez-Reisse v. Switzerland***, No. 9862/82, Judgment of 21 October 1986, §47.
[501] ECtHR, Case ***Abdolkhani and Karimnia v. Turkey (No. 1)***, No. 30471/08, Judgment of 22 September 2009, §141; Case ***Shamayev and others v. Georgia and Russia***, No. 36378/02, Judgment of 14 April 2005, §432.
[502] ECtHR, Case ***Soliyev v. Russia***, No. 62400/10, Judgment of 5 June 2012, §55.
[503] ECtHR, Case ***Shamayev and others v. Georgia and Russia***, No. 36378/02, Judgment of 14 April 2005, §§420-434.
[504] ECtHR, Case ***Zokhidov v. Russia***, No. 67286/10, Judgment of 5 February 2013, §190.

applicant was not allowed to take part in the appeal hearings did not upset the "equality of arms" between the parties or otherwise render the proceedings unfair, as such appeal hearings had been attended by his lawyers and there was no suggestion that the applicant himself had had additional arguments which could not have been raised by his lawyers at those hearings[505].

Indeed, in ***appeal proceedings*** the Court's interpretation of the requirements of Article 5 (4) may be less stringent: in a case where neither the applicant or his lawyer were informed of the appeal hearing, the Court, despite finding this"regrettable", did not find a breach of Article 5 (4) of the Convention, noting in this connection that the applicant and his lawyer were present at the detention hearing before the first-instance court; that there was no indication that this hearing was unfair; that the appeal court examined the issue of the applicant's detention on the basis of written submissions and upheld the detention order issued by the lower court;, and that the prosecutor made no additional oral argument nor adduced new evidence.[506] The Court has also found manifestly ill-founded a complaint that an applicant had been deprived of an opportunity to contact a lawyer and receive legal assistance in a case where the person had signed the record of his arrest, clearly stating that he had been informed of his right to invite a lawyer in order to receive legal assistance as required by law, without any objections as to the course of that process; furthermore, the person had been provided with a phone to contact a lawyer while the search was still ongoing, but failed to do so and to request a list of lawyers; despite this, he did appoint a legal representative on the same day and was represented by a lawyer at the detention hearing.[507]

The lack of access to legal cousel can also give rise to a violation of **Article 5 (2)** of the Convention, since a lawyer is best placed to interpret the information provided by the authorities and then explain to the detainee, ***in a language which he understands***, the reasons for his arrest and any charge against him. In a case where the applicant had signed a copy of the arrest warrant, but alleged that she had been unable to understand its implications, the fact that, in due course, she had met with her lawyers, who could have explained what the warrant implied, was considered by the Court in reaching the conclusion that there had been no violation of Article 5 (2) of the Convention.[508] The reverse is also true: the fact that, in a given case, the detainee was not represented and that his lawyer, who spoke his native language, could have explained to him what the arrest and interview records implied, was also found relevant by the Court to conclude that there had been a violation of Article 5 (2)[509].

Another right which may be violated in case of lack of access to a lawyer is the right to an **effective remedy against extradition** (Article 13 of the Convention), namely in cases where the person may need to invoke any basis for the refusal of extradition (see below). This right is also unjustifiably hindered when competent authorities fail to notify either the applicants or their lawyers of the extradition orders issued and to provide them with sufficient information, served officially and in good time[510].

In case the person is deprived of the right of access to a lawyer or to lodge a complaint in the case of an extradition which might entail the subjection to ***torture or ill-treatment*** in the receiving country, a violation of Article 3 has been found, in combination with Article 13[511]. In the context of asylum proceedings, the Court has found that, given the absolute nature of the right guaranteed by Article 3 of the Convention, and the situation of vulnerability in which asylum seekers often find themselves, the lack of representation by lawyer in these cases place on authorities a particular duty to assess *ex officio* the risks faced by the person[512].

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[505] ECtHR, Case ***Molotchko v. Ukraine***, No. 12275/10, Judgment of 26 April 2012, §182.
[506] ECtHR, Case ***Soliyev v. Russia***, No. 62400/10, Judgment of 5 June 2012, §§59-60, 66.
[507] ECtHR, Case ***Čalovskis v. Latvia***, No. 22205/13, Judgment of 24 July 2014, §§160-163.
[508] ECtHR, Case ***Khudyakova v. Russia***, No. 13476/04, Judgment of 8 January 2009, 81.
[509] ECtHR, Case ***Zokhidov v. Russia***, No. 67286/10, Judgment of 5 February 2013, §§173-175.
[510] Case ***Shamayev and others v. Georgia and Russia***, No. 36378/02, Judgment of 14 April 2005, §458, 461.
[511] ECtHR, Case ***Garabayev v. Russia***, No. 38411/02, Judgment of 7 June 2008, §§106-107.
[512] ECtHR, Case ***M.A.M. v. Switzerland***, No. 29836/20, Judgment of 26 April 2022, §78.

The **lack of access to a lawyer in the country of destination** may entail a risk of flagrant denial of justice[513] and, like the risk of treatment proscribed by Article 2 and/or Article 3 of the Convention, must primarily be assessed by reference to the facts which the Contracting State knew or should have known when it extradited the persons concerned[514]. However, in a case where the only specific argument put forward by the applicant to substantiate her fear of being faced with a flagrant denial of a fair trial in the requesting State concerned the courts' refusal to admit her lawyer to the criminal proceedings against her, but evidence indicated that such refusal was made in the context of a criminal case that had been severed from her own, the allegation was found unsubstantiated[515].

Denial of access to a lawyer may also violate the right of individual petition to the ECtHR (often in connection to the request for *interim measures*), provided for under **Article 34** of the Convention (individual applications), which reads:

> *The Court may receive applications from any person, nongovernmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the Protocols thereto. The High Contracting Parties undertake not to hinder in any way the effective exercise of this right.*

This was so in a deportation case where authorities did everything in their power to conceal the person's whereabouts from his lawyer and relatives and flatly denied his detention when his lawyer contacted them, depite the fact that this contact occurred before the person was taken to the airport[516].

Guarantees and State practice of providing unfettered access to one's lawyer is an important factor to take into account in order to assess the ***quality of assurances*** provided to avert the risk of grave human rights violations in the receiving country[517].

Possible ***delays*** in proceedings due to the person's request for the appointment of a lawyer are, as a rule, imputed to the State[518]. But requests for extra time in order to prepare one's defence do not undermine due diligence on the part of State authorities in the conduct of proceedings[519]. Also, an appointed counsel's failure to act on behalf of the sought person, even if he or she is absent from the country where proceedings are held, is imputed to the applicant and one indicative factor that no "flagrant denial of justice" was present[520].

In 2012, the ECtHR examined the obligation placed on French lawyers to report their "suspicions" regarding possible money laundering activities by their clients. Among other things, it was alleged that this obligation, which resulted from the transposition of European directives, was in conflict with Article 8 (right to respect for private life) of the Convention, which protects the **confidentiality of lawyer-client relations**. The Court held that it was required to rule on this question, since the "presumption of equivalent protection" was not applicable in this case. It stressed the importance of the confidentiality of lawyer-client relations and of legal professional privilege, but considered that the obligation to report suspicions pursued the legitimate aim of prevention of disorder or crime, since it was intended to combat money laundering and related criminal offences, and that it was necessary in pursuit of that aim. On the latter point, the Court held that the obligation to report suspicions, as implemented in France, did not interfere disproportionately with legal professional privilege, since lawyers were not subject to the above requirement when defending

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[513] ECtHR, Case ***Muhammed Asif Hafeez v. the United Kingdom***, No. 14198/20, Decision of 28 March 2023, §72 (*a contrario*).
[514] ECtHR, ***Al-Moayad v. Germany***, No. 35865/03, Decision of 20 February 2007, §101; Case ***Mamatkulov and Askarov, v. Turkey***, Nos. 46827/99 & 46951/99, Judgment [GC] of 4 February 2005, §90.
[515] ECtHR, Case ***Yefimova v.Russia***, No. 39786/09, Judgment of 19 February 2013, §§223-224.
[516] ECtHR, Case ***Zokhidov v. Russia***, No. 67286/10, Judgment of 5 February 2013, §204, 211.
[517]ECtHR, Case ***Othman (Abu Qatada) v. United Kingdom***, No. 8139/09, Judgment of 17 January 2012, §§ 188-189 and 193-196.
[518] ECtHR, Case ***Khomullo v. Ukraine***, No. 47593/10, Judgment of 27 November 2014, §85.
[519] ECtHR, Case ***Khokhlov v. Cyprus***, No. 53114/20, Judgment of 13 June 2023, §96.
[520] ECtHR, Case ***Kislov v. Russia***, No. 3598/10, Judgment of 9 July 2019, §§ 118-119.

litigants and the legislation had put in place a filter to protect professional privilege, thus ensuring that lawyers did not submit their reports directly to the authorities, but to the president of their Bar association. Therefore, it found no violation of Article 8 in this instance.[521]

European Union

In accordance with Articles 11 (2) and 13 (2) of the **EAW FD**, a requested person who is arrested for the purpose of the execution of an EAW shall have a right to be assisted by a ***legal counsel*** (as well as by an ***interpreter***) in accordance with the national law of the executing Member State, inter alia to ensure that a possible consent to the surrender to the issuing judicial authority and renunciation to the rule of speciality as provided for under Article 27 (2) of the **EAW FD** are provided voluntarily and in full awareness of the respective consequences.

EU **Directive 2013/48/EU** specifically lays down minimum rules concerning the right of access to a lawyer in criminal proceedings and in proceedings for the execution of an EAW. It establishes, *inter alia*, that persons subject to an EAW should have the ***right of access to a lawyer in the executing Member State*** in order to allow them to exercise their rights effectively under the **EAW FD** (Article 10 (1)). In case a lawyer participates in a hearing of a requested person by an executing judicial authority, that lawyer may, *inter alia*, in accordance with procedures provided for under national law, ***ask questions***, request ***clarification*** and make ***statements***. (PP42).

Article 10 (2) defines the contents of the right of ***access to a lawyer in the executing Member State*** upon arrest pursuant to an EAW, as follows:

> (a) right of access to a lawyer in such ***time*** and in such a ***manner*** as to allow the requested persons to ***exercise their rights effectively*** and in any event without ***undue delay*** from deprivation of liberty;
>
> (b) right to ***meet and communicate*** with the lawyer representing them;
>
> (c) right for their lawyer to be ***present*** and, in accordance with procedures in national law, participate during a hearing of a requested person by the executing judicial authority. Where a lawyer participates during the hearing this shall be noted using the recording procedure in accordance with the law of the Member State concerned.

Requested persons also have the right to ***appoint a lawyer in the issuing Member State***, and the competent authority in the executing Member State shall, without undue delay after deprivation of liberty, inform them of this right. The role of that lawyer in the issuing Member State is to assist the lawyer in the executing Member State by providing that lawyer with information and advice with a view to the effective exercise of the rights of requested persons under **EAW FD**. In case the requested person wishes to exercise the right but does not already have a lawyer in the issuing Member State, the competent authority of this Member State shall provide the necessary information to facilitate such appointment. It has been suggested that a list of lawyers for this purpose may be drafted (eg. by the appropriate bar association) or that the name of a lawyer on duty in the issuing State be indicated. This right is without prejudice to the time-limits set out in **EAW FD** or the obligation on the executing judicial authority to decide, within those time-limits and defined conditions, whether the person is to be surrendered.

Furthermore, Member States shall respect the ***confidentiality*** of communication between persons subject to an EAW and their lawyer. Such communications include meetings, correspondence, telephone conversations and other forms of communication permitted under national law (article 4 of **Directive 2013/48/EU**).

Directive (EU) 2016/1919, of 26 October 2016, on legal aid for suspects and accused persons in criminal proceedings and for requested persons in EAW proceedings, establishes that the executing Member State shall ensure that requested persons have a ***right to legal aid*** upon arrest pursuant to an EAW until they are surrendered, or until the decision not to surrender them

[521] ECtHR, Case ***Michaud v. France***, No. 12323/11, Judgment of 6 December 2012.

becomes final. In case the EAW is issued for the purpose of conducting a criminal prosecution and the person wishes to appoint a lawyer in the issuing Member State, also have the right to legal aid in this State, provided that legal aid is necessary to ensure effective access to justice (Article 5 of **Directive (EU) 2016/1919**). Legal aid is provided in accordance with the domestic law of the Member State where the assistance of a lawyer is necessary (Article 11 of **Directive 2013/48/EU**) and, in case this State applies a means test, it shall take into account all relevant and objective factors, such as the income, capital and family situation of the person concerned, as well as the costs of the assistance of a lawyer and the standard of living in that Member State, in order to determine whether, in accordance with the applicable criteria in that Member State, a suspect or an accused person lacks sufficient resources to pay for the assistance of a lawyer (Article 4 (3) of **Directive (EU) 2016/1919**).

Any ***waiver*** of the right of access to a lawyer in the executing Member State, if admitted by national legislation, must be given given voluntarily and unequivocally, preceded by the provision, orally or in writing, of clear and sufficient information in simple and understandable language about the content of such right and possible consequences of waiving it. This waiver must be recorded and can be subsequently revoked at any point during the proceedings. Requested persons must be informed of this possibility and the revocation shall have effect from the moment it is made (Article 9).

As stated in sub-chapter 1.2, the **Letter of Rights** which should be provided to all persons arrested in execution of an EAW should make reference to the right to the assistance of a lawyer, for example in the following terms:

> *You have the right to speak confidentially to a lawyer. A lawyer is independent from the police. Ask the police if you need help to get in contact with a lawyer, the police shall help you. In certain cases the assistance may be free of charge. Ask the police for more information.*

In a case concerning the execution of an EAW issued for the purpose of serving a prison sentence imposed *in absentia*, the ECtHR found that the fact that the person had been assisted before the Court of Appeal and defended by a lawyer whom he had appointed himself, who had also defended him at the first instance and whose defense was proved to be effective since it led to a reduction of sentence, was sufficient to conclude that, in the case at hand, the execution of the EAW was not tainted by a manifest insufficiency capable of reversing the presumption of equivalent protection provided under the EAW system and the surrender of the person to the issuing authorities could not be regarded as being based on a trial constituting a flagrant denial of justice[522].

1.5 Right to be heard

The ECHR does guarantee the right to be heard in its **Article 6 (1)**, the relevant part of which provides that: "*In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law* [...]". However, as explained above, in complaints submitted to it alleging violation of this right in the context of extradition proceedings, the Court has reiterated its well-established caselaw according to which "[…] decisions regarding the entry, stay and deportation of aliens do not concern the determination of an applicant's civil rights or obligations or of a criminal charge against him, within the meaning of Article 6 § 1 of the Convention". Therefore, this provision does not apply to such proceedings, including on what

[522] ECtHR, Case ***Pirozzi v. Belgium***, No. 21055/11, Judgment of 17 April 2018, §§66-67, 70-71; for a similar case, see ***De Sousa v. Portugal***, No. 28/17, Decision of 7 December 2021, §§80-81, 83-84, 88.

concerns a court's examination of an extradition request from a foreign State[523] or alleged breach of the principle of equality of arms due to the authorities of the requested State failing to demand certain documents from the requesting State (eg. document with the sentence calculation).[524]

However, the right to be heard in extradition proceedings is ***inextricably linked*** with the right of access to a lawyer and to benefit from legal counsel in such proceedings, as previously examined. It is one of the fundamental guarantees of procedure applied in matters of deprivation of liberty"[525]. The Committee of Ministers of the CoE, in its **Resolution 75 (2)** – concerning the practical application of the **ECE** – provides for both rights and links them directly, by stating that (emphasis added):

> *Contracting Parties, whilst providing for a speedy extradition procedure, shall ensure that the person whose extradition has been requested has the **right to be heard** by a judicial authority and to be assisted by the lawyer of his own choosing and shall submit to a judicial authority the control of his custody for the purpose of extradition as well as the conditions of his extradition.*

Recommendation No. R (80) 7 of the Committee of Ministers of the CoE reinforces this provision by recommending that, irrespective of the administrative or judicial nature of the extradition proceedings, the person concerned should ***be heard on the arguments which he invokes against his extradition***. This recommendation pertains to the right to be heard in relation to extradition itself, rather than on custody for the purpose of extradition, as the previous one. It is consistent with the Court's conclusion that the submissions concerning the lawfulness of the extradition itself, as far it may constitute a violation of other material rights enshrined in the Convention, are examined in the context of its Article 13[526].

Furthermore, account should be taken, in this regard, of Article 1 of **Protocol 7 to the ECHR**, on "procedural safeguards relating to expulsion of aliens", which establishes that an alien lawfully resident in the territory of a Contracting State shall not be expelled therefrom except in pursuance of a decision reached in accordance with law and shall be allowed to submit reasons against his or her expulsion. This should be viewed in connection with the need to ensure ***procedural fairness*** in judicial review proceedings, which must be adversarial and ensure equality of arms, and therefore require, inter alia, that the person has the opportunity to be heard in court either in person or, where necessary, through some form of representation[527].

In the case of States Parties to **AP3,** the sought person ***must be heard*** in order to determine whether he or she consents to be subject to the ***simplified extradition procedure*** and, where appropriate, to ***renounce to the rule of speciality*** (Article 4 (1)). In order to ensure that such consent and, where appropriate, renunciation, are provided voluntarily and in full awareness of the respective legal consequences, the person sought has the right to legal counsel and, if necessary, to the assistance of an interpreter. In case the State Party makes a declaration consenting thereto under Article 4 (5) of **AP3**, consent may be revoked until the requested Party takes its final decision on extradition under the simplified procedure; and renunciation to the rule of speciality until surrender.

European Arrest Warrant

As stated before, the **EAW FD** establishes that, when a requested person is arrested, the executing competent judicial authority shall, in accordance with its national law, inform that person of the EAW and of its contents, and also of the possibility of ***consenting to surrender*** to the

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[523] ECtHR, Case ***Aronica v. Germany***, No. 72032/01, Decision of 18 April 2002, §; ***Case Maaouia v. France***, No. 39652/98, Judgment [GC] of 5 October 2000, §§33-37; Case ***E.G.M. v. Luxembourg***, No. 24015/94, Decision of 20 May 1994, p. 1.
[524] ECtHR, Case ***Findikoglu v. Germany***, No. 20672/15, Decision of 7 June 2016, §44.
[525] ECtHR, Case ***Sanchez-Reisse v. Switzerland***, No. 9862/82, Judgment of 21 October 1986, §51.
[526] ECtHR, Case ***Shamayev and others v. Georgia and Russia***, No. 36378/02, Judgment of 14 April 2005, §§460-461.
[527] ECtHR, Case ***Soliyev v. Russia***, No. 62400/10, Judgment of 5 June 2012, §55.

issuing judicial authority. The person shall have a right to be assisted by a legal counsel and by an interpreter in accordance with the national law of the executing Member State. If the arrested person indicates that he or she consents to surrender, that consent and, if appropriate, express ***renunciation to the rule of speciality*** shall be given before the executing judicial authority, in accordance with the domestic law of the executing Member State. In principle, such consent and, if appropriate, renunciation, may not be revoked, except if the Member State concerned expressly provides for the contrary, in accordance with the rules applicable under its domestic law. Where the arrested person ***does not consent*** to his or her surrender, he or she shall be ***entitled to be heard by the executing judicial authority***, in accordance with the law of the executing Member State (Articles 11, 13 and 14 of the **EAW FD**).

In case the EAW is issued for the purpose of conducting ***a criminal prosecution***, the executing judicial authority must either agree that the requested person be heard pending the decision on surrender or agree to the temporary transfer of such person. The requested person shall be heard by a judicial authority, assisted by another person designated in accordance with the law of the requesting Member State, in accordance with the law of the executing Member State and with the conditions determined by mutual agreement between the issuing and executing judicial authorities (Article 19 (1) and (2) of **EAW FD**).

The **Letter of rights** which should be provided to all persons arrested in execution of an EAW should make reference to the rights to be heard and to consent to surrender, for example, in the following terms:

> **HEARING**
>
> *If you do not consent to your surrender, you have the right to be heard by a judicial authority.*
>
> **POSSIBILITY TO CONSENT**
>
> *You may consent or not consent to being surrendered to the State seeking you. Your consent would speed up the proceedings. [Possible addition of certain Member States: It may be difficult or even impossible to change this decision at a later stage.] Ask the authorities or your lawyer for more information.*

The executing authority cannot refuse to execute the EAW on the grounds that the requested person ***was not heard*** in the issuing Member State before the arrest warrant was issued[528].

Furthermore, the CJEU also considers that, when the executing judicial authority is requested to give its consent to the person's possible prosecution for offences committed prior to surrender, other than those which motivated it (Article 27 **EAW FD**), or to his or her subsequent surrender to a third State (Article 28 (3) **EAW FD)**, such person has the ***right to be heard*** by the executing judicial authority. This hearing can take place in the issuing Member State, in which case the issuing judicial authorities must ensure that the surrendered person's right to be heard is exercised effectively, without the executing judicial authority participating directly. However, it is for the executing judicial authority to ensure that it has sufficient information, in particular as regards the position of the person concerned, to be able to take its decision, in full knowledge of the facts and in full respect of the rights of the defence of the person concerned, on the request for consent and, where appropriate, to request additional information from the issuing judicial authority as a matter of urgency.[529]

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[528] CJEU, Case **C-396/11, *Radu***, Judgement [GC] of 29 January 2013.

[529] CJEU, **Joined cases C-428/21 PPU and C-429/21 PPU, *Openbaar Ministerie (Droit d'être entendu par l'autorité judiciaire d'exécution)***, Judgment of 26 October 2021.

1.6 Right to an expedient procedure

As explained in detail in **subsection 1.1.2** (*The length of detention pending extradition*), the diligence shown by State authorities in the conduct of extradition proceedings has a direct impact on the lawfulness of detention, for if such proceedings cease to be conducted with due diligence, the detention will also cease to be lawful, in accordance with Article 5 (1) (f) of the Convention.

The vast majority of extradition proceedings involves, at least in a given stage, the arrest and detention of the sought person with the view to his or her surrender to the authorities of the requesting State. However, the overall need to ensure a speedy extradition procedure is also an issue, as expressed by the Committee of Ministers of the CoE in its **Resolution 75 (12)**: in the recommendation on Article 22 of the Convention (on the extradition procedure), it states that the Contracting Parties, whilst providing for a ***speedy extradition procedure***, shall ensure that the person whose extradition has been requested has the right to be heard by a judicial authority and to be assisted by the lawyer of his own choosing and shall submit to a judicial authority the control of his custody for the purpose of extradition as well as the ***conditions of his extradition***.

The importance of expediency in the conduct of proceedings, both from the point of view of the rights of the requested person and of the efficiency of international criminal cooperation, is evidenced in the tight deadlines established in the **ECE and its Protocols** for the performance of various procedural steps[530], in the diversification of competent authorities and multiplication of means and forms of communication between them[531], and in the creation of quicker and simplified forms of surrender (eg. under the simplified extradition procedure formally created by the AP3 or, at the EU level, by the establishment of the EAW mechanism).

Again, in a case in which the applicant complained that the length of the proceedings (1994-1998) was unreasonable in view of Article 6 (1) of the **ECHR**, ECtHR Court reiterated its view that this Article does not apply to decisions regarding the entry, stay and deportation of aliens, since such decisions do not concern the determination of one's civil rights or obligations or of a criminal charge against him or her, within the meaning of Article 6 (1) of the Convention.[532]

European Arrest Warrant[533]

Based on the principles of mutual trust and mutual recognition of decisions between EU Member States, with the clear purpose of speeding up and facilitating the surrender of persons fleeing justice between these States, the **EAW FD** also establishes tight time-limits, the observance of which "is essential for such cooperation in criminal matters between Member States. Therefore, while requested persons should be able to exercise fully their rights under this Directive" in EAW proceedings, "those time-limits should be respected" (PP47 of **Directive 2013/48/EU**). Paragraph 1 of **Article 17** clearly establishes that an EAW "shall be dealt with and executed ***as a matter of urgency***" (emphasis added).

Account should also be taken of the time-limits for ***decision*** set in the same **Article 17** (eg. 10 days after consent is given to take a final decision on execution; or 60 days after arrest when no such consent exists; possibility of a further 30-day extension) and for ***surrender*** provided for under **Article 23** (10 days after decision on execution, with the possibility to set a new date due to circumstances beyond the control of any of the Member States or of temporary postponement, on an exceptional basis, for serious humanitarian reasons).

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[530] Eg. **Article 16 (4)** (*maximum duration of provisional arrest*), **Article 18 (4)** (*mandatory release of the person after 30 days if surrender does not take place*), **Article 6 of AP3** (*deadlines for notifications in case of provisional arrest*), **Article 7** of **AP3** (*20-day deadline for the notification of the decision in the case of consent)* and **Article 9** of **AP3** (*10-day deadline for surrender after notification of decision*).

[531] Eg. **Article 6** of **AP4**.

[532] ECtHR, Case ***Maaouia v. France***, No. 39652/98, Judgment [GC] of 5 October 2000, §40.

[533] Eurojust, ***Case-law by the Court of Justice of the EU on the European Arrest Warrant***, updated until 1 December 2021, p. 90.

In several judgments, the CJEU underlined that Member States are, in principle, required to comply with the time limits for taking decisions relating to an EAW[534]. However, a failure to observe the time limits set in **Article 17** of the **EAW FD** does not preclude the executing court from taking a decision on the execution of the EAW[535]. Member States are also required to comply with the time limits under Article 17 **EAW FD** where they provide for an ***appeal with suspensive effect*** against a decision by which the judicial authority gives its consent to the extension of an arrest warrant or to an onward surrender to another Member State pursuant to Articles 27 (4) and 28 (3)I **EAW FD**[536]. This Court equally clarified the time limits for surrender mentioned in **Article 23**[537], underlined that authorities remain obliged to agree on a new date for surrender if these time limits have expired and interpreted the concept of ***force majeure***.

Furthermore, the CJEU ruled that, even after ***expiry of the time limits***, the requested person can be kept in ***custody***, in accordance with the law of the executing Member State, provided that the duration of such custody is not excessive in light of the characteristics of the procedure followed in the main proceedings, which is a matter to be ascertained by the national court. If the executing judicial authority decides to bring the requested person's custody to an end, that authority is required to attach to his or her ***provisional release*** any measures it deems necessary so as to prevent him or her from ***absconding*** and to ensure that the material conditions necessary for his or her ***effective surrender*** remain fulfilled for as long as no final decision on the execution of the EAW has been taken[538].

Finally, the CJEU considers that any ***suspension*** of the period for taking a final decision on the execution of the EAW is permissible only if the duty to provide information to the issuing judicial authority and/or Eurojust/Council, imposed on the executing judicial authority notably by Article 17(4) and (7) **EAW FD**, is complied with[539].

1.7 Presumption of innocence

The presumption of innocence is guaranteed by Article 6 (2) of the **ECHR**, as one of the dimensions of the right to a fair trial, under the following terms:

> *Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.*

Despite the fact that Article 6 (1) does not apply to extradition proceedings, the EctHR has ruled that Article 6 (2) – the **presumption of innocence** – does apply where extradition proceedings are a ***direct consequence*** of, and ***concomitant*** to, the criminal investigation pending against an individual in the receiving State. In these cases, there may be a close link between proceedings in the requesting State and extradition proceedings, justifying the extension of the scope of application of Article 6 (2) to the latter proceedings.[540]

It is important that States do not jeopardize this right, especially in the context of extraditions for the purpose of prosecution. Despite not viewing a decision to extradite, in itself, as an offence to

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[534] Eg. CJEU, **Case C-367/16, *Piotrowski***, Judgment of 23 January 2018; Case **C-270/17, *Tupikas***, Judgment of 10 August 2017; **Joined Cases C-404/15 and C-659/15 PPU, *Aranyosi and Căldăraru***, Judgment of 5 April 2016.
[535] CJEU, Case **C-237/15 PPU, *Lanigan***, Judgement of 16 July 2015.
[536] CJEU, Case **C-168/13 PPU, *Jeremy F***, Judgment of 30 May 2013.
[537] CJEU, Case **C-640/15, *Vilkas***, Judgment of 25 January 2017.
[538] CJEU, Case **C-492/18 PPU, *TC***, Judgment of 12 February 2019; Case **C-237/15 PPU, *Lanigan***, Judgement of 16 July 2015.
[539] CJEU, Case **C-492/18 PPU, *TC***, Judgment of 12 February 2019.
[540] ECtHR, Case ***Ismoilov and others v. Russia***, No. 2947/06, Judgment of 24 April 2008, §164, 167.

the presumption of innocence, [541], the Court considers that the ***reasoning of such a decision*** (which cannot be dissociated from its operative provisions) may give rise to an issue under Article 6 (2) of the **ECHR**, in case it amounts, in substance, to a determination of the person's guilt[542].

Thus, for instance, the presumption of innocence may apply with regard to court decisions taken within extradition proceedings against an applicant if there was a close link, in legislation, practice or fact, between the impugned statements made in the context of the extradition proceedings and the criminal proceedings pending against the applicant in the requesting State. For example, the use, in the decision to extradite, of the expression "committed crimes (...) in the territory of (…)" was considered by the Court as a violation of **Convention** Article 6 (2), since such statement represented an established fact, rather than a mere "state of suspicion" against the person. The Court therefore concluded that such wording in the extradition decision amounted to a ***declaration of the applicant's guilt which prejudged the assessment of the facts by the courts of the requesting State***[543].

On the contrary, a wording such as "[t]he actions of [Mr. …] are punishable under the Russian criminal law and correspond to Article 209 (2) of the Russian Criminal Code" and "had granted their Tajikistani counterpart's request for the applicant's extradition with a view to prosecuting him in connection with his participation in a prohibited religious organisation" despite being considered "unfortunate", were found to be, not a determination of the applicant's guilt, but a determination of whether there were legal grounds for the extradition, and not deemed to violate Article 6 (2)[544]. The same occurs with extradition decisions describing the charges against the requested person[545].

Respect for the principle of the presumption of innocence demands, not only that ***remedies*** are available to allow the person to obtain a speedy judicial review of the lawfulness of his or her detention in the context of extradition (see sub-chapter 1.1.3, above), but also that the ensuing decision on such remedies is particularly swift in cases when trial is pending or the investigation is ongoing[546].

European Union

Guaranteed by Article 48 (1) of the **CFREU**, the right to be presumed innocent until proven guilty in accordance to law has had its protection strengthened, at the EU level, with the adoption of **EU Directive 2016/343**, in force since 1 April 2018. This Directive is part of a package of six legal instruments which ensures that people have common rights whether they are accused or suspected of an offence in their home country or elsewhere in the EU, and allows for better judicial cooperation across the EU.

Among other aspects, it establishes that Member States shall take the necessary measures to ensure that, for as long as a suspect or an accused person has not been proved guilty according to law, ***public statements*** made by public authorities, and ***judicial decisions***, other than those on guilt, do not refer to that person as being guilty (Article 4), and that suspects and accused persons are not ***presented*** as guilty, in court or in public, through the use of measures of physical restraint (Article 5). It also establishes that the burden of proof for establishing the guilt of suspects and accused persons lies with the prosecution (article 6), and guarantees the right to remain silent

[541] See, *mutadis mutandis*, **X. v. Austria**, no. 1918/63, Commission decision of 18 December 1963, Yearbook 6, p. 492.
[542] ECtHR, Case ***Ismoilov and others v. Russia*****,** N.º 2947/06, Judgment of 24 April 2008, §§164 and 167.
[543] ECtHR, Case ***Eshonkulov v. Russia***, N.º 68900/13, Judgment of 15 January 2015, §§74-76.
[544] ECtHR, Case ***Sidikovy v. Russia***, No. 73455/11, Judgment of 20 June 2013, §§191-198, Case ***Gaforov v. Russia***, N.º 25404/09, Judgment of 21 October 2010, §§208, 212-214; Case ***Khaydarov v. Russia***, N.º 21055/09, Judgment of 20 May 2010, §§150, 151.
[545] See, for instance, ECtHR, Case ***Sidikovy v. Russia***, N.º 73455/11, Judgment of 20 June 2013, §§191-199; Case ***Kolesnik v. Russia***, N.º 26876/08, Judgment of 17 June 2010, §92.
[546] ECtHR, Case, **Khudyakova v. Russia**, N.º 13476/04, Judgment of 8 January 2009, §§89, 92.

and not to incriminate oneself (Article 7). The same Directive aims at ensuring that everyone benefits from the right to be present at their trial.

1.8 The rights of foreign prisoners

Foreign prisoners in European States enjoy the vast majority of rights as those applicable to the State's own citizens, as provided for under such universal instruments as the **Universal Declaration of Human Rights**, **ICCPR** and **UNCAT**. In addition, the CoE has also been developing numerous applicable standards, in particular those provided for under the **Convention for the Protection of Human Rights and Fundamental Freedoms**, which applies to all persons under the jurisdiction of Contracting Parties. Of paramount importance in this regard are also the **standards and tools** developed by the CPT, which contain detailed and specific guidance on, inter alia, police and law enforcement activities, prisons, immigration detention, juveniles, women, accountability and complaints mechanisms, as well as transportation.

Other relevant European instruments in this regard are, for instance:

- **Convention on the Transfer of Sentenced Persons** (ETS No. 112) and **its Additional Protocol** (ETS No. 167);
- **Recommendation Rec(93)6 concerning prison and criminological aspects of the control of transmissible diseases including AIDS and related health problems in prison**;
- **Recommendation Rec(2006)2 on the European Prison Rules** (EPR);
- **Recommendation CM/Rec(2008)11 on the European Rules for juvenile offenders subject to sanctions or measures** (ERJO);
- **Recommendation CM/Rec(2012)12 concerning foreign prisoners** (RCFP);
- **Recommendation CM/Rec(2012)5 on the European Code of Ethics for Prison Staff** (ECEPS).

Some instruments contain specific provisions on the rights which should be guaranteed to foreign detainees and/or to detainees belonging to ethnic or linguistic minorities, and which are particularly relevant in the case of persons arrested or detained the purpose of extradition. Here are some examples:

- Right to request contact and be allowed reasonable facilities to communicate with the ***diplomatic or consular representative*** of their State or of the State or authority representing them, and to information about this right, including for juveniles (EPR, 37.1-37.2, ERJO, 105.1-105.2);
- Full ***cooperation*** between prison, institutional and welfare authorities, and diplomatic or consular officials representing foreign detainees, in the interest of those with special needs, including juveniles (EPR, 37.3; ERJO, 105.3);
- Right to specific information about ***legal assistance***, including for juveniles facing expulsion (EPR, 37.4; ERJO, 105.4);
- Right to ***special arrangements*** to meet the needs of detainees belonging to ethnic or linguistic minorities (EPR, 38.1);
- As far as practicable, right to maintain the ***cultural practices*** of one's group while in detention (EPR, 38.2);
- Right to have their ***linguistic needs*** met by using competent interpreters and by providing written material in the range of languages used in the place of detention (EPR, 38.3);
- Detainees with **HIV/AIDS**: right to the same information, counselling and healthcare as other inmates; and possibility to ***postpone their deportation for humanitarian reasons if the detainees are seriously or terminally ill*** (Recommendation R (93) 6, 24, 26);

- Special attention to ***juveniles*** who are foreign nationals and close co-operation with the juvenile welfare and justice agencies in order to facilitate the necessary assistance for such juveniles immediately upon arrival in their country of origin (ERJO, 43.1-43.2);
- ***Other rights of foreign juveniles***: to be ***treated in the same way*** as national juveniles while a definite decision on their transfer to their country of origin is not taken; to extended visits or other forms of ***contacts with the outside world*** where this is necessary to compensate for their social isolation (ERFJ, 104.2, 104.5);
- Special sensitivity of prison staff to the ***special needs*** of foreign nationals, minorities and other detainees in particularly vulnerable situations (ECEPS, 19);

In 10 October 2012, the Committee of Ministers of CoE adopted **Recommendation CM/Rec(2012)12 concerning foreign prisoners**. It contains two specific provisions regarding **extradition**:

- ***Access to activities shall not be restricted*** because the prisoners concerned may be transferred, extradited or expelled. The **Commentary** to this Rule recalls that there *is a danger that foreign prisoners will be regarded as less worthy of treatment and training because they may be transferred, extradited or expelled* and recommends that if *some activities are considered to be unsuitable for foreign prisoners due to the activities' focus on reintegration into the state in question, or because the activity takes place out of the prison premises, then suitable alternatives, which also focus on reintegration, should be provided* (RCFP, 26.2).
- Steps shall be taken to facilitate the ***continuation of medical treatment*** of foreign prisoners who are to be transferred, extradited or expelled, which may include the provision of medication for use during transportation to that State and, with the prisoners' consent, the transfer of medical records to the medical services of another State. The **Commentary** further specifies that *where the prisoner is ill, steps should be taken to ensure that the transfer is prompt and humane. The prisoner should be accompanied by medical personnel and the mode of transport should be suitable. In cases of transfer, extradition or expulsion, steps should be taken to ensure the continuation of medical treatment. This should involve the provision of medication for use during transit to the other state and, where the prisoner consents, the transfer of medical records. The CPT has stressed that any such provision of medication must only be done on the basis of a medical decision and in accordance with medical ethics.* (RCFP, 31.9).

Among the basic principles of this Recommendation, are that foreign prisoners shall be treated with respect for their human rights and with due regard for their particular situation and individual needs; that positive steps shall be taken to avoid discrimination and to address specific problems that foreign persons may face while subject to community sanctions or measures, in prison, during transfer and after release; that foreign prisoners who so require shall be given appropriate access to interpretation and translation facilities and the possibility to learn a language that will enable them to communicate more effectively; and that decisions to transfer foreign prisoners to a State with which they have links shall be taken with respect for human rights, in the interests of justice and with regard to the need to socially reintegrate such prisoners[547].

Concerning ***conditions of imprisonment***, this recommendation contains provisions on admission, allocation, accommodation, hygiene, clothing, nutrition, legal advice and assistance, contact with the outside world, contact with consular representatives, prison regime, work, exercise and recreation, education and training, freedom of religion or belief, health, good order, safety and security, women, and infant children of foreign prisoners.

Extradition procedures may give rise to violations of Article 3 of the **ECHR** (prohibition of torture and ill-treatment) due to certain security arrangements in the courtroom: in 2014, the Court found that placing a person in a dock with metal bars (a permanent fixture in the courtroom) during his

[547] **Recommendation CM/Rec(2012)12 of the Committee of Ministers to member States concerning foreign prisoners**, §§3, 7, 8 and 10.

hearing, with the hood of his jacket over his head as instructed by the police, without any evidence that the applicant posed any risk to himself or others, and the publication of photos of this by the media, were, in the circumstances, excessive and could have been reasonably perceived by the applicant and the public as humiliating, in violation of Article 3 of the **Convention**[548].

Similarly, according to the EctHR, holding a person in a metal cage during a court hearing – having regard to its objectively degrading nature, which is incompatible with the standards of civilised behaviour that are the hallmark of a democratic society – constitutes in itself an affront to human dignity in breach of Article 3 of the Convention. The Court noted that, in the case at hand, the Government had not provided any evidence that there had been an actual and specific security risk in the courtroom which had necessitated the measure[549].

Furthermore, the EctHR examined a case in which four individuals to be extradited (who had fled the country for fear of treatment contrary to Articles 2 and 3 of the ECHR) were kept for weeks in total uncertainty about their extradition, without being notified thereof or possibility to challenge its lawfulness. They were kept in a cell with 7 other persons, all in despair and subject to panic since none of them knew who was going to be extradited, and learned about their extradition only minutes before being taken to the airport, having been tricked into leaving the cell for this purpose. This way to proceed resulted in a collective resistance of all detainees in the cell (seemingly "linked to the legitimate fears that they experienced at the idea of their extradition"), controlled by prison wards and special forces through the use of force resulting in multiple and extensive bruises to some of them and followed by the lack of appropriate medical treatment in good time. In light of this combination of circumstances, the Court found that all 11 detainees were subjected to physical and mental suffering of such a nature that it amounted to inhuman treatment. Accordingly, it found a violation of Article 3 of the Convention[550].

However, blindfolding the detainee during the transfer as a measure of precaution and even him or her being photographed while blindfolded may, under certain circumstances, be compatible with Article 3[551].

European Union

EU **Directive 2013/48/EU** provides for specific rights that must be guaranteed to all persons subject to criminal proceedings and to EAW proceedings, such as the ***right to have a third person informed of the deprivation of liberty*** (article 5), the ***right to communicate***, while deprived of liberty, ***with third persons*** (Article 6) and the ***right to communicate with consular authorities*** (Article 7).

Also, **Council Framework Decision 2009/829/JHA**, of 23 October 2009, on the application, between Member States of the European Union, of the principle of mutual recognition to decisions on supervision measures as an alternative to provisional detention, aims, *inter alia*, at promoting, where appropriate, the use, in the course of criminal proceedings, of non-custodial measures for persons who are not resident in the Member State where the proceedings are taking place.

1.9 The right to an effective remedy

Article 13 of the **ECHR** guarantees the ***right to an effective remedy***, in the following terms:

[548] ECtHR, Case ***Čalovskis v. Latvia***, N.º 22205/13, Judgment of 24 July 2014, §§103-107.
[549] ECtHR, Case ***Turdikhojaev v. Ukraine***, No. 72510/12, Judgment of 18 March 2021, §§40-41.
[550] ECtHR, Case ***Shamayev and others v. Georgia and Russia***, No. 36378/02, Judgment of 14 April 2005, §§378-381, 385-386.
[551] ECtHR, Case ***Öcalan v. Turkey***, No. 46221/99, Judgment [GC] 12 of May 2005, § 86.

> *Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.*

This Article guarantees the availability, at national level, of a remedy to ***enforce the substance*** of the Convention rights and freedoms in whatever form they might happen to be secured in the domestic legal order. The effect of this Article is thus to require the provision of a domestic remedy allowing the competent national authority both to deal with the substance of an **"arguable claim"** under the Convention and to grant ***appropriate relief***. It ***does not require the establishment of a double degree of jurisdiction*** in these proceedings: one effective domestic remedy shall be sufficient.[552].

This should be understood as the right to ***challenge extradition itself***, and on this basis is different from the right established in Article 5 (4), which specifically relates to the right of any person deprived of liberty by arrest or detention to take proceedings by which the lawfulness of his or her detention shall be decided speedily by a court.

The Court notes that the scope of a State's obligation under Article 13 ***varies*** depending on the nature of the applicant's complaint under the Convention and Contracting States have some ***margin of appreciation*** in fulfilling the obligation imposed by this Article. The remedy must, however, be **"effective"**, ***in law and in practice***[553]. ***Judicial review*** proceedings constitute, in principle, an effective remedy within the meaning of Article 13 of the Convention in relation to complaints in the context of expulsion and extradition, provided that the courts can effectively review the legality of executive discretion on substantive and procedural grounds and quash decisions as appropriate[554]. However, in case domestic courts ***ignore*** the arguments advanced by the person and their decisions are ***silent*** in relation to the substance of complaints when examining extradition (even if required to do so under the Convention and under the substantive provisions of the domestic law on extradition), the Court finds that an an effective domestic remedy by which to challenge one's extradition has been denied, and, consequently, that there has been a violation of Article 13 of the Convention[555].

The EctHR has ruled on this provision in the context of extradition and ***in connection with other Convention rights***. It considers that the "effectiveness" of a "remedy" within the meaning of Article 13 does not depend on the certainty of a favourable outcome for the applicant. Nor does the "authority" referred to in that provision necessarily have to be a judicial authority; but if it is not, its ***powers*** and the ***guarantees*** which it affords are relevant to determine whether the remedy before it is effective. Also, even if a single remedy does not by itself entirely satisfies the requirements of Article 13 of the Convention, the ***aggregate of remedies*** provided for under domestic law may do so (eg. in the context of concurring proceedings for granting asylum or temporary protection)[556].

For instance, as it regards Article 3 (prohibition of torture and ill-treatment) it emerges from the Court's case-law that the authorities' ***positive obligations*** under this Article comprise, firstly, an obligation to put in place a legislative and regulatory framework to guarantee this right; secondly, in certain well-defined circumstances, an obligation to take operational measures to protect specific individuals against a risk of treatment contrary to Article 3; and, thirdly, an obligation to carry out an ***effective investigation*** into arguable claims that such treatment has been inflicted. Generally speaking, the first two aspects of these positive obligations are classified as "substantive", while the third aspect corresponds to the State's positive "procedural" obligation[557].

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[552] ECtHR, Case ***Chankayev v. Azerbaijan***, No. 56688/12, Judgment of 14 November 2013, §88; Case ***Baysakov and others v. Ukraine***, No. 54131/08, Judgment of 8 February 2010, §70.
[553] ECtHR, Case ***Chankayev v. Azerbaijan***, No. 56688/12, Judgment of 14 November 2013, §88.
[554] ECtHR, Case ***Allanazarova v. Russia***, No. 46721/15, Judgment of 14 February 2017, §§92, 94; Case ***Abdulazhon Isakov v. Russia***, No. 14049/08, Judgment of 8 July 2010, §§136-137.
[555] ECtHR, Case ***Chankayev v. Azerbaijan***, No. 56688/12, Judgment of 14 November 2013, §§93-94.
[556] ECtHR, Case ***Čonka v. Belgium***, No. 51564/99, Judgment of 5 February 2002, §75.
[557] ECtHR, Case ***X and Others v. Bulgaria***, No. 22457/16, Judgment [GC] of 2 February 2021, §178.

This procedural obligation entails that Contracting States must, for instance, thoroughly assess the risk that the person, upon extradition or any other kind of removal, may be subjected to treatment incompatible with Article 3 in the receiving State. Failure to make this assessment constitutes, in itself, a violation of Article 3 in its ***procedural dimension***[558].

Given the irreversible nature of the harm that might occur if the alleged risk of ***torture or ill-treatment*** materialised and the importance which the Court attaches to Article 3, the notion of an effective remedy under Article 13, in this context, requires: (i) an independent and rigorous ***scrutiny*** of a claim according to which there are substantial grounds for believing that there is a real risk of treatment contrary to Article 3 in the event of the applicant's extradition/expulsion to the country of destination; and (ii) the provision of an effective possibility of ***suspending the enforcement of measures whose effects are potentially irreversible*** (or "a remedy with automatic suspensive effect"). It is inconsistent with Article 13 that extradition or other forms of removal of persons are executed before the national authorities have examined whether they are compatible with the Convention, notwithstanding some margin of discretion of States in fulfilling these obligatioons[559]. And it is not possible to exclude the risk that in a system where ***stays of execution*** must be ***applied for*** and are ***discretionary*** they may be refused wrongly. In such cases, the remedy exercised by the applicant would not be sufficiently effective for the purposes of Article 13 of the Convention.[560].

Also in the context of **deportation**, the Court has found violations of Article 13 when it is not clear whether and, if so, to what extent the national authorities examined the applicants' fear of persecution, and when an asylum procedure lacks automatic suspensive effect.[561]

In a case where the applicant complained that the domestic extradition proceedings had not constituted an effective remedy by which the applicant could have challenged his extradition on the grounds that he would risk being subjected to torture or ill-treatment if extradited, the Court, stated that, "however scant the applicant's submissions might have been, he explicitly complained that he would be subjected to a risk of torture or ill-treatment and pointed out the general precarious situation of former rebels in Chechnya. In the present case, that was sufficient to show that his allegations in this regard were arguable and should have been examined". Since it did not appear that domestic courts took these considerations into account when they examined the question of the applicant's extradition, even though they were required to do so not only under the Convention, which was directly applicable in the domestic legal system, but also under the substantive provisions of the domestic law on extradition, the Court found a violation of Article 13[562].

In a case where only the prison governor and three other employees of the prison administration were aware of the surrender (extradition) which was being prepared and the persons to be extradited learned of their extradition only moments before being taken to the airport – when the reason for fleeing the receiving country had been a fear of treatment contrary to Article 2 or Article 3 of the Convention – and neither the applicants extradited nor their lawyers were informed of the

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[558] ECtHR, Case ***M.A.M. v. Switzerland***, No. 29836/20, Judgment of 26 April 2022, §§65, 76, 78; Case ***Shenturk and Others v. Azerbaijan***, No. 41326/17, 8098/18, 8147/18 & 8384/18, Judgment of 10 March 2022, §116; Case, ***Batyrkhairov v. Turkey***, No. 69929/12, Judgment of 5 June 2018, §§47, 51-52; Case ***Paposhvili v. Belgium***, N.º 41738/10, Judgment [GC] of 13 December 2016, §§200-202 and 205; Case ***Tershiyev v. Azerbaijan***, No. 10226/13, Judgment of 31 July 2014, §72; Case ***Yoh-Ekale Mwanje v. Belgium***, No. 10486/10, Judgment of 20 December 2011, §§82-83 and 106-107; Case ***Tehrani v. Turkey***, Nos. 32940/08 & 41626/08 & 43616/08, Judgment of 13 April 2010, §66; Case ***Klein v. Russia***, No. 24268/08, Judgment of 1 April 2010, §§51, §53.

[559] ECtHR, Case ***Garabayev v. Russia***, No. 38411/02, Judgment of 7 June 2008, §105.

[560] ECtHR, Case ***Allanazarova v. Russia***, No. 46721/15, Judgment of 14 February 2017, §§96-98; Case ***Chankayev v. Azerbaijan***, No. 56688/12, Judgment of 14 November 2013, §89; Case ***Abdulazhon Isakov v. Russia***, No. 14049/08, Judgment of 8 July 2010, §136; Case ***Baysakov and others v. Ukraine***, No. 54131/08, Judgment of 8 February 2010, §§74-78; Case ***Čonka v. Belgium***, No. 51564/99, Judgment of 5 February 2002, §§79 and 82.

[561] ECtHR, Case ***Tehrani v. Turkey***, Nos. 32940/08 & 41626/08 & 43616/08, Judgment of 13 April 2010, §66.

[562] ECtHR, Case ***Tershiyev v. Azerbaijan***, No. 10226/13, Judgment of 31 July 2014, §72.

extradition orders issued, the Court considered that such an enforcement procedure cannot be regarded as transparent and hardly demonstrates that the competent authorities took steps to protect the applicants' right to be informed of the extradition measure against them. In order to be able to challenge an extradition order, the applicants or their lawyers would have had to have sufficient information, served officially and in good time by the competent authorities and, by failing to do so, domestic authorities effectively prevented the applicants' lawyers from lodging an appeal against a measure whose existence they learned of only through a leak from inside the State administration, thereby hindering in an unjustifiable manner the exercise of the right to appeal that might have been available to them, at least theoreticall,y and violating Article 13 of the Convention[563]. A similar conclusion was reached in a case where the applicant was informed of the decision to extradite him only on the day of the transfer and was not allowed to contact his lawyer or to lodge a complaint, in breach of the relevant provisions of domestic legislation. Thus, the compatibility of the scheduled removal with Article 3 was not examined by the relevant authorities before it had occurred and the Court considered that the applicant was not provided with an effective remedy as regards the complaint concerning the risk of treatment in breach of Article 3 in case of extradition to the requesting State[564].

However, when, in the course of extradition proceedings, the person ***never mentioned the risk of ill-treatment*** in the requesting State, and in their appeals against the extradition order the applicant and his counsel merely cited the Court's case-law, which is clearly distinguishable from the applicant's personal situation and referred to the overall poor human rights situation in the receiving country, as described by international observers, having raised an issue of his own experience of ill-treatment for the first time when complaining about refusal to grant him temporary asylum – that is, when the extradition order had already become final – the Court declared itself "disinclined to find that the applicant has substantiated allegations of an individualised risk of ill-treatment in the requesting country". Therefore, it considered that it could not be said that the courts of the requested State had "disregarded his arguments that there existed substantial grounds for believing that there was a real risk of treatment contrary to Article 3 in the requesting country thus depriving him of effective remedies in respect of the alleged violation of this provision."[565] Also, when a complaint was raised under Article 8 in an extradition case and the applicants alleged they had no effective remedy in order to assert their right to respect for their family life, the Court took into account that the national courts had examined the arguments put forward by the applicants and responded to them in a reasoned and convincing manner; it saw no reason to challenge their findings. Therefore, it considered that the applicants had had an effective remedy in order to assert their right to respect for their family life.[566]

A groundbreaking case regarding the Court's interpretation of the right to an effective remedy is one concerning the "extraordinary rendition" of a suspect of international terrorism, abducted from Italy by CIA operatives with the cooperation of Italian secret service agents and ultimately taken to Egypt, where he was held in secret detention for several months and subject to ill-treatment and torture. Although an investigation into his abduction was immediately undertaken, leading to the prosecution and trial of a number of Italian secret services officials and American CIA agents, the case against the Italian officials had to be discontinued because the requested information and documents were protected by State secrecy as stated by the Prime Minister and backed by the Constitutional Court. The American agents ended up convicted *in absentia* to prison sentences ranging from six to nine years, but Italy refused to request their extradition and the President of the Republic granted pardons to some of them, effectively ensuring the impunity of all involved. Italy was found responsible on three accounts: for not having sought extradition from the USA; for not having asked for extradition to the USA; because the President of the Republic granted pardons to some of the sentenced American persons. The interest of the decision lies in

[563] ECtHR, Case ***Shamayev and others v. Georgia and Russia***, No. 36378/02, Judgment of 14 April 2005, §§453-454, 458, 460-461.
[564] ECtHR, Case ***Garabayev v. Russia***, No. 38411/02, Judgment of 7 June 2008, §106.
[565] ECtHR, Case ***Elmuratov v. Russia***, No. 66317/09, Judgment of 3 March 2011, §87, 127.
[566] ECtHR, Case ***Vlas and Others v. Romania***, No. 30541/12, Decision of 6 January 2015, §§ 46-50, 55-56.

particular in the fact that the granting of pardons is traditionally considered to be ***a sovereign power***; according to the Court's judgment, such a decision can be ***scrutinized by the Court. Likewise, any political decision, such as a decision on granting or refusing extradition, may be under scrutiny as well***.[567]

Article 5 (5) of the **ECHR** contains a specific provision on the ***right to compensation*** of those who have been ***arrested or detained*** in violation of the Convention, which reads:

> *Everyone who has been the victim of arrest or detention in contravention of the provisions of this Article shall have an enforceable right to compensation*.

The Committee of Ministers of the CoE furthermore recommends that States Parties to the ECE should to examine their legislation with a view to enabling persons who have suffered unjustified detention pending their extradition to ***claim compensation*** under the same conditions as those governing compensation for unjustified pre-trial detention (**Recommendation R (86) 13**, I b)).

In cases where this right is not recognized or is not sufficiently clear at the domestic level, leaving room for interpretation (eg. because national law undoubtedly provides for State liability in the case of "unlawful application of a preventive measure in the form of placement in custody", but is not clear on whether national authorities would be prepared to consider as an equivalent to this the "unlawful detention pending extradition"), the Court is not persuaded that the person's claim for damages has prospects of success and therefore that a claim for compensation under such terms constitutes an "effective remedy" within the meaning of Article 35 of the Convention. Consequently, the Court finds that the person cannot be blamed for not having used that legal avenue and concludes that he or she did not have an "enforceable right to compensation" as entitled under Article 5 (5) of the Convention.[568]

Also, it should be underlined that the right to compensation must be recognized in all cases of arrest and detention which violate Article 5 of the Convention. A mere recognition of this right in cases of "unlawful" detention only does not satisfy the requirements of Article 5 (5)[569].

Denial of access to a lawyer may also violate the ***right of individual petition*** to the EctHR, provided for under **Article 34** of the Convention (individual applications), which reads:

> *The Court may receive applications from any person, nongovernmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the Protocols thereto. The High Contracting Parties undertake not to hinder in any way the effective exercise of this right.*

In an extradition case where the applicant complained, under Article 34, that the requested State's failure to comply with an interim measure precluded the EctHR from effectively examining his application, the Court considered that the fact that the applicant had remained in constant contact with his counsel in the requested State was indicative that there was no obstacle to the exercise of his right to an effective remedy[570].

However, since, by virtue of Article 1 of the Convention, it is primarily incumbent upon domestic authorities to secure the enjoyment of the rights and freedoms provided for under the Convention, the complaint mechanism to the Court has a subsidiary nature in relation to the national systems of human rights protection (cf. Articles 34 and 35 **ECHR**). Thus, Article 13 of the Convention requires the existence, in domestic law, of a remedy capable of ensuring the rights and freedoms set forth in the Convention, provided that the person has a "arguable claim" in that regard[571].

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[567] ECtHR, Case ***Nasr and Ghali v. Italy***, No. 44883/09, Judgment of 23 February 2016, as summarised in **PC-OC (2011) 21 Rev17**, pp. 230-231.
[568] ECtHR, Case ***Shcherbina v. Russia***, Nos. 41970/11, Judgment of 26 June 2014, §§55-56.
[569] ECtHR, Case ***Kaboulov v. Ukraine***, No. 41015/04, Judgment of 19 November 2009, §§157-159.
[570] ECtHR, Case ***Oleacha Cahuas v. Spain***, No. 24668/03, Judgment of 10 August 2006, §79.
[571] ECtHR, Case ***Allanazarova v. Russia***, No. 46721/15, Judgment of 14 February 2017, §§91-92.

In 2006, in the context of the modernisation of CoE Conventions in the criminal field, PC-OC experts discussed and underlined the need to explore normative developments on complex issues such as:

- People subject to extradition proceedings and then acquitted: it was felt that when compensation is available for a national who has been acquitted, it should also be made available for persons who have been extradited and acquitted in similar circumstances[572]. Note was also taken of the question of the return of the extradited person to the requested State in case of acquittal. Some Committee members observed that the acquittal may be caused by factors not dependent from the requesting State (ex: the requested State did not provide evidence or the person's lawyer did not provide information on a decision related to the same facts taken in a third country – *ne bis in idem*)[573].
- People arrested whose extradition request is subsequently withdrawn – members discussed that, in this case, compensation could be provided by the requesting State and one expert underlined that this could also apply if the requesting State sends the extradition request too late. It was pointed out that, in one State, compensation was paid by the requested State, which took the responsibility to affect the person's rights and freedoms and stated that the same could apply for instance if an authority from the requesting State does not in fact take the person over, despite a positive decision on extradition[574].
- Arrest of a person followed by a refusal of the requested State to extradite[575].

Experts underlined that practice in terms of compensation widely varied among States. Several members of the committee were of the opinion that an approximation of legislation or practice would be desirable in this matter, in particular as it directly concerns the individual's rights. Any future work should therefore carefully consider the case law of the EctHR in this matter. In conformity with the idea of the development of transnational criminal justice, the point has been raised that the treatment of persons in transnational criminal procedures such as extradition should not in principle be too different than the treatment of nationals in the same circumstances[576].

In light of the above, a questionnaire[577] was prepared and sent to all delegations, with a request to submit their replies no latter than 1 March 2008[578], later extended to 1 June 2008[579]. Replies thereto showed a great divergence of law and practice between member States concerning compensation issues, as well as differences in opinion as to possible future activities which could be undertaken by the CoE. The PC-OC notably took account of the need identified by some respondents to have clear guidelines for the allocation of responsibility for compensation in extradition cases between requesting and requested States, again considering that member States should at the very least provide compensation for detention sustained as a consequence of an extradition request, where such compensation would have been provided in analogous, purely internal cases[580].

If, at its 53rd meeting, the Committee had decided that a draft text concerning compensation issues should be prepared[581], at the following meetings it was felt that priority should be given to other issues on the PC-OC's agenda, such as simplified extradition, the rule of speciality or lapse of time. Nevertheless, it agreed on the importance of compensation of persons in extradition cases, in particular as it affects human rights, and on the fact that this complex issue deserved further

572 **PC-OC (2006) 12**: *Summary report of the 51st meeting*, §32.
573 **PC-OC (2006) 16**: *Summary report of the 52nd meeting*, p. 10.
574 **PC-OC (2006) 16**: *Summary report of the 52nd meeting*, p. 10.
575 **PC-OC (2006) 15**: *List of adopted decisions at the 52nd meeting*, p.4.
576 **PC-OC (2006) 16**: *Summary report of the 52nd meeting*, p. 11.
577 **PC-OC (2007) 10 Rev**., *Questionnaire concerning compensation issues related to the European Convention on Extradition*, Appendix IV, p. 18.
578 **PC-OC (2007) 13 Rev**, *List of adopted decisions at the 53rd meeting*, p. 1.
579 **PC-OC (2008) 16**: *Summary report of the 54th meeting*, §21.
580 **PC-OC (2008) 29**: *Summary report of the 55th meeting*, §21.
581 **PC-OC (2007) 14**: *Summary Report of the 53rd meeting*, §§14-15.

consideration at a later stage. It considered that, if future work is to be undertaken in this area, it could range from practical guidance to the elaboration of non-binding standards. The PC-OC found it premature to envisage a binding instrument regarding this issue, given the differences between member States[582]. At its 56th meeting, it requested further guidance from the CDPC on this matter[583].

European Arrest Warrant

Article 47 of the **CFREU** provides for the right to effective judicial protection. EU **Directive 2013/48/EU,** on the right of access to a lawyer in criminal proceedings and in EAW proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty, establishes, in its Article 12, that requested persons in EAW proceedings must have an effective remedy under national law in the event of a breach of the rights set forth this Directive.

As stated above, Member States are required to comply with the time limits under Article 17 of the **EAW FD** where they provide for an appeal with suspensive effect against a decision by which the judicial authority gives its consent to the extension of an arrest warrant or to an onward surrender to another Member State pursuant to Articles 27(4) and 28(3)I of the **EAW FD**[584].

1.10 Specific rights of children

It is important to recall, in the first place, the legal definition of **"child"** contained in Article 1 of the **CRC**, as every human being ***below the age of eighteen years***, as well as the principle of the ***best interest of the child*** contained in Article 3 (1) of the same treaty, according to which: *in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration*.

In its **Resolution (75) 12**, on the practical application of the **ECE**, the Committee of Ministers of the CoE recommends to Contracting Parties (emphasis added):

> *That, 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**;*

As we have seen, several CoE recommendations in the area of criminal justice contain guidance to respond to the particular needs of children. Furthermore, the CoE has adopted **Recommendation CM/Rec(2008)11 on the European Rules for juvenile offenders subject to sanctions or measures** (ERJO) and the EU **Directive 2016/800/EU** of the European Parliament and of the Council of 11 May 2016 on procedural safeguards for children who are suspects or accused persons in criminal proceedings (also applicable to EAW proceedings). In light of the combined provisions of these instruments, we shall highlight some specific rights which children must enjoy in the context of such proceedings:

(a) right to ***information*** (**ERJO**, 25 a), 33.1; **Directive 2016/800/EU,** Article 4);

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582 **PC-OC (2008) 16**: *Summary report of the 54th meeting*, §20; **PC-OC (2008) 29**: *Summary report of the 55th meeting*, §22.
583 **PC-OC (2009) 12**: *Summary Report of the 56th meeting*, §16.
584 CJEU, Case **C-168/13 PPU, *Jeremy F***, Judgment of 30 May 2013.

(b) right to have the holder of ***parental responsibility*** informed (**ERJO**, 62.4; **Directive 2016/800/EU,** Article 5);

I right to be assisted by a lawyer (**ERJO**, 120.1-120.3; **Directive 2016/800/EU,** Article 6);

(d) right to ***legal aid*** (**ERJO**, 120.3; **Directive 2016/800/EU,** Article 18);

I right to a ***medical examination*** (**ERJO**, 62.5; **Directive 2016/800/EU,** Article 8);

(f) Right to ***measures alternative to detention*** (**ERJO**, Part II; **Directive 2016/800/EU,** Article11);

(g) right to ***special treatment*** in case of deprivation of liberty, including to measures specifically adapted to the particular circumstancesof each case and the the right to be held in institutions designed for children or to be separated from adults (**ERJO**, 59.1; **Directive 2016/800/EU,** Article 12);

(h) Right that the deprivation of liberty shall be a ***measure of last resort***, imposed and implemented for the shortest period possible (**ERJO**, 10; **Directive 2016/800/EU,** Article 10);

(i) right to the protection of ***privacy*** (**ERJO**, 16; **Directive 2016/800/EU,** Article 14);

(j) right to be ***accompanied*** by the holder of parental responsibility during the proceedings (**ERJO**, 14; **Directive 2016/800/EU,** Article 15);

(k) Right of the child to effectively ***participate*** in proceedings (**ERJO**, 13);

(l) In exceptional cases where juveniles who are foreign nationals are to be expelled to their countries of origin after the execution of the community sanctions or measures, efforts shall be made to establish contacts with ***social welfare authorities*** in their countries of origin, in so far as such contacts are in the best interest of the juveniles concerned (**ERJO**, 43.3).

1.11 Whistleblowers

If the offence for which extradition (or surrender) is sought relates to the disclosure of confidential information that could fall within the scope of “whistleblowing activities”, it necessary to check whether such disclosure of confidential information benefits from the protection of Article 10 of the **ECHR**. To assess this, the EctHR has established several criteria[585] which such disclosures must meet, as follows:

- The disclosure should correspond to a ***strong public interest***;
- There should be ***no other effective means of remedying the wrongdoing*** which the employee intends to uncover;
- The interest which the public may have in that particular information should be strong as to ***override a legally imposed duty of confidence***;
- The ***damage***, if any, caused as a result of the disclosure should ***not outweigh*** the interest of the public in having the information revealed;
- The disclosure should ***not be motivated by a personal grievance*** or a personal antagonism or the expectation of personal advantage, including pecuniary gain;
- In making the disclosure, the whistle blower should have ***acted in good faith*** and in the belief that the information was true and that it was in the public interest to disclose it;
- The ***severity of the sanction*** imposed.

[585] ECtHR, Case ***Guja v. Moldova***, No. 14277/04, Judgment [GC] of 12 February 2008., §§80ss

Whistle blowers play a key role in preserving public interest. Their protection, which is considered as a matter of fundamental rights under CoE and EU standards, prohibits retaliation measures and may require some action from States. For example:

- ❖ Granting whistle blowers criminal and civil ***immunity*** for acts undertaken for the acquisition of the information reported, provided that these acts do not themselves constitute offences in their own right;
- ❖ Granting them the right to ***asylum***.

For Coe and EU standards, see, in particular:

- **Recommendation CM/Rec(2014)7 of the Committee of Ministers to member States** on the protection of whistleblowers
- **Resolution 2300 (2019) by the Parliamentary Assembly of the Council of Europe on Improving the protection of whistle-blowers all over Europe**
- **European Committee on Legal Co-Operation webpage** on Protecting Whistleblowers
- **Directive (EU) 2019/1937 of the European Parliament and of the Council of 23 October 2019 on the protection of persons who report breaches of Union law**
- **European Commission Webpage on protection for whistleblowers**[586]

If appropriate and depending on the specific circumstances of the case, the requested State may ***refuse to extradite or surrender*** the person concerned on the following grounds:

- ❖ ***Lack of dual criminality***: Eg. “Swissleaks”: extradition from Spain to Switzerland was rejected because the Spanish Criminal Code does not include any offence which is the equivalent to the Swiss crime of “aggravated financial espionage”;
- ❖ Existence of a ***risk of denial of a fair trial***.

[586] CoE, **Help Online Course on International Cooperation in Criminal Matters**, Module 2 - Extradition and surrender, pp. 44-45.

Chapter 2: Procedural aspects of extradition

Contracting States have the right, afforded by international law and subject to their treaty obligations, including the **ECHR**, to control the entry, residence and expulsion of aliens[587]. Thus, the **ECHR** permits co-operation between States, within the framework of extradition treaties or on matters of deportation, for the purpose of bringing fugitive offenders to justice, provided that this co-operation does not interfere with any specific rights recognised in the Convention[588]. This right of States, which stems from the notion of sovereignty[589], has to be exercised in conformity with their international obligations, namely under the **ECE** and the **ECHR**, which recognize to the sought individual a number of rights affecting the procedural aspects of extradition. This is, for example, the case of **Article 5** of the **ECHR**, regarding the ***right to liberty and security***[590], already examined in the sub-chapter 1.1.

The **procedure** to be followed in extradition cases is, primarily and as stipulated by **Article 22** of **ECE**, governed by the ***domestic law of the requested Party***. Such law must be compatible with the State's human rights obligations and, in the case of States Parties to the **ECHR**, with the provisions of this Convention. But the complexity and inter-relation of procedures in the States involved raises issues regarding the continuity and legality of proceedings. This legality depends on multiple factors, but is strongly influenced by the legal basis for extradition. The **European Convention on Extradition** (ECE) provides a legal basis of paramount importance for CoE Member States. But extradition may also be effected on other basis, such as via simple international criminal cooperation in the absence of a treaty between the States involved, on the basis of a multilateral treaty with provisions on extradition (eg. UNCAT or the UN Convention against Enforced Disappearances) or on the basis of a bilateral extradition treaty. The procedure to be followed may vary slightly depending on the legal basis used.

And, at the EU level, the ***EAW replaces the extradition system amongst EU Member States*** by requiring each national judicial authority to recognize, *ipso facto*, and with a minimum of formalities, requests for the surrender of a person made by the judicial authority of another Member State, on the basis of the principle of mutual recognition.

In cases of extradition in the absence of a treaty between the two States, the procedure shall be governed solely by customary international law and the rules of domestic law, but these must also be compatible with the **ECHR** in relation to the States which are Parties to it. If only one of the States is a Party, it must abide fully by the provisions of the **ECHR** and ensure that extradition does not give rise to any violation of its extraterritorial human rights obligations (eg. due to the risk of flagrant denial of justice or other reason that would justify the refusal of extradition as explained in detail in the next Chapter). For a detention in these circumstances to be lawful two requirements have to be met. Firstly, the domestic substantial and procedural rules of the requested State concerning the arrest should be complied with (cf. Article 5 (1), "in accordance with a procedure prescribed by law") and be consistent with the purpose of Article 5 (protection from arbitrariness)[591]. And, secondly, the requesting State's action has to be compatible with respect for sovereignty of the requested State.[592]

In case a bilateral or multilateral extradition treaty has been celebrated between both States, the procedure shall still be governed mostly in accordance with the law of the requested Party, but within the procedural framework established by the extradition treaty in question. Again, in

[587] See, among many others, ECtHR, Case ***Hoti v. Croatia***, N.º 63311/14, Judgement of 26 April 2018, §120; Case ***Üner v. the Netherlands***, N.º 46410/99, Judgement [GC] of 18 October 2006, §54; Case ***Chahal v. the United Kingdom***, N.º 22414/93, Judgment [GC] of 15 November 1996, §73.
[588] ECtHR, Case ***Öcalan v. Turkey***, No. 46221/99, Judgment [GC] 12 of May 2005, § 86.
[589] Dailler, P. and Pellet, A., Droit international public, LGDJ, 7th edition, 2002, pp. 462-463; and Shaw, M.N., International law, 5th edition, Cambridge University Press, 2003, pp. 574-577.
[590] Eg., ECtHR, Case ***Amuur v. France***, No. 19776/92, Judgment of 25 June 1996.
[591] EComHR, Case ***Bozano v. Switzerland***, No. 9009/80, Decision (Partial) of 12 July 1984, §54.
[592] ECtHR, Case ***Öcalan v. Turkey***, No. 46221/99, Judgment [GC] of 12 May 2005, §90.

accordance with the overriding principle *pacta sunt servanda* of international law, when becoming Parties to any extradition (or other) treaty, States must not undermine the fulfilment of their human rights obligations imposed, either by international customary law, or by a regional or multilateral treaty.

The ECtHR does not accept the argument that failure to extradite would interfere with ***other international obligations*** of the requested State, eg. under bilateral or multilateral extradition treaties. It underlines that the **ECHR** is intended to safeguard rights that are **"practical and effective"** and a respondent State is liable under the Convention regardless of treaty commitments entered into before or after the entry into force of the Convention. It is not open to a Contracting State to enter into an agreement with another State which conflicts with its obligations under the Convention. The Court also rejects arguments to the effect that an extradition was "unavoidable" given the imminent expiry of the person's period of detention and the absence of any alternatives to release, as well as based on the legal framework in force in the State, its deficiencies or difficulties encountered by the authorities in seeking to achieve their legislative and regulatory objectives[593].

In this Chapter, we shall describe the procedural aspects of extradition as framed under the unified system established by the **ECE and its Additional Protocols**. Despite not referring specifically to the procedural and substantive rights of the individual involved, it has a dimension of protection thereof, for example when it prohibits extradition for political offences (Article 5) or when it provides for the principle *non bis in idem* (Article 9). Furthermore, the Committee of Ministers of the CoE adopted a package of guiding principles to assist Member States in the implementation of this Convention – reproduced in full in Part III of this publication. One of their main purposes is to ensure the application of the guarantees provided for by Article 5 of the ECHR in the extradition procedure. Where relevant, we will discuss the impact of the procedural aspects of extradition on human rights, on the basis of the case law developed on the subject by the ECtHR, and suggest forms to overcome the numerous legal and practical ***challenges*** that States can face to fulfil their human rights obligations within the requirements of extradition procedures[594].

2.1 Interim measures and preliminary ruling

Compliance with interim measures imposed by the monitoring bodies of **ECHR** has been a concern for legal practitioners in the field of international cooperation in criminal matters for many decades and already in 1980 the Committee of Ministers recommended to Member States that they "comply with any interim measure which the European Commission on 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 the matter".[595]

Pursuant to the profound reform of the **ECHR** monitoring system upon the entry into force of Protocol 11, in 1998, this reference must now be understood as made to Rule 39 of the **Rules of Court** of the ECtHR, although the *raison d'être* of the above recommendation remains the same. **Rule 39 (*Interim measures*)** reads as follows:

> *1. The Court may, in exceptional circumstances, whether at the request of a party or of any other person concerned, or of its own motion, indicate to the parties any interim measure which it considers should be adopted. Such measures, applicable in cases of imminent risk of irreparable harm to a Convention right, which, on account of its nature, would not be susceptible to reparation, restoration or adequate compensation, may be*

[593] ECtHR, Case ***Rrapo v. Albania***, No. 58555/10, Judgment of 25 September 2012, §§86-87.
[594] CoE, **Help Online Course on International Cooperation in Criminal Matters**, Module 2 - Extradition and surrender, p. 46.
[595] **Recommendation No. R (80) 9 concerning extradition to states not party to the European Convention on Human Rights**, §2.

> *adopted where necessary in the interests of the parties or the proper conduct of the proceedings.*
>
> *2. The Court's power to decide on requests for interim measures shall be exercised by duty judges appointed pursuant to paragraph 5 of this Rule or, where appropriate, the President of the Section, the Chamber, the President of the Grand Chamber, the Grand Chamber or the President of the Court.*
>
> *3. Where it is considered appropriate, immediate notice of the measure adopted in a particular case may be given to the Committee of Ministers.*
>
> *4. A duty judge appointed pursuant to paragraph 5 of this Rule or, where appropriate, the President of the Section, the Chamber, the President of the Grand Chamber, the Grand Chamber or the President of the Court may request information from the parties on any matter connected with the implementation of any interim measure indicated.*
>
> *5. The President of the Court shall appoint Vice-Presidents of Sections as duty judges to decide on requests for interim measures.*

These are ***urgent*** measures applied only in ***exceptional circumstances***, when the applicant would otherwise face an ***imminent risk*** of ***irreparable harm*** to a Convention right and where such measures are necessary in the interests of the parties or the proper conduct of proceedings. These measures are decided in connection with proceedings before the Court without prejudging any subsequent decisions on the admissibility or merits of the case in question. In the majority of cases, the applicant requests the ***suspension*** of an expulsion or extradition measure.

The Court's practice is to examine each request on an ***individual and priority basis*** through a written procedure. Rulings of the Court regarding interim measures are notified to the parties in the form of a ***decision***. The Court may indicate interim measures until further notice, for the duration of the proceedings before the Court or for a limited period of time, depending on the circumstances of the case.

Concerning the ***scope*** of interim measures, in practice they are applied only in a limited number of areas and a majority of them concern **expulsion and extradition**. They usually consist in a suspension of the applicant's expulsion or extradition for as long as the application is being examined[596]. Sometimes – but not always[597] – ***assurances*** are enough for the Court to lift such measures[598].

As a rule, these measures are ordered to the ***respondent Government***, although it is also possible for the Court to indicate measures under Rule 39 to applicants[599]. Concerning the ***advance communication*** of the interim measure to the respondent State, a 24-hour period is considered by the Court, by itself and also in the context of available modern technologies, to be amply sufficient for all competent and relevant authorities to be notified that the person's removal has been stayed by the Court[600]. Also a communication of the Court's order under Rule 39 to State authorities, by the concerned person and/or his/her lawyer, together with the exhibition of a

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[596] Eg., in Case ***Khasanov and Rakhmanov v. Russia*** (Nos. 28492/15 and 49975/15), where the interim measure granted on 6 June and 12 October 2015 respectively came to an end on 29 April 2022 upon the delivery of the judgment by the Grand Chamber.

[597] ECtHR, Case ***Toumi v. Italy*** No. 25716/09, Judgment of 5 April 2011, §§44-46;

[598] ECtHR, Case ***Nivette v. France***, No. 44190/98, Decision of 3 July 2001.

[599] For example, in Case ***Ilaşcu and Others v. the Republic of Moldova and Russia***, Judgement [GC] of 8 July 2004, §11, where the Court asked one of the applicants to stop a hunger-strike. See also Case ***Rodić and Others v. Bosnia and Herzegovina*** No. 22893/05, Judgment of 27 May 2008. More recently, in Case ***Saakashvili v. Georgia*** , No. 54641/21, Decision of 1 March 2022, the Court urged the applicant to call off his hunger strike and, at the same time, it indicated to the Government of Georgia to inform it about the applicant's current state of health, to ensure his safety in prison, and to provide him with appropriate medical care for the post-hunger strike recovery period.

[600] ECtHR, ***S.S. and B.Z. v. Russia***, Nos. 35332/17 & 79223/17, Judgment of 11 June 2019, §49.

copy of the Court's letter to that effect, is sufficient for the Court to reject allegations that the Government was unaware of such order[601].

No appeal exists against any decision in relation to requests for interim measures. Contracting Parties may, however, request the Court to ***reconsider its decision*** to indicate interim measures if they find that the measures are no longer necessary or where they possess information which was not available at the relevant time or not made available to the Court in a timely fashion. In the event of a ***change in circumstances***, applicants may lodge a fresh request for interim measures where the initial request has not been granted.

A measure under Rule 39 may be ***discontinued at any time*** by a decision of the Court. In particular, as it is linked to the proceedings before the Court, the measure will be lifted if the application is not pursued. Furthermore, extradition procedures can be ***suspended*** by the application of interim measures, for an indefinite period of time, possibly up to several years, with no guarantee for the States concerned that they will be able to complete this procedure at a later stage[602].

Even though there is a certain presumption that Contracting States to the **ECHR** will provide the necessary human rights guarantees, interim measures may be applied in certain cases to ***prevent an extradition to another CoE Member State***[603].

States Parties are under the ***obligation to comply*** with interim measures, as became evident, inter alia, since the delivery of the Court's judgement in case **Mamatkulov and Askarov v. Turkey** (2005). The Court noted in particular that, under the Convention system, interim measures, as they had consistently been applied in practice, played a vital role in ***avoiding irreversible situations*** that would prevent the Court from properly examining the application and, where appropriate, securing to the applicant the practical and effective enjoyment of the rights enshrined in the Convention.[604] According to the Court, the obligation set out in Article 34 *in fine* requires the Contracting States to also refrain from any act or omission which, by destroying or removing the subject matter of an application, would make it pointless or otherwise prevent the Court from considering it under its normal procedure. By virtue of **Article 34** of the Convention, Contracting States undertake to refrain from any act or omission that may hinder the effective exercise of an individual's right to application before the Court. A failure by a Contracting State to comply with an interim measure is to be regarded as preventing the Court from effectively examining the applicant's complaint and hindering the effective exercise of his or her right and, accordingly, as a ***violation of Article 34*** of the Convention[605], possibly in conjunction with other right(s)[606]. The State's formal undertaking under **Article 1** to protect the rights and freedoms set out in the Convention may also be at stake.

In 1989, in case **Cruz Varas and Others v. Sweden**, concerning an expulsion from Sweden to Chile, and failure by Sweden to comply with the interim measure ordered by the then existing EcomHR, the Court, finding there had been no violation of Articles 3 or 8 of the Convention (as alleged by the applicants) and in view of the fact that the first applicant remained in liberty following his return to Chile and was free to leave the country , that their counsel was in fact able to represent them fully before the Commission, and that the inability to confer with his lawyer did not hamper the gathering of evidence additional to that already adduced during the lengthy immigration proceedings in Sweden or the countering of the Government's submissions on

[601] ECtHR, Case ***Zokhidov v. Russia***, No. 67286/10, Judgment of 5 February 2013, §§203-205, 207.
[602] Eg. ECtHR, Case ***M. G. v. Bulgaria***, No. 59297/12, Judgment of 25 March 2014.
[603] ECtHR, Case ***Gasayev v. Spain***, No. 48514/06, Decision of 17 February 2009; Case ***Shamayev and others v. Georgia and Russia***, N.º 36378/02, Judgment of 14 April 2005; Case ***Avcisoy v. the United Kingdom***, No. 49277/99, Decision of 19 February 2002.
[604] ECtHR, Case ***Mamatkulov and Askarov v. Turkey***, Judgement 4 February 2005, §125.
[605] ECtHR, Case ***Mamatkulov and Askarov v. Turkey***, Judgement 4 February 2005, §§102, 128.
[606] ECtHR, Case ***Kondrulin v. Russia***, No. 12987/15, Judgment of 20 September 2016; Case ***Paladi v. the Republic of Moldova***, No. 39806/05, Judgement [GC] of 10 March 2009, §§105-106.

questions of fact, concluded that, in this particular case, there had been no violation of the applicant's right to petition[607].

However, this line of jurisprudence has clearly been reversed in recent times, with the Court pointing out that an interim measure is ***provisional*** by nature and the need for it is assessed at a given moment. In case of non-compliance with an interim measure, even if later facts determine that the risk which was on the basis of its application has not been confirmed, the force of the interim measure remains compulsory. The decision of the State to comply with the interim measure ***cannot be postponed pending confirmation of the existence of a risk***. The mere failure to comply with an interim measure ordered by the Court on account of the existence of a risk is in itself a serious obstacle to the effective exercise of the right of the applicant at that particular moment[608]. As a rule, any intentions underlying the acts or omissions of a State to justify non-compliance with an interim measure ordered by the Court are considered irrelevant by it[609]. The Court has consistently held that it is not open to Contracting States to ***substitute their own judgment*** for that of the Court in verifying whether or not there existed a real risk of immediate and irreparable damage to an applicant at the time when the interim measure was indicated, in deciding on the time-limits for complying with such a measure or in replacing the measure indicated by the Court by another that the Contracting State finds more appropriate.[610]

More specifically, when the requested State proceeds to extradite in contravention of a Court's order and subsequently the Court encounters difficulties with the actions of the receiving State – which amount to hindrance of the applicant's right under **Article 34** of the Convention – the requested State has violated Article 34, ***even though the difficulties may not be imputable to it***. The fact that the requested State has co-operated in the Court's examination of the applicant's allegations – despite its non-compliance with the order for interim measures – does not mean that a problem is not raised in the case as a whole. The Court, thus, takes a coherent view throughout transnational proceedings; namely, it acknowledges that there is an inter-relationship of responsibility between the two States throughout the execution of an extradition. For example, the fact that the handling of a case by the Russian Federation affected the effective examination of the applicant's allegations against Georgia entails a violation of Article 34 of the Convention[611]. Therefore, Georgia had violated Article 34 because of the interference against the right provided for therein by Russia, and Russia had violated the same article on the grounds of impeding its effective exercise against Georgia. This is an example of the attitude of the Court regarding transnational co-operation.

In the Court's case-law as it currently stands, Rule 39 of the Rules of Court is ***not applied***, for example, in the following cases: to prevent the imminent demolition of property, imminent insolvency, or the enforcement of an obligation to do military service; to obtain the release of an applicant who is in prison pending the Court's decision as to the fairness of the proceedings; to ensure the holding of a referendum; to prevent the dissolution of a political party; or to freeze the adoption of constitutional amendments affecting the term of office of members of the judiciary.[612]

The most typical cases of application of Rule 39 are those where, if the expulsion or extradition were to take place, the applicants would fear for their lives (thus engaging Article 2 – ***right to life*** – of the ECHR) or would face ill-treatment prohibited by Article 3 (***prohibition of torture or inhuman or degrading treatment***), as was underlined by the former ECtHR judge Johannes

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[607] ECtHR, Case ***Cruz Varas and others v. Sweden***, No. 15576/89, Judgment of 20 March 1991, §§86, 89, 104.
[608] ECtHR, Case ***Rrapo v. Albania***, No. 58555/10, Judgment of 25 September 2012, §86; Case ***Oleacha Cahuas v. Spain***, No. 24668/03, Judgment of 10 August 2006, §81.
[609] ECtHR, Case ***Zokhidov v. Russia***, No. 67286/10, Judgment of 5 February 2013.
[610] ECtHR, Case ***Kondrulin v. Russia***, No. 12987/15, Judgment of 20 September 2016, §47; Case ***Paladi v. the Republic of Moldova***, No. 39806/05, Judgement [GC] of 10 March 2009, §90.
[611] ECtHR, Case ***Shamayev and others v. Georgia and Russia***, N.º 36378/02, Judgment of 14 April 2005, §§477-478 and 715.
[612] ECtHR, **Factsheet – Interim measures**, Press Unit, March 2024, pp. 1-3.

Silvis in his lecture before PC-OC during the special session on extradition held in 2014.[613]. Such measures may also be indicated in response to certain requests concerning the ***right to liberty and security*** (Article 5) and the ***right to a fair trial*** that risks amounting to a "flagrant denial of justice" in the event of expulsion or extradition (Article 6) [614]. More exceptionally, Rule 39 has been applied in cases that engage an imminent risk of irreparable harm to the ***right to respect for private and family life***[615] (Article 8) and ***freedom of expression*** (Article 10).

The Court has requested States, as interim measures, to refrain from deporting the applicants due to real risk to their lives or of torture, inhuman or degrading punishment or treatment in view of persecution for ***political, ethnic or religious reasons*** [616], risk of ill-treatment related to ***sexual orientation***[617], risk of ***stoning for adultery***[618], risk of subjection to ***genital mutilation***[619]***,*** risk of ***social exclusion***[620] and risk of ***sexual exploitation***[621]. ***Health concerns*** led to the same kind of interim measures, for example in cases of HIV/AIDS patients[622] and people suffering from leukaemia and tuberculosis[623], and from the effects of a past stroke[624]. Yet, only in the most exceptional circumstances did the Court conclude, in its final judgement, that removal to another country would indeed entail a violation of Convention rights (eg. a critically ill patient with HIV/AIDS, apparently close to death, who could not be guaranteed any nursing or medical care in his country of origin and had no family there willing or able to care for him or provide him with even a basic level of food, shelter or social support[625]; and failure of the deporting State to assess the risks faced by the applicants in the event of deportation or extradition[626]). Furthermore, Rule 39 has been applied where the risk to the applicant's life and well-being stemmed from the expulsion/extradition measure itself or its effects. For example, in case **Einhorn v. France** (2001), having been informed that the applicant had attempted to commit suicide, the Court requested the French Government to provide information on the person's health status, and to refrain from extraditing him pending a new decision; the interim measure was lifted a week later after the French Government provided a medical report confirming that Mr Einhorn could be transferred by plane to the USA under medical and police supervision. [627]

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[613] Silvis, Johannes, **"Extradition and Human Rights: Diplomatic Assurances and human rights in the extradition context"**, lecture presented on 20 May 2014 at the special session on extradition held during the 66th meeting of PC-OC, p. 2.

[614] ECtHR, Case ***Othman (Abu Qatada) v. United Kingdom***, No. 8139/09, Judgment of 17 January 2012; Case ***Ismoilov and others v. Russia***, No. 2947/06, Judgment of 24 April 2008; Case ***Soering v. the United Kingdom***, N.º 14038/88, Judgement of 7 July 1989.

[615] ECtHR, Case ***Amrollahi v. Denmark***, No. 56811/00, Decision of 11 of October 2002.

[616] ECtHR, Case ***O.O. v. Russia***, No. 36321/16, Judgment of 21 May 2019; §§43-44, 47-48 and 51-52; Case ***F.G. v. Sweden***, No. 43611/11, Judgement [GC] of 23 March 2016; Case ***W.H. v. Sweden***, No. 49341/10, Judgement [GC] of 8 April 2015; Case ***M.A. v. Switzerland***, No. 52589/13, Judgment of 18 November 2014; Case ***Y.P. and L.P. v. France***, No. 32476/06, Judgment of 2 September 2010; Case ***Abdollahi v. Turkey***, No. 23980/08, Decision of 3 of November 2009; Case ***F.H. v. Sweden***, No. 32621/06, Judgement of 20 January 2009.

[617] ECtHR, Case ***M.E. v. Sweden***, No. 71398/12, Judgement [GC] of 8 April 2015; Case ***A.S.B. v. the Netherlands***, No. 4854/12, decision of 10 July 2012; Case ***A.E. v. Finland***, No. 30953/11, decision of 22 September 2015.

[618] ECtHR, Case ***Jabari v. Turkey***, No. 40035/98, Judgement of 11 July 2000.

[619] ECtHR, ***Sow v. Belgium***, No. 27081/13, Judgment of 19 January 2016; Case ***Omeredo v. Austria***, No. 8969/10, Decision of 20 September 2011; Case ***Izevbekhai v. Ireland***, No. 43408/08, Decision of 17 May 2011; Case ***Collins and Akaziebie v. Sweden***, No. 23944/05, decision of 8 March 2007; Case ***Abraham Lunguli v. Sweden***, No. 33692/02, Decision of 1 July 2003.

[620] ECtHR, Case ***N. v. Sweden,*** No. 23505/09, Judgment of 20 July 2010; Case ***Hossein Kheel v. the Netherlands***, No. 34583/08, Decision of 16 December 2008.

[621] ECtHR, Case ***M. v. the United Kingdom***, No. 16081/08, Judgement of 1 December 2009.

[622] ECtHR, Case **N. v. United Kingdom**, Nº. 26565/05, Judgement [GC] of 27 May 2008; Case ***D. v. United Kingdom***, No. 30240/96, Judgment of 2 May 1997.

[623] ECtHR, Case ***Paposhvili v. Belgium***, N.º 41738/10, Judgment [GC] of 13 December 2016.

[624] ECtHR, Case ***Khachaturov v. Armenia***, No. 59687/17, Judgment of 24 June 2021.

[625] ECtHR, Case ***D. v. United Kingdom***, No. 30240/96, Judgment of 2 May 1997.

[626] ECtHR, Case ***Khachaturov v. Armenia***, No. 59687/17, Judgment of 24 June 2021; Case ***Paposhvili v. Belgium***, N.º 41738/10, Judgment [GC] of 13 December 2016.

[627] ECtHR, Case ***Einhorn v. France***, No. 71555/01, Decision of 16 October 2001.

Specifically in the context of ***extradition***, the application of interim measures is often considered when the application of sentences of death or irreducible life imprisonment are at stake[628], as well as in cases of real risk of ill-treatment contrary to Article 3[629].

The ECtHR has found **violations** of Convention rights in the context of the application of interim measures ordered under Rule 39, for example, in the following cases:

- Failure to comply with an interim measure on the basis that the Court's request, according to the very wording of its Rules, was simply an indication given to the State and not a legally binding order for action on its part (further invoking the **Cruz Varas** judgement according to which the applicant's removal had not interfered with his right under Article 34 of the Convention to lodge an individual application with the Court and pointing out that the applicant's expulsion had taken place before the delivery of the **Mamatkulov and Askarov** judgment) (violation of Article 34)[630];
- Inability of the applicant, due to his expulsion, to submit all relevant arguments in his defence, with the consequence that the ECtHR's judgement would likely be deprived of its effect; his removal thereby constituted a serious obstacle likely to prevent a Contracting State from honouring its obligations under Articles 1 and 46 of the Convention, to protect the applicant's rights and make reparation for the consequences of any violation found by the Court[631];
- Expulsion without previous request for the Court to lift the interim measure and without obtaining the invoked assurances[632];
- Expulsion of the applicant, in violation of a measure under Rule 39, but on the basis of a different decision than the one referred to in the Court's interim measure (violation of Article 34)[633];
- Extradition proceedings stayed or suspended but applicant's removal to the "requesting" country under other domestic procedure or in an illegal manner (eg. abduction), with the tolerance or acquiescence of the authorities of the "requested State", thus circumventing the purpose of an interim measure against extradition previously ordered by the Court under Rule 39 (violation of Article 34)[634] – in case the involvement of the authorities of the "requested" State has not been sufficiently proven, the Court has not found a violation of Article 34[635];
- Applicant expelled from a Contracting to a non-Contracting Party to the **ECHR**, with authorities taking various measures to speed up expulsion and prevent enforcement of the interim measure ordered by the Court and published in its secure website only 13 minutes before the airplane on whose board the applicant was returned closed its doors: failure to contact the border police in order to delay closing the airplane doors; decision denying asylum communicated directly in a police station, allowing for an even faster execution of the decision and depriving the applicant of any judicial or administrative

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[628] ECtHR, Case ***Trabelsi v. Belgium***, N.º 140/10, Judgement of 4 September 2014, §§ 121-139 and 144-154; Case ***Babar Ahmad and Others v. United Kingdom* (Judgment)**, Nos.: 24027/07, 11949/08, 36742/08, 66911/09 & 67354/09, Judgment of 10 April 2012; Case ***Öcalan v. Turkey***, No: 46221/99, Judgment [GC] 12 of May 2005.

[629] ECtHR, Case ***Labsi v. Slovakia***, No. 33809/08, Judgment of 15 May 2012; Case ***Khodzhayev v. Russia***, No. 52466/08, Judgment of 12 May 2010.

[630] ECtHR, Case ***Aoulmi v. France***, No. 50278/99, Judgment of 17 January 2006, §§98-100, 112.

[631] ECtHR, Case ***Trabelsi v. Italy***, No. 50163/08, Judgment of 13 April 2010, §§65, 68, 70.

[632] ECtHR, Case ***Trabelsi v. Italy***, No. 50163/08, Judgment of 13 April 2010, §69.

[633] ECtHR, Case ***Mannai v. Italy***, No. 9961/10, Judgment of 27 March 2012, §§49-57; Case ***Ben Khemais v. Italy***, No. 246/07, Judgment of 24 February 2009, §§81, 87.

[634] ECtHR, Case ***N.K. v. Russia***, No. 45761/18, Judgment of 29 March 2022, §§5, 7-9; Case ***Mukhitdinov v. Russia***, No. 20999/14, Judgment of 21 May 2015, §§89-96; Case ***Mamazhonov v. Russia***, No. 17239/13, Judgment of 23 October 2014, §§217-219; Case ***Kasymakhunov v. Russia***, No. 29604/12, Judgment of 14 November 2013, §§184-189; Case ***Ermakov v. Russia***, No. 43165/10, Judgment of 7 November 2013, §§283-284, 287; Case ***Zokhidov v. Russia***, No. 67286/10, Judgment of 5 February 2013, §203-205, 207; ECtHR, Case ***Abdulkhakov v. Russia***, No. 14743/11, Judgment of 2 October 2012, §§152-157 and 219-231.

[635] ECtHR, Case ***Latipov v. Russia***, No. 77658/11, Judgment of 12 December 2013, §151.

appeal; and consular *laisser passer* issued by the authorities of the receiving country the day before expulsion – the ECtHR considered that the authorities of the expelling country had created conditions under which the applicant had major difficulties in applying to the Court for a second interim measure, thus deliberately and irreversibly undermining the level of protection of the rights set out in Article 3 of the Convention which the applicant sought to enforce by filing his application, and that was therefore rendered useless[636];

- Complaint by two Iraqi nationals that the British authorities in Iraq had transferred them to Iraqi custody in breach of an interim measure indicated by the ECtHR, thereby putting them at real risk of an unfair trial followed by execution by hanging (violation of Article 34)[637];
- Applicants placed in detention pending expulsion without any indication of time-limits, no analysis of the particularities of the cases as regards the need for detention, no estimation of how realistic the applicants' removal was in light the measure under Rule 39, and no time-limits for review of the continued validity of the applicants' detention (violation of Article 5 (1) (f))[638].

By contrast, the Court **rejected** that Article 34 had been violated, for example, in the following cases:

- Where it concluded that a copy of the application for interim measures had not reached the Ministry of Justice of the requested State and confirmed that this State had a "constant practice" of ordering the provisional stay of extraditions if requested to do so by the Court itself while the decision on the applicant's request for a measure under Rule 39 request was pending[639].
- Adjournment of extradition under Rule 39, followed by the applicant's release from detention and by Government undertaking that, in case the Court discontinued the application of Rule 39, the applicant would be given a real opportunity to re-apply to the Court for interim measures in the event that competent authorities authorised his extradition in the future[640].

Concerning ***delays*** caused by the Court's own interim measures, 5 to 8-month delays in this regard have not been found unreasonable by the Court[641]. However, in case of a substantially longer delay, the Court could still decide otherwise. An interim measure, indicated under Rule 39, preventing a person's extradition does not require or form a basis for the person's detention pending a decision on his or her extradition[642]. Furthermore, the implementation of an interim measure does not, in itself, have any bearing on whether the deprivation of liberty to which that individual may be subjected complies with Article 5 (1)[643]. Thus, domestic authorities must still act in strict compliance with domestic law[644].

At its 62nd session, in 2012, PC-OC had an exchange of views on the application of interim measures by the ECtHR in cases of extradition on the basis of a statement issued by the Court's

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[636] ECtHR, Case ***M. A. v. France***, No. 9373/15, Judgment of 1 February 2018, §70.
[637] ECtHR, Case ***Al-Saadoon and Mufdhi v. the United Kingdom***, No. 61498/08, Judgment of 2 March 2010.
[638] ECtHR, Case ***B.U. and Others v. Russia***, Nos. 59609/17, 74677/17 & 76379/17, Judgment of 22 January 2019, §§35-36.
[639] ECtHR, Case ***Al-Moayad v. Germany***, No. 35865/03, Decision of 20 February 2007, §126.
[640] ECtHR, Case ***Atmaca v. Germany***, No. 45293/06, Decision of 6 March 2012.
[641] ECtHR, Case ***Mukhitdinov v. Russia***, No.: 20999/14, Judgment of 21 May 2015, §§84, 87; Case ***Ermakov v. Russia***, No.: 43165/10, Judgment of 7 November 2013, §273; Case ***Kasymakhunov v. Russia***, N.º 29604/12, Judgment of 14 November 2013, §172.
[642] ECtHR, Case ***Nizomkhon Dzhurayev v. Russia***, No. 31890/11, Judgment of 3 October 2013, §§158-159; Case ***Molotchko v. Ukraine***, No. 12275/10, Judgment of 26 April 2012, §174.
[643] ECtHR, Case ***Gebremedhin [Gaberamadhien] v. France***, N.º 25389/05, Judgment of 26 April 2007, 74.
[644] ECtHR, Case ***Umirov v. Russia***, N.º 17455/11, Judgment of 18 September 2012, §140.

President, Jean-Paul Costa[645], who considered it "alarming" the sharp increase (of over 4000%) in the number of received requests for interim measures under Rule 39 of the Rules of Court in the area of immigration only. He warned that, with such large in-flow of applications and limited human resources available to deal with these urgent procedures, it was often not possible to contact individually to obtain the necessary information and adequately prioritize cases, with the risk that "the small minority of applicants who do face a genuine threat to life and limb in the country of destination will not have their cases examined in time to prevent removal."

In light of this, the following ***recommendations*** have been made:

1. Applicants and their representatives should respect the **Practice Direction on Requests for Interim Measures**[646]. In particular, requests for interim measures should be:
    a. Individuated;
    b. Fully reasoned, specifying in detail the grounds on which the applicant's particular fears are based and the nature of the alleged risks;
    c. Sent with all relevant documentation including the decisions of the national authorities and courts (normally as soon as possible after the final domestic decision has been taken) and any other material which may substantiate the applicant's allegations;
    d. Mentioning the application number allocated to the case if it relates to any case already pending before the Court, indicate full contact details, the applicant's address or place of detention and his or her official case-reference number;
    e. Be sent by facsimile or by post (according to the degree of urgency and bearing in mind that requests by letter must not be sent by standard post), if possible during working hours and in one of the official languages of the Contracting States;
    f. Sent in good time before the expected date of removal; the expected date and time of removal should be clearly indicated – any change in those details must be notified to the Court as soon as possible.

    Since the Court cannot always examine in a timely and proper manner requests which are sent at the last moment, particularly when they are supported by a large number of documents, where the final domestic decision is imminent and there is a risk of immediate enforcement, especially in extradition or deportation cases, applicants and their representatives should submit the request for interim measures ***without waiting for the decision of national authorities***, indicating clearly the date on which it will be taken and that the request is subject to the final domestic decision being negative.

    The Court's President underlines that the "widespread distribution of application forms to potential applicants is not and should not be seen as a substitute for proper legal representation in compliance with these conditions. It must be emphasised that failure to comply with the conditions set out in the Practice Direction may lead to such cases not being accepted for examination by the Court."

2. Member States should provide ***national remedies*** with suspensive effect which operate effectively and fairly, in accordance with the Court's case-law and provide a proper and timely examination of the issue of risk. Where a lead case concerning the safety of return to a particular country of origin is pending before the national courts or the ECtHR, removals to that country should be suspended. Failure to provide for this suspension may entail a violation of Convention Article 13[647].

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[645] Available at the website of PC-OC, at https://www.strasbourgconsortium.org/content/blurb/files/20110211_ART_39_Statement_EN.pdf.
[646] Issued by the President of the Court in accordance with Rule 32 of the Rules of Court on 16 October 2009.
[647] **Practice Direction on Requests for Interim Measures**, Appendix II; see also ECtHR, Case ***Tehrani v. Turkey***, Nos. 32940/08 & 41626/08 & 43616/08, Judgment of 13 April 2010, §66.

For further details and forms, please consult the Court's Internet site: http://www.echr.coe.int/echr. In 2020, a catalogue of interim measures taken by central authorities regarding requests for extradition in the context of the COVID-19 crisis was published in the PC-OC's website[648].

For information concerning the impact of interim measures on the length of extradition proceedings, see **sub-chapter 1.1.2** (*Length of the detention pending extradition*).

European Arrest Warrant[649]

The CJEU interpreted Article 267 of the TFEU, which establishes the preliminary ruling procedure, in the context of the **EAW FD** and accepted that an issuing judicial authority can request a preliminary ruling that concerns obligations of the executing judicial authority[650]. The CJEU also accepted that an issuing judicial authority can request a preliminary ruling where the EAW has already been annulled, with a view to adopting a new EAW[651].

2.2 Extraditable offences

If extradition is requested in the context of **ongoing criminal proceedings**, the offence must be punishable, under the laws of both the requesting and the requested States, with, at least, ***one year of deprivation of liberty***. If requested in order to **execute a sentence** issued in the requesting State, the punishment must have been imposed for a ***minimum of four months.*** In relation to these offences, extradition is ***compulsory*** if no legitimate cause for denial – under international customary or treaty law, including **ECE** itself – can be found. If the request includes **several offences** punishable with deprivation of liberty by the laws of both States, but in relation to some of those offences the threshold of punishment is not attained, extradition can still be granted as it concerns these offences as well. For Parties to **AP2**, this shall also apply to offences punishable only with pecuniary sanctions (**ECE**, Article 2 (1)-(2)).

Any Party whose legislation does not admit extradition for certain offences may, by means of a declaration deposited with the Secretary-General of the CoE, exclude such offences from the ***scope of application*** of **ECE**. Any Party may apply reciprocity in this regard (**ECE**, Articles 2 (3)-(7)).

Exclusions

The ***obligation to extradite*** (**ECE**, Article 1) shall not apply to the following offences:

1. Political offences or offences connected therewith and offences aimed at the prosecution or punishment of a person on ***discriminatory grounds*** (**ECE**, Article 3).

> This is in line with paragraph 1 of Committee of Ministers' **Recommendation No. R 80 (9),** in which this body recommends that the governments of Member States *not to grant extradition where a request for extradition emanates from a state not party to the European Convention on Human Rights and where there are substantial grounds for believing that the request has been made for the purpose of prosecuting or punishing the person concerned on account of his race, religion, nationality or political opinion, or that his position may be prejudiced for any of these reasons;*

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[648] **PC-OC (2020) 12**, *List of decisions taken at the 78th meeting of the PC-OC*, Strasbourg, 9 October 2020.
[649] Eurojust, ***Case-law by the Court of Justice of the EU on the European Arrest Warrant***, updated until 1 December 2021, p. 13.
[650] CJEU, Case **C-268/17, *AY***, Judgment of 25 July 2018.
[651] CJEU, Case **C-649-19, *Spetsializirana prokuratura (Déclaration des droits)***, Judgment of 28 January 2021.

The concept of "political offence" is not defined in ECE, although the following offences are explicitly excluded therefrom:

- Murder or attempted murder of ***head of State*** or his relative(s);
- ***Terrorism*** (Article 1 of the European Convention on the Suppression of Terrorism; Article 20 of the European Convention for the Prevention of Terrorism);
- ***Enforced disappearance*** (Article 13 (1) of the International Convention for the Protection of All Persons from Enforced Disappearance); and

For States Parties to AP1:

- ***Crimes against humanity*** as specified in the Convention on the Prevention and Punishment of the Crime of Genocide (1948);
- ***Grave breaches*** of the Geneva Conventions of 12 August 1949 (Convention I, Article 50; Convention II, Article 51; Convention III, Article 130; Convention IV, Article 147) or comparable violations of the laws of war.

Since the prohibition of extradition on the basis of political offences is provided for in ECE, but not in the ECHR, the protection afforded by the latter in this context is often examined in relation to asylum requests for fear of political persecution or the extraterritorial responsibility of the State for human rights guarantees as a grounds for the refusal of extradition or deportation (see Chapter 3).

The ECtHR considered that accusations of offences "against the constitutional order, the manufacture or disclosure of material harmful to public security and order, creation and direction of extremist, separatist, fundamentalist or other prohibited organizations and participation in such organizations ***undoubtedly have a political and religious character***.[652]

The Court requires that allegations of political persecution are duly substantiated, and has found this requirement lacking, even in relation to countries with poor human rights records, in case the sought person is wanted for ordinary criminal offences and the decisions of the authorities of the requesting State describing the circumstances of the crimes and outlining the suspicions against the applicant are detailed and well-reasoned[653].

The scope of guarantees established in this regard in ECE and in ECHR is, however, different. For example, while the prohibition of extradition for political offences in Article 3 of ECE is ***absolute*** and ***cannot be rebutted through diplomatic or other assurances***, the protection against ill-treatment in view of the risk of political persecution may, if the situation so warrants, be enforced through the delivery and monitoring of diplomatic assurances. This means that if the person is actually sought with the view to prosecution or sentenced for political offences, extradition must be rejected. If he or she is sought for "ordinary offences", but fears being subjected, for instance, to treatment incompatible with Article 3 due to the risk of political persecution, his or her protection may be secured through the delivery and monitoring of reliable diplomatic assurances (see Chapter 3).

In order to prevent the ***misuse of Interpol red notices*** to diffuse unfounded or abusive, including politically motivated red notices, arrest warrants and extradition requests, an automated screening and detection system has been established. Accordingly, each incoming request is checked against a watch list containing requests that have been denied in the past so that they are automatically rejected, and more automated tools for this purpose are under development. Moreover, a special Task Force, composed of lawyers and police officers from different Interpol Member States, has been established in the Interpol General Secretariat. The Task Force assesses all incoming requests for publications of notices and diffusions from Interpol member countries with regard to their compatibility with the respective legal framework and requirements. Interpol red notices can be removed on a number of grounds by making submissions to the independent Commission for the Control of Files

[652] ECtHR, Case ***Kholmurodov v. Russia***, No. 58923/14, Judgment of 1 March 2016, §65.
[653] ECtHR, Case ***K. v. Russia***, No. 69235/11, Judgment of 23 May 2013, §68.

(CCF) claiming that they breach Interpol's Constitution and its Rules on the Process of Data. Member States can advise individuals concerned by abusive red notices, in particular politically motivated red notices, to exercise their rights before the CCF and alert them beforehand, or ask for the notices or diffusions to be deleted. A permanent notice advisory group supports these activities.

In cases of reasonable suspicion that a request for extradition is abusive, in particular politically motivated or otherwise unfounded (unlawful), the focal point of the person's State of nationality (if other than the issuing State) shall always be informed, in order to allow for an exchange of relevant information that enables taking an informed decision on the matter. Moreover, in these cases of reasonable suspicion any focal point should promptly and proactively inform and consult other focal points, as well as Eurojust, Europol and Interpol. This notification mechanism applies to nationals of States, as well as to nationals of third States and stateless persons (see **EU Guidelines on Extradition to Third Sates**, chapter 3.2).

2. Offences of a **purely military** nature (**ECE**, Article 4).

3. Fiscal offences

The original Convention established that offences related to taxes, duties, customs and exchange were in principle excluded, but could give rise to extradition if the Contracting States so decided through a previous arrangement between them. **AP2**, however, puts "ordinary" and fiscal offences on the same footing, by establishing that all of them shall give rise to extradition provided that the dual criminality rule is fulfilled. For this purpose, the offence must be of the same "nature" in both Parties, but the fact that the law of the requested State does not impose the same kind of tax, duty or regulation is irrelevant and may not be used as a basis to refuse extradition. What matters are the constituent elements of the offence. Given that, in these cases, extradition is to be granted "in accordance with the provisions of the Convention" the conditions laid down therein shall apply, including those concerning the minimum threshold of applicable penalties cf. Article 2.

Furthermore, in accordance with Committee of Ministers' **Recommendation No. R (80) 7** (on the "use of extradition"):

*When deciding on whether to request extradition, the **requesting State** should take into consideration the **hardship** which might be caused by the extradition procedure to the person concerned and to his family, where this procedure is manifestly **disproportionate** to the seriousness of the offence and where the penalty likely to be passed will not significantly exceed the minimum period of detention laid down in Article 2, paragraph 1, of the convention, or will not involve deprivation of liberty.*

*In the case of enforcement of a sentence or detention order, the requesting state should apply the same **principle of proportionality**, particularly where the remainder of the sanction to be served does not exceed a period of four months.*

European Arrest Warrant

The EAW may be issued for acts **punishable** by the law of the issuing Member State by a custodial sentence or a detention order for a maximum period of ***at least 12 months*** or, where a **sentence** has been passed or a detention order has been made, for sentences of at least ***four months*** (Article 2.1 **EAW FD**).

Article 2.2 of the **EAW FD** contains a list of **32 offences** which, if punishable in the issuing Member State by a custodial sentence or a detention order for a maximum period of ***at least three years***, give rise to surrender pursuant to an EAW, ***without verification of the double criminality rule***. These are:

- participation in a criminal organisation;

- terrorism;
- trafficking in human beings;
- sexual exploitation of children and child pornography;
- illicit trafficking in narcotic drugs and psychotropic substances;
- illicit trafficking in weapons, munitions and explosives;
- corruption;
- fraud;
- laundering of the proceeds of crime;
- counterfeiting currency, including the euro;
- computer-related crime;
- environmental crime, including illicit trafficking in endangered animal species and in endangered plant species and varieties;
- facilitation of unauthorised entry and residence;
- murder, grievous bodily injury;
- illicit trade in human organs and tissue;
- kidnapping, illegal restraint and hostage-taking;
- racism and xenophobia;
- organised or armed robbery;
- illicit trafficking in cultural goods, including antiques and works of art;
- swindling;
- racketeering and extortion;
- counterfeiting and piracy of products;
- forgery of administrative documents and trafficking therein;
- forgery of means of payment;
- illicit trafficking in hormonal substances and other growth promoters:
- illicit trafficking in nuclear or radioactive materials;
- trafficking in stolen vehicles;
- rape;
- arson;
- crimes within the jurisdiction of the International Criminal Court;
- unlawful seizure of aircraft/ships;
- sabotage.

For offences other than the above, surrender may be subject to the condition that the acts for which the EAW was issued constitute an offence under the law of the executing Member State, whatever its constitutive elements or description (Article 2 (4) **EAW FD**).

The CJEU clarified that, in the context of Article 2 **EAW FD**, the ***law of the issuing Member State*** is the frame of reference to determine whether the facts that gave rise to the EAW are punishable and for how long[654]. This applies both for assessing whether an act is punishable by a custodial sentence of a maximum of at least 12 months[655] and for assessing whether an act is to be considered as integrated in one of the listed offences[656].

2. 3 Causes to refuse extradition

2.3.1. Mandatory refusal

Even if the crime can give rise to extradition, the latter ***must be refused*** in the following circumstances:

[654] CJEU, Case **C-717/18, *X***, Judgment of 3 March 2020.
[655] CJEU, Case **C-463/15 PPU, *A***, Order of 25 September 2015.
[656] CJEU, Case **C-303/05, *Advocaten voor de Wereld***, Judgment of 3 May 2007.

1. Violation of the ***non bis in idem*** principle because a ***final judgement*** upon the person claimed has been passed by the authorities of the ***requested State*** (ECE, Article 9 (1). If such judgement is passed by the competent authorities of a ***third State***, extradition shall not be granted subject to the conditions set out in paragraphs 2 to 4 of Article 9 (AP1, Article 2).

2. In case prosecution or punishment of the person claimed has become statute-barred by reason of ***lapse of time*** in accordance with the law of either State (original Convention, Article 10) or in accordance with the law of the requesting State (for States Parties to AP4). Under AP4, it cannot be refused on the grounds that it would be statute-barred in accordance with the law of the requested State – a reservation to this norm is expressly admitted (AP4, Article 1).

The Committee of Ministers of the CoE recommends that, *when determining whether, according to the law of the requested State, the person claimed has become immune by reason of lapse of time from prosecution or punishment, the competent authorities of the said 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* (Resolution (75) 12 of the Committee of Ministers of the CoE, recommendation relating to the original version of Article 10).

3. If there is a real risk that the person sought will be subjected to the ***death penalty***. Although **Article 11** of ECE phrases this question in terms of an "optional ground for refusal", both the ECtHR's case law and all legislative developments within the CoE concur in the sense that extradition must not be carried out in these cases (see further details in Chapter 3.2).

4. Declaration of ***amnesty*** for the offence in question in the requested State, provided that this State had competence to prosecute it (AP2).

5. Existence of any reason to refuse extradition on ***human rights grounds***, except if, in relevant cases, reliable assurances are provided (see **Chapter 3**, below).

European Arrest Warrant

Grounds for mandatory non-execution of an EAW are listed in Article 3 of the EAW FD and are as follows:

- Offence covered by ***amnesty*** in the executing Member State, where this State had jurisdiction to prosecute it;
- Requested person ***finally judged by a Member State*** in respect of the same acts; if there is a sentence, this must have been served, be in the process of being served or may no longer be executed under the law of the sentencing Member State (***non bis in idem***);
- Sought person ***unable to be held criminally responsible*** for the acts in question, on account of his or her ***age***, under the law of the ***executing State*****.**

2.3.2 Optional refusal

Requested States ***can also refuse*** extradition in the following cases:

1. Extradition of a ***child*** (i.e.. person below 18 years of age) ordinarily resident in the requested State: the competent authorities of both States shall take into consideration the interests of the child and, where they think that extradition is likely to impair his or her social rehabilitation, shall endeavour to reach an agreement on the most appropriate measures (Resolution (75) 12 of the Committee of Ministers of the CoE, recommendation relating to Article 1);

2. Extradition of ***nationals*** of the requested State (bee below, section **2.12**);

3. ***Offences committed, in whole or in part, in the territory of the requested State*** (ECE, Article 7 (1)). The Committee of Ministers of the CoE recommends that the State does not exercise this right in case the proceedings and judgement 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[657]. If the offence was committed outside its territory, extradition may only be refused if its domestic law prohibits extradition for such offence or its prosecution when committed outside its territory (**ECE**, **Article 7 (2)**);

4. ***Ongoing proceedings*** against the same person, for the same offence, in the requested State, or if the competent authorities have decided not to initiate or to terminate such proceedings (**ECE**, Article 8);

5. Extradition sought for the purpose of carrying out a sentence or detention order imposed ***in absentia***, in case the requested State does not consider that the proceedings leading to the judgement in question satisfied the minimum rights of defence recognized as due to everyone charged with a criminal offence, except if a sufficient guarantee is provided that the person claimed will have the right to a retrial which safeguards the rights of defence – **AP2**, Chapter III: Article 3 (see below, Chapter 3.5).

European Arrest Warrant

The grounds for an optional refusal to execute an EAW are listed in **Article 4** of the **EAW FD,** which will not be reproduced here. They relate basically to offences, other than those listed in Article 2.2, not punishable under the law of the executing Member State, infringements of the *non bis in idem* principle, decisions of the executing Member State not to prosecute to or halt proceedings, operation of statutory limitations to prosecution in this State, execution of sentence or detention order in the executing Member State in relation to its own nationals and residents or persons staying there, and offences considered to have been committed, in whole or in part, in the territory of the executing Member State.

In relation to **Article 4 (7) (b)** of the **EAW FD**, which establishes that, where the EAW relates to offences which have been committed ***outside the territory*** of the issuing Member State and the law of the executing Member State does not allow prosecution for the same offences when committed outside its territory, this State may refuse to execute the EAW. The CJEU considers that this provision should be interpreted as meaning that, in the case of an EAW issued on the basis of a judicial decision of the issuing Member State allowing execution in that Member State of a sentence imposed by a court of a third State, where the offence concerned was committed in the territory of the latter State, the question whether that offence was committed 'outside the territory of the issuing Member State must be resolved by taking into consideration the criminal jurisdiction of the third which allowed prosecution of that offence, and not that of the issuing Member State[658].

2.4 Issuance and execution of requests

As expressly provided under **Article 22** of **ECE**, except when this Convention provides otherwise, the procedure regarding extradition and provisional arrest shall be governed ***solely by the law of the requested Party***. Therefore, we shall merely outline briefly the procedural requirements imposed by the Convention, in relation to the main steps to be followed.

1. Formulation of the request

The request shall be ***in writing*** (**ECE**, **Article 12**), but the means of communication thereof may vary depending on whether the States in question are Parties to the **original Convention** or to its **Second** and **Fourth** optional protocols (it is one of the provisions most often amended to reflect technological developments and accelerate procedures). If States are Parties to the original Convention only, the request shall be communicated through the diplomatic channel (except if other means of communication have been directly agreed between them). If States are Parties to

[657] CoE, Committee of Ministers, **Resolution (75) 12** on the practical application of the European Convention on Extradition, of 21 May 1975, recommendation in relation to Article 7.
[658] CJEU, Case **C-488/19, *JR***, Judgment of 17 March 2021.

AP2, the request shall, as a rule, be communicated via the respective Ministries of Justice (although the diplomatic channel and direct arrangement are not excluded). If States are Parties to **AP4**, in addition to the Ministry of Justice, a Party may also designate other competent authority to receive these requests, which shall be communicated to the Secretary-General of the CoE, as well as any subsequent changes thereof. A much more detailed explanation of the elaboration of the request, and elements thereof, is contained in the Recommendations concerning the implementation of **Article 12** (see above).

2. Supporting documents

Also indicated in **Article 12**, the documents which must support the extradition request have been altered with the entry into force of **AP4** and may therefore be different for States Parties to this Additional Protocol. Pursuant to the **original Convention**, they are as follows:

- original or 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;
- statement of the ***offences*** for which extradition is requested setting out, as accurately as possible, the time and place of their commission, their legal descriptions and a reference to the relevant legal provisions;
- 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.

In case States are Parties to **AP4**, a ***simple copy*** of the conviction and sentence, immediately enforceable detention order or arrest warrant will suffice and among the legal provisions referred must be an indication of those relating to ***lapse of time***. It should also be included information to help establish the ***location*** of the person sought.

In accordance with Article 25 of **ECE**, **"detention order"** means, for the purposes of this Convention, *any order involving* ***deprivation of liberty*** *which has been made by a criminal court in addition to or instead of a prison sentence* (emphasis added).

In a case where the applicant complained that the requested State's failure to request to the requesting State the ***document with the sentencing calculation*** had breached the principle of ***equality of arms*** (therefore giving rise to a violation of Article 6 of the **ECHR**), the ECtHR reiterated its well-established case law according to which "decisions regarding the entry, stay and deportation of aliens do not concern the determination of an applicant's civil rights or obligations or of a criminal charge against him, within the meaning of Article 6 (1)". Consequently, it did not find that this Article applies to extradition proceedings[659]. This is in line with the jurisprudence developed by the EComHR in a case in which the applicant also complained of violation of the principle of equality of arms in extradition proceedings on the basis that he was unable to establish an alibi for the offence he was being prosecuted for. The EComHR stated that the authorities of the requested State are in no way obliged to authorise the production before them, in extradition proceedings, of evidence of facts relating to the substance of the charge or the criminal prosecution[660].

In another case, the applicant claimed that the request for extradition had resulted from a "flagrant denial of justice" due, *inter alia*, to the fact that the trial judge had refused to hear defence witnesses and the applicant's written testimony, as well as to allow the cross-examination of prosecution witnesses. The Court found the allegations, on the whole, insufficiently substantiated to support the conclusion that there had been a "flagrant denial of justice" and stated that it is not its role to determine, under Article 6 of the Convention, whether the courts of the requesting State convincingly established the applicant's guilt or the strength of the evidence examined by it, nor

[659] ECtHR, Case ***Findikoglu v. Germany***, No. 20672/15, Decision of 7 June 2016, §§43-44.
[660] EComHR, Case ***Lynas v. Switzerland***, No. 7317/75, Decision of 6 October 1976, p. 168, §5.

to deal with errors of fact or of law allegedly committed by a domestic court of the Contracting State, unless and in so far as they may have infringed rights and freedoms protected by the Convention. In the determination of whether the proceedings were fair, the ECtHR does not act as a court of fourth instance deciding on whether the evidence has been unlawfully obtained in terms of domestic law, on its admissibility or on the guilt of an applicant. Therefore, it did not consider appropriate to rule on whether the available evidence was sufficient to convict the applicant, and thus to substitute the assessment of facts and evidence made by domestic courts for its own[661].

Again, we strongly recommend consulting the Recommendations concerning the implementation of **Article 12** of **ECE**, above.

3. Channels and means of communication (**AP4**, Article 6)

AP4 has introduced an altogether new Article on "Channels and means of communication", again with the view to expedite and facilitate communications between competent authorities. Thus, communications may be undertaken via electronic means "or any other means affording evidence in writing" and "under conditions which allow the Parties to ascertain their authenticity". The originals or authenticated copies thereof may be requested at any time. It is also permissible to use Interpol or diplomatic channels. For the initial request and for communications pertaining to the rule of speciality, a Party may always reserve the right to request the original or authenticated copies.

4. Language requirements

The documents shall be elaborated either in the language of the requesting or of the requested Party. However, the latter may require a translation in one of the official languages of the CoE, at its choice (**Article 23 ECE**).

5. Expenses

In accordance with **Article 24 ECE**, the requested Party shall bear the expenses incurred in its territory by reason of extradition, while the requesting Party shall bear the expenses incurred by reason of transit, as well as any expenses that may exist related to travel between a non-metropolitan territory of the requested Party and its metropolitan territory and/or the territory of the requesting State.

6. Request for supplementary information, if necessary

The requested State may request supplementary information if it considers that the information initially provided is insufficient for taking a decision under the Convention. A deadline for such purpose may be established (**ECE**, **Article 13**).

7. Arrest of the person sought

In principle, once the request is received, the sought person shall be arrested or, at the minimum, the requested State shall take measures to ensure that surrender can effectively take place.

In case of urgency, the ***provisional arrest*** of the sought person may be requested, in accordance with **Article 16** of **ECE**. The authorities of the requested State shall decide on this request, which must assert the existence of one of the documents mentioned in Article 12 (2) (a) (conviction and sentence, immediately enforceable detention order, arrest warrant or other order having the same effect) and that there is an intention to seek extradition, and indicate the underlying offence, time and place of commission and description of the person sought.

This request shall be sent to the competent authorities of the requested Party through diplomatic channel, post, telegraph, the Interpol or any other means affording evidence in writing. The requesting authority shall be ***informed without delay*** of the ***results*** of its request. Provisional arrest **may be terminated** if no request for extradition and necessary documentation are received

[661] ECtHR, Case ***Kislov v. Russia***, No. 3598/10, Judgment of 9 July 2019, §§ 118-119, 123-124, 126-129.

within ***18 days*** from the date of arrest and, in any event, it shall not exceed ***40 days***. The person can be provisionally ***released*** at any time, but the requested Party must take all necessary measures to prevent escape. Release does not prejudice ***re-arrest*** and extradition if a new extradition request is received.

Provisional arrest should only be requested when there are strong reasons to suggest that otherwise the extradition could not be effected, and its period should be kept ***as short as possible***. The period of 18 days should be exceed only in cases of necessity, particularly where the requesting authority indicates difficulties in submitting the documents within that deadline[662].

Where the requested Party considers that the duration of detention pending extradition is ***disproportionate*** to the sentence to be enforced or the penalty likely to be incurred upon conviction, it should ***consult the requesting Party*** with a view to ascertaining whether the request for extradition is maintained. The requesting Party should respond without delay[663].

In accordance with **Article 5 (1) (f)** of the **ECHR**, the deprivation of liberty of a person with a view to his or her extradition is only admitted if the arrest or detention was lawful and for as long as action for the purpose of extradition is being taken. For a detailed examination of the requirements of legality for deprivations of liberty in this context, see Chapter 1, section 1.1 (*The right to liberty and security*).

8. Hearing

Despite the fact that neither **ECE** or the **ECHR** make express provision for the right to be heard of the person subject to an extradition procedure, this right is one of the "fundamental guarantees of procedure applied in matters of deprivation of liberty"[664] and essential for the enjoyment of the right of anyone deprived of liberty to take proceedings by which the lawfulness of his or her detention shall be decided speedily by a court and release ordered if the detention is not lawful. It is equally essential for the person to be able to exercise his or her right to an effective remedy to challenge the legality of extradition itself (eg. in case it entails a real risk of violation of other Convention rights upon surrender).

This is the view of the ECtHR, as well as of the Committee of Ministers of the CoE, which recommends, in its **Resolution 75 (12),** that the Contracting Parties, whilst providing for a speedy extradition procedure, shall ensure that the person whose extradition has been requested has the ***right to be heard*** by a judicial authority and to be ***assisted by the lawyer of his own choosing*** and shall submit to a judicial authority the control of his custody for the purpose of extradition as well as the conditions of his extradition. **Recommendation R (80) 7** strengthened these provisions, by stating explicitly that, irrespective of the administrative or judicial nature of the extradition proceedings, the person concerned should be heard on the arguments which he invokes against his extradition, as well as informed, promptly and in a language which he understands, of the extradition request and the facts on which it is based, of the conditions and the procedure of extradition, and, where applicable, of the reasons for his arrest. The person should also be assisted by lawyer, for free if he or she has no means to pay for it, and is entitled to interpretation and translation, if necessary.

For a detailed examination of these rights and conditions for their exercise, please consult Chapter 1.

If the **simplified extradition procedure** is to be followed, it is at this stage that the person may express his or her ***consent*** to extradition and, if applicable, ***renounce the entitlement to the rule of speciality*** (see below).

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[662] CoE, Committee of Ministers, **Recommendation No. R (80) 7** concerning the practical application of the European Convention on Extradition, 27 June 1980, recommendation concerning provisional arrest.
[663] CoE, Committee of Ministers, **Recommendation No. R (86) 13** concerning the practical application of the European Convention on Extradition in respect of detention pending extradition, 16 September 1986, recommendation I.a.2).
[664] ECtHR, Case ***Sanchez-Reisse v. Switzerland***, No. 9862/82, Judgment of 21 October 1986, §51.

9. Decision

The requested Party shall then take its decision regarding extradition. For this purpose, it must *inter alia* verify whether there is a ***legal ground*** for extradition, whether the ***offence*** may give rise to extradition, if there is any cause for the mandatory ***refusal*** of extradition and assess any cause for the optional refusal thereof. Very often, decision-making processes in extradition matters involve, in addition to a ***legal assessment*** of the above requirements, also a ***political assessment*** of whether, notwithstanding all this, the execution of the request is likely to undermine the sovereignty, security, public order, or other essential interests of the country. If this is considered to be the case, extradition may ultimately be refused. It should be noted that a refusal of extradition for serious crimes may give rise to impunity and therefore to violations of the human rights of victims in their procedural limb[665].

10. Surrender

The decision on extradition and surrender are governed by **Article 18** of **ECE**.

The requested Party shall inform the requesting Party of its ***decision*** regarding extradition, by the ***same means*** through which the request was made. Any complete or partial rejection shall be ***reasoned***. In a case where the authorities of the requested State limited themselves to send back the extradition request without reply, thus failing to provide a reasoned reply to an extradition request from another Contracting State regarding suspects wanted for murder or unlawful killings who were known to be present in a territory within its jurisdiction, the Court concluded that the requested State had not made the minimum effort required in the circumstances of the case to cooperate with the State on whose territory the killings had occurred (the requesting State), for the purposes of an effective investigation into the murder of the applicants' relatives. The Court was of the view that, in the context of extradition, **Article 2** of the **ECHR** has be read in light of the provisions of **Articles 18 (1) and (2)** and **13** (the right to request supplementary information, if necessary) of **ECE**. Therefore, it concluded that, by failing to reply to the extradition request in such case, the requested State had violated Article 2 of the **Convention** in its procedural limb[666].

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 claimed person has remained in detention***. As recommended by the Committee of Ministers of the CoE, the time spent in detention by an individual solely for the purpose of extradition in the territory of the requested State or of a State of transit shall be taken into consideration when deciding the penalty involving deprivation of liberty or detention which he has to serve for the offence for which he was extradited. If the requesting State institutes new proceedings 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 also be taken into consideration when deciding the penalty involving deprivation of liberty or detention which he has to serve in the requesting State.[667]

In case the person claimed is ***not taken over*** on the appointed date, he or she may be released after ***15 days*** and must be released after ***30***. The requested Party may refuse to extradite such person for the same offence. However, if surrender or taking over of the person is not possible due to circumstances beyond the control of any of the Parties, the other Party shall be informed and a new date for surrender agreed.

11. Transit

[665] ECtHR, Case ***Güzelyurtlu and Others v. Cyprus and Turkey***, No. 36925/07, Judgment [GC] of 29 January 2019, §§244, 253-256, 263-266.
[666] ECtHR, Case ***Güzelyurtlu and Others v. Cyprus and Turkey***, No. 36925/07, Judgment [GC] of 29 January 2019, §§244, 253-256, 263-266.
[667] CoE, Committee of Ministers, **Resolution 75 (12) on the practical application of the European Convention on Extradition**, of 21 May 1975, recommendations in relation to Articles 9, 16 and 18.

Article 21 of ECE, which regulates transit in cases of extradition, has been completely re-drafted by AP4. The legal framework which States are subject to in this regard shall thus depend on whether they are or not Parties to this Additional Protocol.

Contracting Parties must authorize transit through their territories in case they are requested to do so, provided that they do not consider that the offence in question constitutes a political or purely military offence (**Article 21 (1)** ECE). If States are Parties to the **original Convention** only, this request must be submitted by diplomatic channel or other means directly agreed between the concerned States, and be accompanied by the same ***documents*** presented to request extradition itself; if they are Parties to AP2, the preferred channel shall be communication through the Ministries of Justice (again with the same documentation necessary to request extradition), although the former means are not excluded. In case States are Parties to AP4, the request may be submitted by any means admitted for the communication between Parties, and be accompanied by the following ***information***:

- Identity of the person to be extradited, including his/her nationality(ies);
- Authority requesting transit;
- Existence of an arrest warrant, other legally equivalent order or enforceable judgment, as well as a confirmation that the person is to be extradited;
- Nature and legal description of the offence, including the maximum penalty applicable or imposed in the final judgment;
- Description of the circumstances in which the offence was committed, including the time, place and degree of involvement of the person sought.

In order to expedite transit, ***arrangements*** for obtaining the consent of the transit States should be made, whenever possible, ***at the time extradition is requested***. The requested State should be promptly informed of the means of transit envisaged and whether transit permission is being sought from other Contracting States. In principle, the requested State should comply with the wishes of the requesting State with regard to the way in which the transit is to be effected. However, in cases of particular difficulty, the two States should consult each other on the appropriate means of transport (rail, road or air) and possibly on the place where the person to be extradited is to be handed over. It is recommended that transit by air is used as widely as possible because it is likely to facilitate and accelerate the handing over of the person to be extradited. As a general rule, the person to be surrendered should be escorted. A Contracting State which has been asked to grant transit should act on the request and make the necessary arrangements in a way as to avoid any delay[668].

If States are Parties to the **original Convention** only and air transportation is used, the requesting State shall notify the Party over whose territory the flight is to be made and certify that the ***original or authenticated copy*** of the sentence, immediately enforceable detention order or arrest warrant exists; when it is intended to land, the requesting Party shall submit a formal request for transit. In case States are Parties to AP4, only in the event of an unscheduled landing is the requesting State required to immediately certify that a ***copy*** of one of the above mentioned documents exists. In any case, this notification shall have the effect of a request for provisional arrest under Article 16 and the requesting Party must submit a request for transit to the Party on whose territory landing has occurred.

The country of transit may refuse to grant transit to one of its ***nationals***. A State may also declare that it reserves the right to grant transit of a person only on some or on all the ***conditions on which it grants extradition***. Transit shall not be carried out through any territory where there is reason to believe that the extradited person's ***life or freedom*** may be threatened by reason of his or her race, religion, nationality or political opinion.

12. Handing over of property

[668] CoE, Committee of Ministers, **Recommendation No. R (80) 7** concerning the practical application of the European Convention on Extradition, 27 June 1980, recommendation concerning transit.

The issue of the handing over of property – with direct connection to the rights of victims – is ruled by **Article 20** of ECE. ***At the request of the requesting Party***, the requested State shall, in so far as its law permits, seize and hand over property which may be required as ***evidence***; and which has been ***acquired as a result of the offence*** and is found in the possession of the person claimed or is discovered subsequently. Property shall be handed over even if extradition, having been agreed to, cannot be carried out due to the ***death*** or ***escape*** of the person sought. If the said property is liable to seizure or confiscation in the territory of the requested State, the latter may, in connection with pending proceedings, ***temporarily retain*** it or hand it over on condition that it is ***returned***. Any right which the requested Party or third parties may have acquired over the said property shall be preserved and, should any such rights exist, the property shall be returned without charge to the requested Party as soon as possible after the trial.

The Committee of Ministers of the CoE recommends that, in applying the provisions of **Article 20 (3)**, Contracting Parties take into consideration the interest of the victim of the offence in a ***speedy return*** of the property seized. Furthermore, the requested State, when handing over property without demanding that it be sent back, shall not enforce any demand for customs duty or any other claim under its ***customs or fiscal legislation*** unless the owner of the property who was the victim of the offence is himself liable for the payment[669]. In so far as extradition requests include a request to hand over property, the requested State should take all possible measures to facilitate the handing over of the property sought[670]. In many States, national law requires that, in order for assets to be seized, the extradition request be accompanied by a request for ***mutual legal assistance*** to that effect.

European Arrest Warrant

An EAW is issued by the ***issuing judicial authority*** of an EU Member State on the basis of a national arrest decision or of an enforceable judgement (**Article 8 (1) (c)** EAW FD). If the location of the sought person is known, it shall be ***sent directly*** to the ***executing judicial authority*** of the Member State where the person can be found (enquires can be made through the contact points of the EJN in order to obtain information about the competent authority, cf. **Article 10 (1)** EAW FD). If the person's identity is unknown, it shall enter as an ***alert in the Schengen Information System*** (SIS) by the national SIRENE bureau.

Once the person is apprehended, it shall be informed of the existence of the EAW and its contents, and also of the possibility of consenting to surrender. He or she has the right to be assisted by a legal counsel and by an interpreter in accordance with the national law of the executing Member State (**Article 11** EAW FD). The executing judicial authority shall take a decision on whether the requested person should remain in detention or be provisionally released – which can happen at any time, provided that the competent authority takes all the necessary measures to prevent the person from absconding (**Article 12** EAW FD).

The person shall then be heard (**Article 14** EAW FD). The executing judicial authority must verify whether there are any grounds for the non-execution of the EAW, as provided for under **Articles 3** (mandatory), **4** (optional) and **4.a)** (judgements *in absentia*) of the EAW FD. If it is decided that the EAW shall not be executed on any of those grounds, the issuing judicial authority shall be immediately notified (**Article 22** EAW FD). Reasons must be given for any refusal to execute an EAW (**Article 17 (6)** EAW FD). If those grounds are not present, deadlines will vary depending on whether the person has given consent to surrender – and, if appropriate, expressly renounced entitlement to the ***rule of speciality*** as provided for under **Article 27 (2)** EAW FD). In principle,

669 CoE, Committee of Ministers, Resolution (75) 12 on the practical application of the European Convention on Extradition, 21 May 1975, recommendation in relation to Article 20.

670 CoE, Committee of Ministers, Recommendation R (96) 9 concerning the practical application of the European Convention on Extradition, 5 September 1996, recommendation in relation to Article 20.

consent may not be revoked, except if the Member State in question provides for the contrary and informs the General Secretariat of the Council thereof (**Article 13 EAW FD**).

If consent is given, the final decision on execution of the EAW shall be taken within 10 days (**Article 17 (2) EAW FD**). If not, the decision must be taken within 60 days after the arrest (**Article 17 (3) EAW FD**). The CJEU clarified that **Article 1(2) EAW FD** requires an executing judicial authority to take a decision on any EAW forwarded to it, even when, in that Member State, a ruling has already been made on a previous EAW concerning the same person and the same acts[671]. In fact, according to the CJEU, nothing precludes the issuing of several successive EAWs against the same person after the execution of a previous EAW has been refused, provided that it does not violate the principle of proportionality or the person's fundamental rights. In accordance with the principle of mutual recognition underlying the EAW system, an executing judicial authority may not verify whether the issuing judicial authority had jurisdiction to issue the EAW at stake and refuse to execute it where it considers that it was not the case[672].

The executing judicial authority may request supplementary information, which shall be provided as a matter of urgency (**Article 15 (2) EAW FD**). In a number of judgments[673], the CJEU referred to Article 15(2) **EAW FD** and gave concrete examples where an executing judicial authority can request additional information which it considers necessary to enable it to make a decision on the surrender. Such information can, *inter alia*, relate to information on the reason why the EAW does not mention a national arrest warrant[674], information on the conditions in which it is envisaged that the individual concerned will be detained in the issuing Member State [675], information on the independence of the judiciary[676], information on the surrender of minors[677], information on the precise nature of a judgment delivered in the issuing Member State in the context of a *ne bis in idem* assessment[678], information in relation to *in absentia* judgments[679] or information on consent in a case of subsequent surrender[680]. In specific cases, the deadlines for decision on the execution of an EAW may be extended for a further 30 days, and the issuing judicial authority immediately informed of the delay and reasons thereof, as well as Eurojust (**Article 17 (4) and (7) EAW FD**). In some of its most recent judgments, the CJEU recalled that Member States are required to comply with the ***time limits*** for adopting decisions relating to an EAW (Article 17 **EAW FD**) and underlined that recourse to Article 15 **EAW FD** (requests for necessary, supplementary information) may take place only as a ***last resort in exceptional cases***[681] .

Surrender shall take place within ***10 days*** after a favourable decision is taken (**Article 23 (2) EAW FD**). If this is not possible due to circumstances beyond the control of any of the Member States, the executing and issuing judicial authorities shall immediately contact each other and agree on a new surrender date, which shall take place within a further 10 days **(Article 23 (3) EAW FD**). Surrender may exceptionally be ***temporarily postponed*** for serious humanitarian reasons, for example if there are substantial grounds for believing that it would manifestly endanger the requested person's life or health. Upon expiry of the time limits for surrender, if the person is still being held in custody he or she shall be released (**Article 23 (4) and (5) EAW FD**).

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[671] CJEU, Case **C-268/17, *AY***, Judgment of 25 July 2018.
[672] CJEU, Case **C-158/21, *Puig Gordi and Others***, Judgement [GC] of 31 January 2023.
[673] Eurojust, ***Case-law by the Court of Justice of the EU on the European Arrest Warrant***, updated until 1 December 2021, p. 95.
[674] CJEU, Case **C-241/15, *Bob-Dogi***, Judgement of 1 June 2016.
[675] CJEU, eg. Case **C-128/18 *Dorobantu***, Judgement [GC] of 15 October 2019; Case **C-220/18 PPU *ML (Conditions of detention in Hungary)***, Judgement of 25 July 2018; **Joined Cases C-404/15 and C-659/15 PPU, *Aranyosi and Căldăraru***, Judgment of 5 April 2016
[676] CJEU, Case ***Minister for Justice and Equality v LM (Deficiencies in the system of justice)***, C-216/18 PPU, Judgement [GC] of 25 July 2018.
[677] CJEU, Case **C-367/16, *Piotrowski***, Judgment of 23 January 2018.
[678] CJEU, Case **C-261/09, *Mantello***, Judgment of 16 November 2010.
[679] CJEU, Case **C-270/17, *Tupikas***, Judgment of 10 August 2017.
[680] CJEU, Case **C-192/12 PPU, *Melvin West***, Judgment of 28 June 2012.
[681] CJEU, Case **C-367/16, *Piotrowski***, Judgment of 23 January 2018; Case **C-220/18 PPU *ML (Conditions of detention in Hungary)***, Judgement of 25 July 2018.

Any period of detention served in the executing Member State shall be deduced from the total period of detention to be served in the issuing Member State as a result of a custodial sentence or detention order being passed (**Article 26 (1) EAW FD**).

The ECtHR, in a case relating to a surrender of a German national from the UK to Romania on the basis of a EAW for the purposes of prosecution in which the applicant complained, under Article 6 (1) and (2) of the Convention, about the manner in which the prosecutor's request for the adoption of the preventive measure had been examined by courts, arguing that he had not been properly notified of the proceedings or given sufficient time to properly examine the case given the complexity of the file, and that the reasoning of the decision indicated that the courts had started from the premise that he was guilty, the Court found that the domestic authorities took reasonable steps to inform the applicant of the proceedings against him and to verify that he was absconding. The applicant was given a possibility to appear and defend himself in person or, as he chose to do, through hired counsel. The Court considered that nothing in the case-file showed that the counsel's ability to represent his client and to put forward arguments in his favour before the authorities of the requested State was limited or restricted.[682]

2.5 Simplified extradition procedure

One of the first issues to be discussed in the context of the modernisation of CoE conventions in the area of international cooperation in criminal matters, the simplified extradition procedure – applicable in cases where the person ***consents*** to his or her extradition – already existed in practice much before the adoption of **AP3**. In fact, there are suggestions that, in some cases, 2/3 of extradition requests were already dealt with under simplified procedures. In a recommendation issued in 1980, 30 years before the adoption of **AP3**, the Committee of Ministers of the CoE recommended that: *with a view to expediting extradition and keeping the period of provisional arrest as short as possible, consideration should be given to the use of a summary procedure enabling the rapid surrender of the person sought without following ordinary extradition procedures, provided that the person concerned consents to it*.[683]

It was, however, this **Additional Protocol to the ECE** – entered into force on 1 May 2012 – which formally established a unified simplified procedure and defined its main features and parameters. It should be noted that **AP3** may apply even if the requested Party has received an extradition request in accordance with **Article 12** of **ECE** (**AP3**, **Article 2 (3)**).

AP3 establishes early on that, when a ***request for provisional arrest*** is submitted under Article 16 of **ECE**, it shall not be necessary to submit a formal extradition request and supporting documents, as required by Article 12 of the **Convention**. The submission of the following information shall be deemed sufficient, without prejudice to the possibility of requesting supplementary information to support decision-making (**AP3**, **Article 2 (1) and (2)**):

- Identity of the person sought, including his or her nationality(ies), when available;
- Authority requesting the arrest;
- Existence of an arrest warrant or equivalent, or of an enforceable judgment;
- Confirmation that the person is sought (cf. Article 1 **ECE**);
- Nature and legal description of the offence, including maximum penalty or penalty imposed, and indication of whether any part of the judgment has already been enforced;
- Information concerning lapse of time and its interruption;
- Description of the circumstances in which the offence was committed, including time, place and degree of involvement of the person sought;
- As far as possible, the consequences of the offence;

[682] ECtHR, Case ***B.A.A. v. Romania***, No. 70621/16, Decision of 26 March 2019, §26.
[683] CoE, Committee of Ministers, **Recommendation No. R (80) 7** concerning the practical application of the European Convention on Extradition, 27 June 1980, recommendation concerning *summary extradition*.

- If extradition is requested for the enforcement of a final judgment, information of whether the judgment was rendered *in absentia;*

Once the person is ***arrested***, the competent authority of the requested Party will ***inform*** him or her, in accordance with its domestic legislation and without delay, of the extradition request and possibility to apply the simplified procedure (**AP3**, **Article 3**). Communications between Parties may be forwarded through ***electronic or any other means*** affording evidence in writing, under conditions which allow the Parties to ascertain their authenticity, as well as through Interpol. The Party concerned may be requested to submit the originals or authenticated copies of documents at any time (**AP3**, **Article 8**).

At the moment of signature or when becoming a Party to **AP3**, any State may declare that **Article 14** of **ECE** (concerning the ***rule of speciality***) will not apply to extraditions under this simplified procedure, either ***automatically*** or upon ***express renunciation*** of the sought person to the entitlement to such rule (**AP3**, **Article 5**). To be able to do so, if applicable, and also in order to give his/her consent to extradition, the person shall be heard by the competent authority of the requested State. Such ***consent and renunciation*** must be given voluntarily and in full awareness of the legal consequences. For these purposes, the person sought has the right to ***legal counsel*** and, if necessary, to benefit from the assistance of an ***interpreter*** (**AP3**, **Article 4 (1) and (2)**). The need for such procedural guarantees in this instance has been consistently underlined by experts throughout discussions on a simplified extradition procedure[684].

The person's consent and, where applicable, renunciation to the rule of speciality shall be ***recorded*** and, in principle, ***may not be revoked***, except if the requested State has made a declaration consenting to such revocation, under **Article 4 (5)** of **AP3**. In this case, **consent** may be ***revoked*** until the requested State takes his ***final decision*** on extradition under the simplified procedure; and **renunciation to the rule of speciality** may occur until ***surrender***.

No later than ***10 days*** after the arrest, the requesting Party shall be ***notified*** of whether the person sought has given consent to extradition, so that it may, where applicable, submit an extradition request under **Article 12** of **ECE** (**AP3**, **Article 6 (1)**). If the person gives his or her consent after this 10-day deadline, the requested Party shall still apply the simplified procedure, provided that it has not yet received a request for extradition under **Article 12** of **ECE** (**AP3**, **Article 10**). In exceptional cases when, despite consent of the person sought, the requested State decides not to apply the simplified procedure, it shall also notify the requesting State "sufficiently in advance" and before the period of 40 days provided for under **Article 16** of the **Convention** expires, entailing the release of the person from provisional detention (**AP3**, **Article 6 (2)**).

In case the person sought consents to extradition, the requesting State shall take its ***decision*** regarding extradition and ***notify it within 20 days*** from the date of consent. ***Surrender*** shall take place as soon as possible, preferably within ***10 days*** from the date of this notification (**AP3**, **Articles 7 and 9**). ***Transit*** shall be governed by **Article 21** of **ECE**, but the request for transit only needs to contain the information necessary to initiate the simplified extradition procedure. Supplementary information may also be requested in this context (**AP3**, **Articles 2 (1) and 11**). Already in 1980, the Committee of Ministers had recommended that, when a summary extradition procedure was used and transit involved the presence of the person concerned in the territory of the State of transit for a ***short period*** only, this State considered authorizing it without the production of all the documents mentioned in **Article 12** of **ECE**[685].

2.6 Competing requests

[684] **PC-OC (2006) 16**, *Summary report of the 52nd meeting of the PC-OC*, Strasbourg, 20 November 2006, p. 7.
[685] CoE, Committee of Ministers, **Recommendation No. R (80) 7** concerning the practical application of the European Convention on Extradition, 27 June 1980, recommendation concerning transit, paragraph d).

States may receive multiple arrest warrants or requests for extradition concerning the same person. This matter is regulated by **Article 17 ECE**, which establishes that (emphasis added):

> *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.*

It is recommended that, 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; and also 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[686].

At the **EU level, Article 16** of the **EAW FD** regulates the decision-making process for the executing judicial authority that receives multiple requests for the surrender/extradition of the same person. It reads (emphasis added):

Article 16

Decision in the event of multiple requests

*1. If **two or more Member States have issued European arrest warrants for the same person**, the decision on which of the European arrest warrants shall be executed shall be taken by the executing judicial authority **with due consideration of all the circumstances** and especially the relative seriousness and place of the offences, the respective dates of the European arrest warrants and whether the warrant has been issued for the purposes of prosecution or for execution of a custodial sentence or detention order.*

*2. The executing judicial authority **may seek the advice of Eurojust** when making the choice referred to in paragraph 1.*

*3. In the event of a **conflict between a European arrest warrant and a request for extradition** presented by a third country, the decision on whether the European arrest warrant or the extradition request takes precedence shall be taken by the competent authority of the executing Member State **with due consideration of all the circumstances**, in particular those referred to in paragraph 1 and those mentioned in the applicable convention.*

*4. This Article shall be without prejudice to Member States' obligations under the Statute of the **International Criminal Court**.*

Some **key principles** deriving from EU law should be applied by States when deciding on a competing request. In particular:

- Member States are, in principle, ***obliged to give effect to an EAW***;
- They should ***not create a risk of impunity*** of the requested person;
- They should base their decision on competing requests on the facts of each individual case and consider all the factors deemed relevant. They should ***balance, carefully and fairly***, ***all the factors*** both for and against executing one request instead of the other.

In 2019, Eurojust had to deal with the case of an international contract killer of Serbian and Hungarian dual nationality who was suspected of committing three proven murders, connected to drug trafficking crimes in Amsterdam, Budapest and Belgrade. The contract killer, who remained at large, was therefore wanted in two EU Member States and in one third-party country (Serbia). On 1 March 2019, following intense judicial cooperation via Eurojust, the suspect was arrested

[686] CoE, Committee of Ministers, **Recommendation No. R (96) 9** concerning the practical application of the European Convention on Extradition, 5 September 1996, paragraph b).

and successfully searched for evidence in Prague. The Czech authorities had to decide which surrender/extradition request they should prioritize and serve the evidence seized.

Thus, the National Desks at Eurojust quickly arranged a close **dialogue between the countries concerned**, advised on a **possible transfer** of proceedings to avoid potential conflicts of jurisdiction, and **offered round-the-clock translation and transmission** of EAWs and European Investigation Orders. Following the agreement to transfer the Dutch proceedings to Hungary, the joint conclusion set up and disseminated by Eurojust suggested that Hungary was best placed to prosecute. As Serbia was not legally in a position to either try the Dutch case or surrender its case to Hungary, the suspect was subsequently surrendered to Hungary upon the decision of the Czech Municipal Court in Prague and Minister of Justice. In the case of conviction, the suspect may be surrendered to Serbia following the service of his term in Hungary.

The ultimate decision regarding competing EAWs is made by the ***competent national authorities of the executing Member State***. However, ***early consultation*** between the concerned national authorities is likely to produce a better outcome and is regularly discussed in cases coordinated through Eurojust (EU Agency which operates as a hub where national judicial authorities work closely together to fight serious organised cross-border crime).

With a view to supporting practitioners in the event of multiple EAWs and extradition requests, Eurojust published the **Guidelines for deciding on competing requests for surrender and extradition**.

These Guidelines distinguish **five different scenarios**: **1.** Two or more EAWs against the same person for prosecution of the same offence(s); **2.** Two or more EAWs against the same person for prosecution of different offences; **3.** Two or more EAWs against the same person of which one (or more) EAW(s) for prosecution and one (or more) EAW(s) for the execution of a custodial sentence or a detention order in relation to different offences; **4.** Two or more EAWs against the same person for the execution of two (or more) custodial sentences or detention orders in relation to different offences; **5.** One or more EAW(s) and one (or more) request(s) for extradition. They suggest factors that must be given due consideration before the executing authority takes a decision on competing requests. They include the factors mentioned in the Framework Decision, but complement and develop these factors in light of the five scenarios identified.

Another element to consider, particularly relevant in extradition requests, is at which **moment the principle of double criminality should apply**. Most States appear to apply this principle having regard to the moment when the decision on extradition is made, considering this as the reference moment to assess dual or double criminality. However, certain States may consider other moments, including when the alleged offence was committed or when the request for extradition was introduced (see **Chapter 2.9** for further details) [687].

2.7 The rule of speciality

The rule of speciality is one of the traditional tenets in the field of extradition, expressly provided for under **Article 14** of **ECE**. The provisions of the original wording of this Article have been strengthened and adapted pursuant to the entry into force of **AP4**, which in fact replaced Article 14 in its entirety. In accordance with this rule, a person who has been extradited ***shall not be proceeded against, sentenced or detained*** (according to **AP4**, also ***arrested, prosecuted and tried***) with a view to the carrying out of a *sentence or detention order*, nor shall he or she be for any other *reason restricted in his or her personal freedom****, for any offence committed prior to his surrender other than that for which he or she was extradited.*** This cardinal principle

[687] CoE, **Help Online Course on International Cooperation in Criminal Matters**, Module 2 - Extradition and surrender, pp. 32-35.

admits, however, a number of exceptions, and may be diluted within the simplified extradition procedure, which today accounts for the vast majority of extradition procedures.

a) When the ***Party which surrendered the person so consents***: a request for consent shall be submitted, accompanied with the documents required under **Article 12** (these will vary depending on whether the State is a Party to the **original Convention** only and to its **Second** and **Fourth** Additional Protocols) and a legal record of any statement made by the concerned person in relation to the offence. ***Consent shall be given when the offence for which it is requested is itself subject to extradition***. **AP4** sets a maximum of 90 days for the decision to be taken (**Article 14 (1) (a)** in its revised version).

b) When the person, having had the opportunity to leave the territory of the Party to which he or she has been surrendered, does not do so within ***45 days*** of final discharge (***30 days*** in accordance with **AP4**), or has ***returned*** to such territory after leaving it.

c) When the extradition is undertaken in accordance with the ***simplified extradition procedure*** established by **AP3**and the State has made a declaration to the effect that Article 14 of the Convention (thus, the rule of speciality) shall not apply to extraditions undertaken in accordance with such simplified procedure, either ***automatically*** or upon ***express renunciation*** of the sought person to the entitlement to such rule (**AP3**, **Article 5**). As stated before, in principle such renunciation (if necessary) ***may not be revoked***, except if the concerned State has declared that it accepts such revocation, in this case until the moment of surrender. To ensure that the person's consent is given voluntarily and in full awareness of its legal consequences, he or she shall be entitled to legal counsel and, if necessary, to the assistance of an interpreter (see above).

Notwithstanding the rule of speciality, the requesting Party may always take the necessary measures, including proceedings by default, to ***prevent any legal effects of the lapse of time***, as well as measures to ***remove the person from its territory*** (**Article 14 (2)**). **AP4** has also introduced the possibility of this State carrying out ***pre-trial investigations***, except for measures ***restricting the personal freedom*** of the person concerned, but even this prohibition may be the object of **derogation**, provided that a declaration to this effect is made by both concerned States. In this case, the requesting Party may restrict the personal freedom of the extradited person from the moment it requests waiving the rule of speciality, provided that the requested Party is notified of the date when such restriction is to be applied and its competent authority explicitly acknowledges receipt of this notification. The requested Party may express opposition to the restriction at any time and, if this is the case, the restriction must be immediately terminated, if necessary by releasing the person (**Article 14 (3) c**f. **AP4**).

Furthermore, 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 14 (3)** in the **original Convention** and **Article 14 (4)** cf. **AP4**). Thus, there is an evident attachment to the ***facts***, instead of the offence.

The rule of speciality is not, as such, mentioned in the **ECHR** and the ECtHR examines alleged violations thereof in connection with other Convention rights, namely those enshrined in **Article 5** – in relation to the requested State – and **Article 6** of this Convention – in relation to the requesting State (since the day when the authorities of the requested State arrest the individual).[688] The reasoning is: if the person detained is not informed about all the charges against him or her, namely the basis of the request for extradition, and the precise content of the arrest warrant accompanying the extradition request, then he or she will be deprived, *inter alia*, of the rights guaranteed in **Article 5 (2) and (4)** (rights of those detained to information about the reasons for the arrest and to challenge the lawfulness of such arrest) and in **Article 13** (right to an effective remedy) of the Convention. This may also compromise the enjoyment of the right to a fair trial under **Article 6** of the **ECHR**, and in particular the rights of defence guaranteed by

[688] ECtHR, **Case Gelli v. Italy**, N.º 37752/97, Judgement of 19 October 1999, paragraph 37.

paragraph 3 of this Article. Therefore, the principle of speciality enshrined in the **ECE** completes the continuity and the harmonised application of the provisions of the **ECHR**.

In case **Salem v. Portugal** (2006), relating to the extradition of an Indian national from Portugal to India for the purposes of prosecution on charges relating to terrorism, the applicant complained that the Indian authorities were prosecuting him for offences not enumerated in the extradition request, in violation of the principle of speciality. Having the complaint been submitted against Portugal, the Court considered that the good faith of the Portuguese government could not be put into question in this case, and that what was at stake was the respect of international law by the Indian Union, which could not be viewed as a State not governed by the rule of law. The Court thus concluded that no risk of "flagrant denial of justice" had been substantiated and declared the complaint inadmissible[689].

In case **Zandbergs v. Latvia** (2011), relating to an extradition from the USA to Latvia for the purposes of criminal prosecution, in which the applicant alleged that his right to a fair trial was breached because the Latvian authorities had properly obtained the consent from the US authorities to put him on trial for murder. The Court observed that the acting Secretary of State of the US expressly approved the applicant's deportation to Latvia on the charge of aggravated murder. It underlined that all three levels of Latvian jurisdiction had examined this issue and found such approval to be sufficient to put the applicant on trial. The Court did not find this conclusion unreasonable and reiterated in this respect that it is primarily for the national authorities, notably the courts, to resolve problems of interpretation of national legislation. Therefore, no violation of Article 6 was found[690]

Case **Woolley v. United Kingdom** (2012) dealt with an extradition from Switzerland to the UK for the purpose of the execution of the remainder of a sentence of imprisonment; the UK authorities not only enforced this sentence, but also imposed further imprisonment in default of payment of a confiscation order that had been part of the original sentence. The applicant complained that the imposition of imprisonment in default of payment of the confiscation order was arbitrary and breached the rule of specialty. The Court concluded that the default term was an integral part of the confiscation order, which was in turn part of the original sentence and thus does not appeared to be unreasonable or arbitrary. The execution of the default term of the confiscation order did not involve the bringing of any new "criminal charge" for the purposes of **Article 6 (1)** of the **Convention**. In so far as there was a dispute between the two States concerned regarding whether the specialty rule had been breached, the Court observed that the **ECE** does not contain a dispute resolution mechanism and considered that that it was not for itself to resolve what was essentially a diplomatic dispute. As to the applicant's argument that his detention was arbitrary as a result of the failure of the courts to take into account the reservations of the Swiss authorities, the Court emphasised that he did not allege bad faith or an intention to deceive in respect of the UK authorities. Indeed, the High Court specifically found that the UK had not deliberately misled the Swiss authorities, that it had always made its intentions clear and that there had been no improper or unfair manipulation of the processes of extradition or for the enforcement of the default term. The Court considered that, at most, the applicant relied on a misunderstanding by the Swiss authorities of the position of the UK, and that such misunderstanding did not render the applicant's detention arbitrary in all the circumstances of the case. Thus, no violation of **Article 5 (1) (a)** was either found[691].

It should be noted that the principle of speciality has also been included in the **Rome Statute of the International Criminal Court**[692]. In that system the principle imposes a limit on the charges with which the Court may proceed after surrender, subject to possible waiver by the requested State.

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[689] ECtHR, **Case Salem v. Portugal**, No.: 26844/04, decision of 9 May 2006.
[690] ECtHR, Case **Zandbergs v. Latvia**, No.: 71092/01, Judgment of 20 December 2011, §82.
[691] ECtHR, Case **Woolley v. United Kingdom**, No.: 28019/10, Judgment of 10 April 2012, §§83 and 84.
[692] **Rome Statute of the International Criminal Court**, UN Doc. A/CONF. 183/9, Article 101.

European Arrest Warrant

In what concerns the execution of EAWs, given the principle of ***mutual trust*** underlying the relations between Member States, the rule of speciality is reflected in somewhat inverse terms as those enshrined in the **ECE**. **Article 27** of the **EAW FD**[693] reads as follows:

Article 27

Possible prosecution for other offences

1. Each Member State may notify the General Secretariat of the Council that, in its relations with other Member States that have given the same notification, consent is presumed to have been given for the prosecution, sentencing or detention with a view to the carrying out of a custodial sentence or detention order for an offence committed prior to his or her surrender, other than that for which he or she was surrendered, unless in a particular case the executing judicial authority states otherwise in its decision on surrender.

2. Except in the cases referred to in paragraphs 1 and 3, a person surrendered may not be prosecuted, sentenced or otherwise deprived of his or her liberty for an offence committed prior to his or her surrender other than that for which he or she was surrendered.

3. Paragraph 2 does not apply in the following cases:

> *(a) when the person having had an opportunity to leave the territory of the Member State to which he or she has been surrendered has not done so within 45 days of his or her final discharge, or has returned to that territory after leaving it;*
>
> *(b) the offence is not punishable by a custodial sentence or detention order;*
>
> *(c) the criminal proceedings do not give rise to the application of a measure restricting personal liberty;*
>
> *(d) when the person could be liable to a penalty or a measure not involving the deprivation of liberty, in particular a financial penalty or a measure in lieu thereof, even if the penalty or measure may give rise to a restriction of his or her personal liberty;*
>
> *(e) when the person consented to be surrendered, where appropriate at the same time as he or she renounced the speciality rule, in accordance with Article 13;*
>
> *(f) when the person, after his/her surrender, has expressly renounced entitlement to the speciality rule with regard to specific offences preceding his/her surrender. Renunciation shall be given before the competent judicial authorities of the issuing Member State and shall be recorded in accordance with that State's domestic law. The renunciation shall be drawn up in such a way as to make clear that the person has given it voluntarily and in full awareness of the consequences. To that end, the person shall have the right to legal counsel;*
>
> *(g) where the executing judicial authority which surrendered the person gives its consent in accordance with paragraph 4.*

4. A request for consent shall be submitted to the executing judicial authority, accompanied by the information mentioned in Article 8(1) and a translation as referred to in Article 8(2). Consent shall be given when the offence for which it is requested is itself subject to surrender in accordance with the provisions of this Framework Decision. Consent shall be refused on the grounds referred to in Article 3 and otherwise may be refused only on the grounds referred to in Article 4. The decision shall be taken no later than 30 days after receipt of the request.

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693 **Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States** (2002/584/JHA).

For the situations mentioned in Article 5 the issuing Member State must give the guarantees provided for therein.

The CJEU has, on a number of occasions, been called upon to interpret the principle of speciality in the context of the execution of EAW. In 2008, this Court clarified the exact scope of this principle in the context of a case concerning two individuals surrendered to Finland for drug-trafficking offences related to amphetamines, but later indicted in relation to hashish. The Court was asked, inter alia, whether a modification of the description of the offence – which concerns only the kind of narcotics in question – falls within the classification of 'other offence' and thus require consent from the executing authority.

The Court replied that ***to establish whether the offence under consideration is an 'other offence' within the meaning of Article 27(2) EAW FD, it must be ascertained whether the constituent elements of the offence, according to the legal description given by the issuing Member State, are those in respect of which the person was surrendered and whether there is a sufficient correspondence between the information given in the arrest warrant and that contained in the later procedural document. Modifications concerning the time or place of the offence are allowed, insofar as they derive from evidence gathered in the course of the proceedings conducted in the issuing Member State concerning the conduct described in the arrest warrant, do not alter the nature of the offence and do not lead to grounds for non-execution under Articles 3 and 4 EAW FD. In circumstances such as those in the main proceedings, a modification of the description of the offence concerning the kind of narcotics concerned is not, of itself, to define an offence other than that for which the person was surrendered within the meaning of Article 27(2) EAW FD. The exception in Article 27(3)(c) EAW FD must be interpreted as meaning that, where there is an offence other than that for which the person was surrendered, consent must be requested, in accordance with Article 27(4) EAW FD, and obtained if a penalty or a measure involving the deprivation of liberty is to be executed. The person surrendered can be prosecuted and sentenced for such an offence before that consent has been obtained, provided that no measure restricting liberty is applied during the prosecution or when judgment is given for that offence. The exception in Article 27(3)(c) does not, however, preclude a measure restricting liberty from being imposed on the person surrendered before consent has been obtained where that restriction is lawful on the basis of other charges which appear in the EAW.***

Therefore, to ascertain whether an "other offence" is at stake, a **comparison** must be made between the ***description of the offence in the EAW*** and in the later ***procedural document***, in order to assess whether the constituent elements of the offence, according to the legal description given by the issuing Member State, are those for which the person was surrendered; and if there is a sufficient correspondence between the information given in the EAW and that contained in the later procedural document. The speciality rule does not require consent for every modification of the description of the offence (consent for every modification would go beyond what is implied by the speciality rule and interfere with the objective of speeding up and simplifying judicial cooperation as pursued by the **EAW FD**) and modifications concerning the time or place of the offence are allowed if they: derive from evidence gathered in the course of the proceedings conducted in the issuing Member State concerning the conduct described in the EAW; do not alter the nature of the offence; and do not lead to grounds for non-execution under Articles 3 and 4 **EAW FD**. According to the CJEU, a modification of the description of the offence concerning the kind of narcotics is not, of itself, to define an *other offence* since, while the indictment relates to the importation of hashish whereas the EAW refers to the importation of amphetamines, the offence is still punishable by imprisonment for a maximum period of at least 3 years, and it comes under the category *illegal trafficking in narcotic drugs* of Article 2(2) **EAW FD**. The exception mentioned in Article 27(3)(c) **EAW FD** must be interpreted as meaning that: when there is an *other offence*, consent must, in principle, be requested and obtained if a penalty or a measure involving the deprivation of liberty is to be executed; a measure restricting liberty can be imposed on the person before consent has been obtained if the restriction is lawful on the basis of other charges which appear in the EAW; the person can be prosecuted and sentenced for the 'other

offence' before consent has been obtained, provided that no measure restricting liberty is applied during the prosecution or when the judgment is given for that offence; if, after judgment has been given, the person is sentenced to a penalty or a measure restricting liberty, consent is required to enable that penalty to be executed.[694]

In September 2020, the CJEU further clarified the scope of the rule of speciality as enshrined in Article 27 of the **EAW FD** by stating that ***Article 27(2) and (3) EAW FD must be interpreted as meaning that the rule of speciality does not preclude a measure involving a deprivation of liberty taken against a person subject to a first EAW on the basis of an offence different to that which constituted the basis for his or her surrender under that EAW and prior to that offence, when that person's departure from the Member State which issued the first EAW was voluntary and he or she was surrendered to that Member State under a second EAW issued after that departure for the purposes of executing a custodial sentence, provided that, under the second EAW, the judicial authority executing that warrant consented to the extension of the prosecution to the offence which gave rise to that measure involving deprivation of liberty.***

In reaching this conclusion, the Court underlined, *inter alia*, that the rule of speciality is closely connected to the surrender resulting from the execution of a specific EAW, and that the speciality rule that could be invoked in relation to the first surrender of the person does not affect the surrender of the same person on the basis of the second EAW. The rule of speciality concerning the first EAW is not applicable to the new criminal proceedings because these fall within the execution of the second EAW[695].

Back in 2018, the CJEU made clear that the fact that an executing judicial authority was not informed of an additional sentence imposed on the surrendered person does not fall within the scope of the rule of speciality[696].

Concerning what constitutes an "executing judicial authority" for the purpose of decisions to execute EAWs or disapply the speciality rule, the CJEU found that it ***constitutes an autonomous concept of EU law. It covers the authorities of a Member State which, without necessarily being judges or courts, participate in the administration of criminal justice in that Member State, acting independently in the exercise of the responsibilities inherent in the execution of an EAW and which exercise their responsibilities under a procedure which complies with the requirements inherent in effective judicial protection. Articles 6(2), 27(3)(g) and 27(4) EAW FD must be interpreted as follows. The public prosecutor of a Member State who, although he or she participates in the administration of justice, may receive in exercising his or her decision-making power an instruction in a specific case from the executive, does not constitute an 'executing judicial authority' within the meaning of those provisions.***

Therefore, according to the CJEU, for the CJEU an **"executing judicial authority"** must meet the following **requirements**: participate in the administration of criminal justice; be objective and independent; and offer effective judicial protection - where the law of the executing Member State confers the competence to execute an EAW on a ***public prosecutor***, that authority must exercise its responsibility under a procedure, which complies with the requirements inherent to an ***effective judicial protection***. This means that the decision of that authority must be capable of being subject, in that Member State, to an ***effective judicial remedy***. It is for the Member States to ensure that their legal orders effectively safeguard the level of judicial protection required by the **EAW FD**, as interpreted by the CJEU's case-law. They should do that through the procedural

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[694] CJEU, Case **C-388/08, *Leymann and Pustovarov***, Judgment of 1 December 2008, §§55-57, 61-63 and 73-76, cit. in Eurojust, ***Case-law by the Court of Justice of the EU on the European Arrest Warrant***, updated until 1 December 2021, pp. 97-99.

[695] CJEU, Case **C-195/20 PPU, *Generalbundesanwalt beim Bundesgerichtshof (Speciality rule)***, Judgment of 24 September 2020, §§35-42, cit. in Eurojust, ***Case-law by the Court of Justice of the EU on the European Arrest Warrant***, updated until 1 December 2021, pp. 99-100.

[696] CJEU, Case **C-551/18 PPU, *IK***, Judgment of 6 December 2018, §61, cit. in Eurojust, **Case-law by the Court of Justice of the EU on the European Arrest Warrant**, updated until 1 December 2021, pp. 22-23.

rules which they implement and which may vary from one system to another. The same regime applies to decisions to execute an EAW and not to apply the rule of speciality because, although such decisions are distinct and lead, for the person concerned, to distinct effects, they may compromise the liberty of the person concerned given that they may lead to the imposition of a heavier sentence[697].

The CJEU found that **Articles 27(4) and 28(3)(c)** **EAW FD** must be interpreted as not precluding Member States from providing for an ***appeal suspending execution*** of the decision of the judicial authority which rules, within 30 days from receipt of the request, on giving consent either to the prosecution, sentencing or detention with a view to the carrying out of a custodial sentence or detention order of a person for an offence committed prior to the person's surrender pursuant to an EAW, other than that for which the person was surrendered, or to the surrender of the person to a Member State other than the executing Member State, pursuant to an EAW issued for an offence committed prior to the person's surrender, provided that the final decision is adopted within the time limits laid down in Article 17 **EAW FD**[698].

Furthermore, the CJEU also considers that, when the executing judicial authority is requested to give its consent to the person's possible prosecution for offences committed prior to surrender, other than those which motivated it (**Article 27** **EAW FD**), or to his or her subsequent surrender to a third State (**Article 28 (3)** **EAW FD**), such person has the ***right to be heard*** by the executing judicial authority. This hearing can take place in the issuing Member State, in which case the issuing judicial authorities must ensure that the surrendered person's right to be heard is exercised effectively, without the executing judicial authority participating directly. However, it is for the executing judicial authority to ensure that it has sufficient information, in particular as regards the position of the person concerned, to be able to take its decision, in full knowledge of the facts and in full respect of the rights of the defence of the person concerned, on the request for consent and, where appropriate, to request additional information from the issuing judicial authority as a matter of urgency.[699]

2.8 Re-extradition to a third State

Closely connected to the rule of speciality, the re-extradition of a surrendered person to a third State (either a Party or non-Party to **ECE**), for offences committed before surrender, is governed by **Article 15** of this Convention and equally prohibited, as a rule. The , exceptions are the consent of the requested State and situations in which the person fails to leave the territory of the requesting State within 45 days of final discharge (according to the **original Convention**) or 30 days (according to **AP4**)., or returns to such territory after leaving it. **AP4** introduced a 90-days deadline for the requested State to take its decision on consent to re-extradition.

The Committee of Ministers of the CoE recommends that, *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*[700]*.*

PC-OC, in its **Guidance on good practices regarding the post-surrender phase in extradition proceedings**, recommends, in relation to Article 15, that ***consultations between all three parties*** *would be beneficial in cases involving re-extradition, including before submitting the*

[697] CJEU, Case **C-510/19**, ***Openbaar Ministerie (Faux en écritures)***, Judgment of 24 November 2020, §§42-46, 54-55 and 59-64, cit. in Eurojust, ***Case-law by the Court of Justice of the EU on the European Arrest Warrant***, updated until 1 December 2021, pp. 35-37.
[698] CJEU, Case **C-168/13 PPU, *Jeremy F***, Judgment of 30 May 2013, §§37-75.
[699] CJEU, **Joined cases C-428/21 PPU and C-429/21 PPU, *Openbaar Ministerie (Droit d'être entendu par l'autorité judiciaire d'exécution)***, Judgment of 26 October 2021.
[700] CoE, Committee of Ministers, **Recommendation No. R (96) 9** concerning the practical application of the ECE, 5 September 1996, recommendation concerning Articles 15 and 17.

request whenever possible. It is a good practice for Party B's request to be accompanied by information, such as a form or a checklist, drafted by Party C's authorities, detailing the relevant information in first-hand, and not by proxy.

European Arrest Warrant

Subsequent extradition or surrender is covered by **Article 28** of the **EAW FD**, whose paragraph (1) establishes that each Member State may submit a **notification** indicating that it ***consents the surrender*** of a person to a Member State other than the executing Member State pursuant to an EAW issued for an offence committed prior to his or her surrender, under condition of ***reciprocity*** and ***unless stated otherwise*** in its decision on surrender. Paragraph 2 of the same Article provides for a number of cases in which subsequent surrender to a third State is possible without the consent of the executing Member State (eg. if the requested person remains in the territory of the issuing Member States or returns thereto after 45 days of final discharge). The CJEU has ruled that such paragraph must be interpreted as meaning that the subsequent surrender of the requested person to a Member State other than the Member State having last surrendered the person is subject to the consent only of the Member State which carried out that last surrender[701].

2.9 The *non bis in idem* principle

Considered a general principle of international law[702], the *non bis in idem principle* – also known as the prohibition of ***double jeopardy*** – guarantees that ***no one shall be liable to be tried or punished again in criminal proceedings for an offence for which he or she has already been finally acquitted or convicted***. In general, it prohibits duplication of proceedings and penalties of a criminal nature for the same acts and against the same person.

It prohibits the prosecution or trial of an individual for a second offence in so far as it arose from ***identical facts*** or facts that were "substantially" the same as those underlying the first offence. This guarantee comes into play where a new set of proceedings are instituted after a previous acquittal or conviction acquires the force of ***res judicata***[703].

This principle is included in many national, European and international legal instruments, namely:

- **International Covenant on Civil and Political Rights** (Article 14 (7)):
  No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country.
- **European Convention on Human Rights** (Article 4 of **Protocol 7**):
  1. *No one shall be liable to be tried or punished again in criminal proceedings under the jurisdiction of the same State for an offence for which he has already been finally acquitted or convicted in accordance with the law and penal procedure of that State.*
  2. *The provisions of the preceding paragraph shall not prevent the reopening of the case in accordance with the law and penal procedure of the State concerned, if there is evidence of new or newly discovered facts, or if there has been a fundamental defect in the previous proceedings, which could affect the outcome of the case.*

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[701] CJEU, Case **C-192/12 PPU, *Melvin West***, Judgment of 28 June 2012.
[702] Frieland, M.L., *Double jeopardy*, Oxford University Press, 1969, pp. 391-392; Log, S., "The practical applications of ne bis in idem in international criminal law", in Yee, S. (ed.), *International crime and punishment, selected issues*, Vol. 2, University Press of America, 2004, p. 169. Although some doubt its nature as a general principle of law on the basis of the diversity of interpretation world- wide, as will be discussed in the next paragraphs, see Kittichaisaree, K., *International criminal law*, 2001, p. 29
[703] ECtHE, Case ***Sergey Zolotukhin v. Russia***, N.º 14939/03, Judgement [GC] of 10 February 2009, §83.

> ***3.*** *No derogation from this article shall be made under Article 15 of the Convention.*

- **Charter of Fundamental Rights in the European Union** (Article 50):
  No one shall be liable to be tried or punished again in criminal proceedings for an offence for which he or she has already been finally acquitted or convicted within the Union in accordance with the law.
- **Convention Implementing the Schengen Agreement** (CISA) (Article 54)
  A person whose trial has been finally disposed of in one Contracting Party may not be prosecuted in another Contracting Party for the same acts provided that, if a penalty has been imposed, it has been enforced, is actually in the process of being enforced or can no longer be enforced under the laws of the sentencing Contracting Party.

The principle is also included as ***grounds for refusal*** in a large number of instruments on judicial cooperation on criminal matters, such as **Article 9** of **ECE**, in the following terms (emphasis added):

> 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.

AP1, in its Article 2, has supplemented Article 9 of the original Convention by increasing the number of instances in which the extradition of a person is barred where that person has already been tried for the offence in respect of which the extradition claim was made.

Despite its widespread recognition, a distinction is made between the application of *the ne bis in idem* principle at the national level and its application at the international and transnational level. At the ***national level***, the principle is generally recognised, as a final judgment delivered in a particular State has the effect of preventing the authorities of that State from taking subsequent proceedings against the same person on the basis of the same body of facts. At ***international level***, on the other hand, the question is more complex, with the **ECHR** restricting this principle to criminal proceedings undertaken within the jurisdiction of the same State[704], and therefore not prohibiting the prosecution of, or conviction for, the same offence in another State[705].

For example, in case **E.G.M. v. Luxembourg**, relating to the extradition of a Colombian national from Luxembourg to the USA for the purposes of prosecution, subject to the condition that the applicant could not be prosecuted in the USA for those offences for which he had already been prosecuted and tried in Luxembourg, the applicant complained of a violation of *the ne bis in idem* principle. He argued that the request for extradition was based on the same charges as those on which he had already been tried in Luxembourg. The EComHR found, however, that, in the context of criminal proceedings in different States, respect for the *ne bis in idem* principle is not guaranteed by the **ECHR**, or by Article 4 of Protocol No. 7, and that, similarly, the rights and freedoms recognized in the Convention and its Protocols do not include any right not to be extradited. Furthermore, according to the Commission, the phrase "determination of a criminal charge" contained in Article 6 (1) of the **Convention** relates to the full process of the examination of an individual's guilt or innocence for an offence and not merely to the process of determining whether or not a person may be extradited to another country. Therefore, the Commission considered that the extradition proceedings did not entail a decision on the merits of a criminal charge against the applicant within the meaning of Article 6 (1) of the Convention, and found the complaint inadmissible on these grounds[706].

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[704] ECtHR, Case ***Sarria v. Poland***, No. 45618/09, Decision of 18 December 2012.
[705] ECtHR, Case ***Trabelsi v. Belgium***, No. 140/10, Judgment of 4 September 2014, §164; Case ***Amrollahi v. Denmark***, No. 56811/00, Decision of 11 of October 2002; EComHR, Case ***Gestra v. Italy***, No. 21072/92, Decision (Plenary) of 16 January 1995.
[706] EComHR, Case ***E.G.M. v. Luxembourg***, N.º 24015/94, Decision of 20 May 1994, p. 5.

More recently, in case **Krombach v France**[707], in which the applicant had been convicted in France for offences in respect of which he claimed to have been previously acquitted in Germany, the Court held that, since the applicant's prosecution had been carried out by courts in **two different States** (Germany and France), **Article 4 of Protocol No. 7** ***did not apply to the case*** and also declared the complaint incompatible *ratione materiae*. Pursuant to its consistent case-law, it held in particular that such Article does not prevent an individual from being prosecuted or punished by the courts of a State Party to the Convention on the grounds of an offence of which he or she has been acquitted or convicted by a ***final judgment in another State Party*** (§ 40). Furthermore, the Court considered that the fact that France and Germany are members of the EU and that EU law provides a transnational dimension to the *ne bis in idem* principle at the EU level, does not affect the applicability of Article 4 of Protocol No. 7. Moreover, the Court emphasized that the Convention does not prevent States Parties from granting ***wider legal protection*** to the rights and freedoms guaranteed under the Convention, including by virtue of their obligations under European Union law or international treaties. By means of its collective enforcement mechanism of the rights it establishes, the Convention reinforces, in accordance with the principle of subsidiarity, the protection provided at the national level without setting any limits on the latter (Article 53 of the Convention).[708]

The ECtHR explained the basic principles regarding its interpretation of this principle, as framed under Article 4 of **Protocol 7 to the ECHR**, in case **Sergey Zolotukhin v. Russia [GC]**: recognizing that, in previous occasions, it had adopted an approach which emphasised the legal characterisation of the two offences and was too restrictive on the rights of the individual, the Court took the view that Article 4 of Protocol No. 7 should be understood as prohibiting the prosecution or trial of an individual for a second "offence" in so far as it arose from identical facts or facts which were "substantially" the same as those underlying the first offence[709];

According to the Court, the starting point for the determination of whether the ***facts*** in both proceedings were identical or substantially the same should be the statements of fact concerning both the offence for which the applicant had already been tried and the offence of which he or she stands accused. It considered irrelevant which parts of the new charges were eventually upheld or dismissed in the subsequent proceedings, because Article 4 of Protocol No. 7 contains a safeguard against being tried or being liable to be tried again in new proceedings rather than a prohibition of a second conviction or acquittal. It held that its inquiry should therefore focus on those facts which constitute a set of concrete factual circumstances involving the same defendant and inextricably linked together in time and space, the existence of which must be demonstrated in order to secure a conviction or institute criminal proceedings[710].

The ECtHR's interpretation as to what constitutes a "final" decision (of acquittal or conviction) is reflected, for instance, in its judgement on case **Sergey Zolotukhin v. Russia**: a decision is final if, according to the traditional expression, it has acquired the force of ***res judicata***. This is the case when it is irrevocable, that is to say when no further ordinary remedies are available or when the parties have exhausted such remedies or have permitted the time limit to expire without availing themselves of them. On the other hand, extraordinary remedies such as a request for the reopening of the proceedings or an application for extension of the expired time-limit are not taken into account for the purposes of determining whether the proceedings have reached a final conclusion[711]. Although these remedies represent a continuation of the first set of proceedings,

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[707] ECtHR, Case ***Krombach v France***, No. 67521/14, decision of 20 February 2018.
[708] ECtHR, ***Guide on Article 4 of Protocol No. 7 to the European Convention on Human Rights - Right not to be tried or punished twice***, CoE, updated on 31 August 2022, §7.
[709] ECtHE, Case **Sergey Zolotukhin v. Russia**, N.º 14939/03, Judgement [GC] of 10 February 2009, §§79-82. See also Case **A and B v. Norway**, Nºs 24130/11 and 29758/11, Judgement [GC] of 15 November 2016, §108.
[710] ECtHE, Case **Sergey Zolotukhin v. Russia**, N.º 14939/03, Judgement [GC] of 10 February 2009, §§83-84.
[711] Eurojust, **Case law by the Court of Justice of the European Union on the principle of ne bis in idem *in criminal matters***, April 2020, p. 19.

the "final" nature of the decision does not depend on them being used[712]. Also, the possibility, under national law, of reopening the criminal investigation if new facts or evidence become available does not preclude the decision from being regarded as "final"[713].

In **Sundqvist v. Finland**[714], the Court found that a decision by a prosecutor not to prosecute was not to be regarded as a "final" decision, in light of the applicable domestic law. Accordingly, a subsequent decision by the Prosecutor General to prosecute the applicant and subsequent conviction did not amount to new proceedings falling under the sphere of Article 4 of Protocol No. 7. The Court has already held that the discontinuance of criminal proceedings by a public prosecutor does not amount to either a conviction or an acquittal, and that therefore Article 4 of Protocol No. 7 has no application in that situation[715].

In case **Mihalache v. Romania**[716], regarding_a situation where a higher-ranking prosecutor's office had a possibility to examine of its own motion, in the context of hierarchical supervision, the merits of decisions taken by a lower-level prosecutor's office and to set it aside, the ECtHR considered that a possibility to reopen the proceedings and reconsider the merits of a decision without being bound by any time-limit did not constitute an "ordinary remedy" and thus did not affect the question of finality of the decision taken by the lower-level prosecutor's office[717]. In the same case, the Court referred to the CJEU's case-law in case Kossowski (see below) and held that for a decision to be final it is also necessary that it be taken after a determination as to the ***merits of the case***. It also clarified that judicial intervention is not necessary in this respect. Yet in the decision on case **Smoković v Croatia**, the ECtHR held that a decision terminating the proceedings due to the expiry of the statutory limits does not involve any investigation of the charges brought against the defendant, but it is based merely on procedural reasons and therefore cannot be regarded as final. Also, in the ECtHR's case-law, a public prosecutor's decision not to prosecute cannot be regarded as final[718].

In **Mihalache v. Romania**, the Court further clarified its methodology for the assessment of the finality of a decision. It explained that, in establishing the "ordinary" remedies in a particular case for the purpose of Article 4 of Protocol No. 7, it takes domestic law and procedure as its starting-point. Domestic law – both substantive and procedural – must satisfy the principle of legal certainty, which requires that both the scope of a remedy for the purposes of Article 4 of Protocol No. 7 be clearly circumscribed in time and that the procedure for its use be clear for those parties that are permitted to avail themselves of the remedy in question. In other words, for the principle of legal certainty to be satisfied, a principle which is inherent to the right not to be tried or punished twice for the same offence, a remedy must operate in a manner that makes clear the point in time when a decision becomes final. In particular, the requirement of a time-limit in order for a remedy to be regarded as "ordinary" is implicit in the wording of the explanatory report itself, which states that a decision is irrevocable where the parties have permitted the "time-limit" to expire without availing themselves of such a remedy. A law conferring an unlimited discretion on one of the parties to make use of a specific remedy or subjecting such a remedy to conditions disclosing a

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[712] [712] ECtHR, ***Guide on Article 4 of Protocol No. 7 to the European Convention on Human Rights - Right not to be tried or punished twice***, CoE, updated on 31 August 2022, §60.
[713] [713] ECtHR, ***Guide on Article 4 of Protocol No. 7 to the European Convention on Human Rights - Right not to be tried or punished twice***, CoE, updated on 31 August 2022, §65; Case **Mihalache v. Romania**, Nº 54012/10, Judgment (Grand Chamber) of 8 July 2019, §129.
[714] ECtHR, Case **Sundqvist v. Finland**, No 75602/01, decision of 22 November 2005.
[715] ECtHR, Case **Smirnova and Smirnova v. Russia**, Nos 46133/99 and 48183/99, decision of 3 October 2002; Case **Harutyunyan v. Armenia**, Nº 34334/04, decision of 7 December 2006; Case **Marguš v. Croatia**, Nº 4455/10, Judgment (Grand Chamber) of 27 May 2014, § 120.
[716] ECtHR, Case **Mihalache v. Romania**, No 54012/10, Judgment (Grand Chamber) of 8 July 2019.
[717] ECtHR, ***Guide on Article 4 of Protocol No. 7 to the European Convention on Human Rights - Right not to be tried or punished twice***, CoE, updated on 31 August 2022, §63.
[718] Eurojust, **Case law by the Court of Justice of the European Union on the principle of ne bis in idem *in criminal matters***, April 2020, p. 19.

major imbalance between the parties in their ability to avail themselves of it would run counter to the principle of legal certainty.[719]

In its interpretation of **Article 14 (7) of the ICCPR**, the UN Human Rights Committee (HRC) also considered that such provision "prohibits bringing a person, once convicted or acquitted of a certain offence, either before the same court again or before another tribunal again for the same offence; thus, for instance, someone acquitted by a civilian court cannot be tried again for the same offence by a military or special tribunal." However, such Article "does not guarantee *ne bis in idem* with respect to the national jurisdictions of two or more States", although this "understanding should not, however, undermine efforts by States to prevent retrial for the same criminal offence through international conventions". According to the same Committee, such paragraph also does not prohibit retrial of a person convicted i*n absentia* who requests it, but applies to the second conviction.

The HRC also states that "repeated punishment of conscientious objectors for not having obeyed a renewed order to serve in the military may amount to punishment for the same crime if such subsequent refusal is based on the same constant resolve grounded in reasons of conscience". Furthermore, "the prohibition of article 14, paragraph 7, is not at issue if a higher court quashes a conviction and orders a retrial. Furthermore, it does not prohibit the resumption of a criminal trial justified by exceptional circumstances, such as the discovery of evidence which was not available or known at the time of the acquittal."

The *non bis in idem* principle as provided for under ICCPR applies to ***criminal offences only*** and ***not to disciplinary measures*** that do not amount to a sanction for a criminal offence within the meaning of article 14 of the Covenant[720].

European Union

At the EU level, despite the differences in wording and scope of the *ne bis in idem* principle in various legal provisions, the CJEU has striven in its case-law for a uniform approach in relation to this principle. For example, in view of the shared objective of **Article 54** of the CISA and **Article 3(2)** of the EAW FD, the CJEU has held that an interpretation of the *ne bis in idem* principle given in the context of CISA is equally valid for the purposes of the EAW FD. Similarly, as the principle is enshrined (although not in the exact same terms) in **Articles 54** of CISA and **50** of the CFREU, the former must be interpreted in light of the latter. For instance, with regard to the ***enforcement condition*** that is included in Article 54 of the CISA but not in Article 50 of the Charter, the CJEU concluded that it is compatible with **Article 50** of the Charter. The CJEU also clarified that **Article 50** of the Charter has ***direct effect*** in national legal orders.[721]

Furthermore, there are obvious differences between **Article 50** of the Charter and **Article 4** of Protocol 7 to the ECHR, in particular that Article 50 of the Charter applies both ***within the same Member State and in a cross-border context***, while Article 4 of the Protocol can only apply within the same State. Nevertheless, the CJEU has underlined that even though the ECHR does not constitute a legal instrument formally incorporated into EU law, the guaranteed right of the Charter has the same meaning and the same scope as the corresponding right in the ECHR and that it is necessary to ensure that the interpretation of Article 50 of the Charter does not disregard the level of protection guaranteed by the ECHR in so far as Article 50 of the Charter contains a right corresponding to that provided for under Article 4 of Protocol 7 to the ECHR. In this regard, it should be noted that CJEU and the ECtHR have already referred, on different occasions, to

[719] ECtHR, ***Guide on Article 4 of Protocol No. 7 to the European Convention on Human Rights - Right not to be tried or punished twice***, CoE, updated on 31 August 2022, §62; and ECtHR, Case **Mihalache v. Romania**, No 54012/10, Judgment (Grand Chamber) of 8 July 2019, §115.
[720] HRC, **General Comment No. 32: Article 14: Right to equality before courts and tribunals and to a fair trial,** doc. CCPR/C/GC/32, 23 August 2007, §§54-57.
[721] Eurojust, **Case law by the Court of Justice of the European Union on the principle of ne bis in idem *in criminal matters***, April 2020, p. 7.

each other's case-law. However, the CJEU held that infringements of **Article 50** of the **Charter** and **Article 54** of the **CISA** do not require a remedy permitting the reopening of criminal proceedings; such remedies are available under national law only in the event of infringements of the **ECHR**.[722]

Furthermore, the principle *non bis in idem* constitutes a ground for **mandatory *non-execution of an EAW*** in case the person has been ***finally judged by a Member State*** for the **same acts**, *provided that, where there has been* ***sentence****, the sentence has been* ***served*** *or is* ***currently being served or may no longer be executed*** *under the law of the sentencing Member State;* and a ground ***for*** **optional *non-execution*** of an EAW where a final judgment has been passed upon the requested person in a Member State, in respect of the same acts, but the above mentioned sentencing requirements are not met or they are, but the final judgement has been passed by a ***third State*** (**Article 3 (2) and 4 (3) and (5)** of **EAW FD**.

In several judgments, the CJEU has stated that Article 54 of the **CISA** necessarily implies that the Contracting States have **mutual trust** in each other's criminal justice systems and that they recognise the criminal law in force in the other States even when the outcome would be different if their own national law was applied. The decision at stake of the first State, however, has to constitute a ***final decision*** including a ***determination as to the merits*** of the case.[723] Two requirements must be met for this purpose: firstly, that the decision at stake ***definitely bars further prosecution at the national level***[724]. The CJEU has underlined that the assessment of the "final" nature of the criminal ruling must be carried out on the basis of the law of the Member State in which that ruling was made[725]. In the framework of that assessment, a judicial authority can request that the judicial authority of a Member State in whose territory a decision was taken provide ***legal information on the precise nature*** of that decision[726].

The CJEU has also clarified that the possibility under national law of ***reopening*** the criminal investigation if new facts/evidence become available does not preclude the initial decision from being regarded as a '"inal' decision"[727]. Also, the fact that the decision at issue was taken by a ***prosecuting authority***[728], even where no penalty was enforced[729], is not a decisive factor for the purposes of ascertaining whether that decision definitively bars prosecution. The interpretation given by the first Member State is, however, not absolute, and can be set aside if it is not in line with the objectives of **Article 54** of the **CISA** or **Article 3(2)** of the **TEU**, which comprise not only the need to ensure the free movement of persons but also the need to promote the prevention and combating of crime within the area of freedom, security and justice[730]. Furthermore, it is necessary that the decision at stake be given after a ***determination has been made as to the merits*** of the case[731]. The CJEU held that this requires a detailed investigation to have been

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[722] Eurojust, **Case law by the Court of Justice of the European Union on the principle of ne bis in idem *in criminal matters***, April 2020, p. 7.
[723] Eurojust, **Case law by the Court of Justice of the European Union on the principle of ne bis in idem *in criminal matters***, April 2020, p. 7.
[724] CJEU, Case C-491/07, **Turanský**, Judgment of 22 December 2008, §§41-44; Case C-261/09, **Mantello**, Judgment of 16 November 2010, §47; Case C-398/12, **M.**, Judgment of 5 June 2014, §§28-36, and Case C-486/14, **Kossowski**, Judgment of 29 June 2016, §§34-35.
[725] CJEU, Case C-398/12, **M.**, Judgment of 5 June 2014, §§31-33 and 36; and Case C-486/14, **Kossowski**, Judgment of 29 June 2016, §§34-35.
[726] CJEU, Case C-491/07, **Turanský**, Judgment of 22 December 2008, §§37-38; Case C-261/09, **Mantello**, Judgment of 16 November 2010, §48.
[727] CJEU, Case C-398/12, **M.**, Judgment of 5 June 2014, §§31-33; Case C-486/14, **Kossowski**, Judgment of 29 June 2016, §§52.
[728] CJEU, Joined Cases C-187/01 and C-385/01, **Gözütok and Brügge**, Judgment of 11 February 2003, §§27-40; CJEU, Case C-268/17, **AY**, Judgment of 25 July 2018, §§39-45.
[729] Case C-486/14, **Kossowski**, Judgment of 29 June 2016, §§38-41.
[730] CJEU, Case C-469/03, **Miraglia**, Judgment of 10 March 2005, §§31-34; Case C-486/14, **Kossowski**, Judgment of 29 June 2016, §52, and Eurojust, **Case law by the Court of Justice of the European Union on the principle of ne bis in idem *in criminal matters***, April 2020, pp. 18-19.
[731] CJEU, Case C-469/03, **Miraglia**, Judgment of 10 March 2005, §§31-34; Case C-150/05, **Van Straaten**, Judgment of 28 September 2006, §§55-59; CJEU, Case C-398/12, **M.**, Judgment of 5 June 2014, §§28 and 30; and Case C-486/14, **Kossowski**, Judgment of 29 June 2016, §§35-44.

undertaken[732]. At the same time, the CJEU held that an acquittal or a decision of *non-lieu* (i.e. a finding that there were no grounds to refer the case to a trial court because of insufficient evidence) also satisfies this requirement[733]. To date, the CJEU has accepted as ***a decision that has been finally disposed of*** an out-of-court settlement with the public prosecutor[734], a court acquittal based on lack of evidence[735], a court acquittal arising due to the prosecution of the offence being time-barred [736] and a decision of *non-lieu*[737].

The CJEU has also clarified[738] that the term ***same acts*** is an autonomous concept of EU law and has the same meaning in the context of **Article 54** of the **CISA** and in **Articles 3 (2) and 4 (5)** of **EAW FD**[739]. The same Court confirmed that the question of whether a case has been ***finally judged*** must be determined by the law of the Member State in which judgment was delivered[740]. It also held that **Articles 3 (2) and 4 (3)** **EAW FD** cannot be relied on for the purpose of refusing to execute an EAW in cases where a public prosecutor's office terminated an investigation opened against an unknown person during which the person who is the subject of the EAW was ***interviewed as a witness only***[741]. In relation to the ***enforcement condition*** under **Article 4(5)** **EAW FD**, the CJEU held that such condition is satisfied in case of ***partial remission*** of the sentence in accordance with the law of the sentencing country; however, it is for the executing judicial authority, when exercising the discretion it enjoys, to strike a balance between preventing impunity and ensuring legal certainty for the person concerned by taking into account all the relevant circumstances, including the fact that the requested person has been the object of a general leniency measure[742].

The CJEU has also considered that **Article 4 (5)** must be interpreted as meaning that, where a Member State chooses to transpose that provision into its domestic law, the executing judicial authority must have a ***margin of appreciation*** in order to determine whether or not it is appropriate to refuse to execute an EAW on the grounds referred to in that provision.[743] This is in line with **Article 58** of **CISA**: *The above provisions shall not preclude the application of broader national provisions on the* ne bis in idem principle *with regard to judicial decisions taken abroad.* In case **Kraaijenbrink**, the CJEU made clear that this margin of discretion is not unlimited; for example, it does not authorise States to refrain from trying a drugs offence on the sole grounds that the person charged has already been convicted in another Contracting State of other offences motivated by the same criminal intention[744].

Regarding the ***identity of facts*** that form the basis of prosecution or punishment, both CJEU and ECtHR follow a similar approach, considering that the relevant criterion in this regard is the identity of the ***material acts***, understood as the existence of a ***set of facts which are inextricably linked together***, irrespective of the legal classification given to them or the legal interest protected. So, for example, punishable acts of exporting and importing the same narcotic drugs are in principle to be regarded as "the same acts", although the definitive assessment is left to the competent

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[732] CJEU, Case C-486/14, **Kossowski**, Judgment of 29 June 2016, §§35-38.
[733] Case C-150/05, **Van Straaten**, Judgment of 28 September 2006, §§55-59; Case C-398/12, **M.**, Judgment of 5 June 2014, §§28 and 30;
[734] CJEU, Joined Cases C-187/01 and C-385/01, **Gözütok and Brügge**, Judgment of 11 February 2003, §§27-32.
[735] CJEU, Case C-150/05, **Van Straaten**, Judgment of 28 September 2006, §§55-59.
[736] CJEU, Case C-467/04, **Gasparini**, Judgment of 28 September 2006, §§23-30.
[737] CJEU, Case C-398/12, **M.**, Judgment of 5 June 2014, §§28-36.
[738] Eurojust, ***Case-law by the Court of Justice of the EU on the European Arrest Warrant***, updated until 1 December 2021, pp. 69-70.
[739] CJEU**,** Case **C-665/20 PPU, *X (Mandat d'arrêt européen* - Ne bis in idem)**, Judgment of 29 April 2021; Case **C-261/09, *Mantello***, Judgment of 16 November 2010.
[740] CJEU, Case **C-261/09, *Mantello***, Judgment of 16 November 2010.
[741] CJEU, Case **C-268/17, *AY***, Judgment of 25 July 2018, §§39-45
[742] CJEU**,** Case **C-665/20 PPU, *X (Mandat d'arrêt européen* - Ne bis in idem)**, Judgment of 29 April 2021.
[743] CJEU, Case **C-665/20 PPU, *X (Mandat d'arrêt européen* - Ne bis in idem)**, Judgment of 29 April 2021.
[744] Ibid., §34.

national courts[745]. The CJEU has further clarified that the inextricable link does not require the quantities of the drug at issue in the two Contracting States to be identical[746] and that such a link does not depend solely on the intentions of the defendant (subjective link), since an objective link between the material elements in the two proceedings must be established[747].

On the other hand, the CJEU ***rejected the application*** of **Article 54** of the **CISA** in cases where a judicial authority had closed proceedings without any assessment of the unlawful conduct with which the defendant had been charged[748], cases where a police authority, following the expiry of the limitation period and an examination of the merits of the case, had submitted an order to suspend the criminal proceedings (provided that the suspension decision does not, under the national law of that State, definitively bar further prosecution and therefore does not preclude new criminal proceedings, in respect of the same acts, in that State)[749], cases where a decision by the public prosecutor to terminate the criminal proceedings against a person was adopted without a detailed investigation having been undertaken[750], and cases where the public prosecutor closed criminal investigations against unknown persons and the person involved was only interviewed as a witness[751].

So far, the CJEU has assessed two different **limitations** to the *ne bis in idem* principle under **Article 50** of the **Charter**: the ***enforcement condition*** under Article 54 **CISA** and the ***duplication of criminal proceedings and administrative proceedings of a criminal nature*** against the same person for the same facts.

Contrary to Article 50 of the Charter, Article 54 of the **CISA** makes the application of the *ne bis in idem* principle subject to the condition that, upon conviction and sentencing, the penalty imposed', ***is actually in the process of being enforced*** or ***can no longer be enforced*** (known as the "enforcement condition"). Notwithstanding this lack of uniformity, the CJEU acknowledged the relevance of the enforcement requirement of the *ne bis in idem* principle to the EU's area of freedom, security and justice and underlined its compatibility with the Charter[752].

In its case-law, the CJEU held that ***out-of-court settlements***[753] and ***suspended sentences***[754] must be regarded as penalties which are actually in the process of being enforced or which have been enforced. Similarly, it accepted that the enforcement condition had been fulfilled if a penalty could no longer be enforced, regardless of whether that penalty could ever have been executed in practice[755]. By contrast, the CJEU rejected the possibility that the enforcement condition had

[745] Eurojust, **Case law by the Court of Justice of the European Union on the principle of ne bis in idem *in criminal matters***, April 2020, pp. 14-18; CJEU, Case C-436/04, **Van Esbroeck**, Judgment of 9 March 2006, §§28-35; CJEU, Case C-150/05, **Van Straaten**, Judgment of 28 September 2006, §§41-52; Case C-467/04, **Gasparini**, Judgment of 28 September 2006, §54-56; Case C-288/05, **Kretzinger**, Judgment of 18 July 2007; §§29-36; CJEU, Case C-367/05, **Kraaijenbrink**, Judgment of 18 July 2007, §§§30-32; Case C-524/15, **Menci**, Judgment of 20 March 2018, §§36-38; Case C-537/16, **Garlsson Real Estate and others**, Judgment of 20 March 2018, §§37-40.
[746] CJEU, Case C-150/05, **Van Straaten**, Judgment of 28 September 2006, §49.
[747] CJEU, Case C-367/05, **Kraaijenbrink**, Judgment of 18 July 2007, §§§30-31.
[748] CJEU, Case C-469/03, **Miraglia**, Judgment of 10 March 2005, §§31-34.
[749] CJEU, Case C-491/07, **Turanský**, Judgment of 22 December 2008, §§35-38.
[750] CJEU, Case C-486/14, **Kossowski**, Judgment of 29 June 2016, §§51-52.
[751] CJEU, Case C-268/17, **AY**, Judgment of 25 July 2018, §§39-45.
[752] Eurojust, **Case law by the Court of Justice of the European Union on the principle of ne bis in idem *in criminal matters***, April 2020, p. 26; and CJEU, Case C-129/14 PPU, **Spasic**, Judgment of 27 May 2014, §§57-72.
[753] CJEU, Joined Cases C-187/01 and C-385/01, **Gözütok and Brügge**, Judgment of 11 February 2003, §§27-40.
[754] CJEU, Case C-288/05, **Kretzinger**, Judgment of 18 July 2007; §§40, 42, 44, 49 and 50.
[755] CJEU, Case C-297/07, **Bourquain**, Judgment of 11 December 2008, §§47-50.

been fulfilled in cases of a suspect being held in police custody and/or on remand pending trial for a short time[756] and in cases where only one part of the sentence had been enforced[757].

Furthermore, the CJEU has held that the ***duplication of criminal proceedings and penalties and administrative proceedings and penalties of a criminal nature for the same act*** (the "double-track enforcement system") constitutes a limitation to the *ne bis in idem* principle that ***may be justified*** under **Article 52(1)** of the **Charter** provided that certain conditions are fulfilled[758]: that the duplication is ***provided for by law***; that it respects the ***essential content*** of *ne bis in idem* (eg. permitted only in some exhaustively defined circumstances); that it meets an objective of general interest, in so far as the two sets of criminal proceedings and penalties pursue ***complementary aims*** relating to different aspects of the same unlawful conduct; and that it complies with the principle of ***proportionality*** (eg. clear and precise rules as to when an act can be subject to duplication of proceedings; rules ensuring coordination that limits disadvantage resulting from duplication to what is strictly necessary and ensure that the severity of all the penalties imposed does not exceed the seriousness of the offence).[759] In joined cases **Di Puma and Zecca**, the CJEU, despite recognizing that the duplication of such proceedings could be justified, considered that the bringing of proceedings for an administrative fine of a criminal nature where a final criminal judgment had established that the acts capable of constituting a violation of the legislation on insider dealing were not established clearly exceeds what is necessary in order to achieve this purpose[760].

In this regard, the CJEU has so far only addressed cases of national application of *ne bis in idem*, either related to VAT offences, where criminal proceedings were brought after the administrative ones had been finally concluded[761], or to market manipulation offences, where administrative proceedings were still pending after the criminal proceedings had been terminated by a final decision[762]. Yet it should not be overlooked that **Article 50** of the **Charter** also has transnational effect. Hence, Member States might be confronted with the transnational application of *ne bis in idem* for duplication of punitive sanctions imposed in different Member States[763].

In the above mentioned cases **Menci**, Judgment of 20 March 2018; and Case C-537/16, **Garlsson Real Estate and others**, the CJEU referred to ECtHR [GC] judgment in case **A and B v. Norway**, in which the ECtHR changed its previous case-law on *the ne bis in idem* principle, finding, i*nter alia*, that a ***combination of tax penalties and criminal penalties*** as punishment for the same tax offences did not infringe the principle of *ne bis in idem* as affirmed in **Article 4** of **Protocol 7 to the ECHR**. The ECtHR concluded that there was no duplication of trial or punishment as proscribed by that article, even though the tax penalties at issue in those cases were of a criminal nature and had become definitive before the imposing of the criminal penalties, because there was *a sufficiently close connection, both in substance and in time* between the tax and criminal proceedings in question[764]. The CJEU also considered that *non bis in idem* cannot be invoked in case a tax penalty is imposed on a company with legal personality but the criminal

[756] CJEU, Case C-288/05, **Kretzinger**, Judgment of 18 July 2007; §§49-51.
[757] Eurojust, **Case law by the Court of Justice of the European Union on the principle of ne bis in idem *in criminal matters***, April 2020, p. 26; and CJEU, Case C-129/14 PPU, **Spasic**, Judgment of 27 May 2014, §§77-83.
[758] Eurojust, **Case law by the Court of Justice of the European Union on the principle of ne bis in idem *in criminal matters***, April 2020, p. 29.
[759] CJEU, Case C-524/15, **Menci**, Judgment of 20 March 2018, §§41-56, and Case C-537/16, **Garlsson Real Estate and others**, Judgment of 20 March 2018, §§44-62.
[760] CJEU, Joined Cases C-596/16 and C-597/16, **Di Puma and Zecca**, Judgment of 20 March 2018, §§43-44.
[761] CJEU, Case C-524/15, **Menci**, Judgment of 20 March 2018.
[762] CJEU, Case C-524/15, **Menci**, Judgment of 20 March 2018; and Case C-537/16, **Garlsson Real Estate and others**, Judgment of 20 March 2018.
[763] Eurojust, **Case law by the Court of Justice of the European Union on the principle of ne bis in idem *in criminal matters***, April 2020, p. 29.
[764] Eurojust, **Case law by the Court of Justice of the European Union on the principle of ne bis in idem *in criminal matters***, April 2020, p. 29.

proceedings are brought against a natural person – even if the natural person was the legal representative of the company subject to the tax penalty[765].

In relation to **detention pending the decision on surrender**, the CJEU held that although, under Article 3(2) **EAW FD**, the execution of an EAW is to be refused if the *ne bis in idem* principle applies, the arrest of the person concerned or his or her continued detention is precluded only if that authority has established that the *ne bis in idem* principle applies[766].

For the interpretation of the CJEU concerning the application of the *non bis in idem* principle in case of amnesty, see chapter 2.13 *(Amnesty*).

2.10 The principle of double criminality

The principle of dual or double criminality – terms which can be used interchangeably - *réciprocité d'incrimination*, implies that extradition, as any other form of international cooperation in criminal matters, is subject to the criminalisation of the act in both the requesting and the requested States. It is founded in the long-standing international ***principle of legality*** – *nulla poena sine lege* – and requires that a fugitive be extradited only for conduct that is criminal and punished to the prescribed level by the domestic law of both States. This principle is enshrined, in particular, in Article 2 of the **ECE**. Traditionally, it has been considered closely related to the notion of ***sovereignty*** and ***reciprocity***[767].

PC-OC has been having extensive discussions on the exact meaning and interpretation of this principle – and its practical implications – since 2000. Two basic approaches in this respect have been identified: an interpretation of dual criminality "**in abstracto"**, more flexible and meaning that consideration of the behaviour in question limits itself to the question of whether such behaviour is ***punishable***, ***regardless of its legal qualification*** (*nomen juris*) or of the existence of possible ***reasons excluding punishment***; and an interpretation "**in concreto"**, meaning that the ***concrete behaviour*** underlying the request must fulfil all requirements for punishment under the law of the requested State. Not only should the alleged behaviour fulfil the definition of the crime, there should also be no justification (eg. self-defence), excuse (eg. insanity) or other reasons excluding the imposition of a penalty.

Also raised was the question of the **moment** at which the double criminality principle should apply. Many States apply this principle having regard to the moment when the ***decision*** to extradite is taken, considering this as the reference point to assess dual or double criminality. However, certain States may consider other moments, including when the alleged offence was ***committed*** or when the ***request*** for extradition was introduced. For a summary of discussions held within PC-OC, see Comments to Article 2.

An individual could invoke the principle of double criminality in connection with **Article 7** of the **ECHR**. This article provides that no one shall be held guilty of any criminal offence on account of any act or omission that did not constitute a criminal offence under national or international law at the time when it was committed. Nevertheless, it is possible to challenge this argument, since extradition proceedings are not covered by "criminal charges", as stipulated in Article 6 of the

[765] Ibid., p. 14; CJEU, Joined Cases C-217/15 and C-350/15, ***Orsi and Baldetti***, Judgment of 5 April 2017, §§17, 21-23.
[766] CJEU, Case **C-505/19 PPU, *Bundesrepublik Deutschland (Notice rouge d'Interpol)***, Judgment of 12 May 2021, para 104, on the applicability of the principle of *ne bis in idem* under Article 50 of the CFREU and Article 54 CISA to provisional arrests in execution of an Interpol red notice at the request of third countries.
[767] Lagodny, O., ***Expert opinion for the Council of Europe on questions concerning double criminality***, Committee on Experts on the Operation of European Conventions in the Penal Field (PC-OC), European Committee on Crime Problems (CDPC), 24 June 2004, p. 3.

Convention. It should also be noted that the **AP2** to the **ECE** provides that extradition shall be denied when amnesty is granted in the requested State.

European Union

In 2022, the CJEU passed a ruling on lack of dual criminality as a refusal ground (**Article 4 (1) EAW FD**) for the execution of an EAW issued for the purpose of ***enforcing a custodial sentence***, stating, *inter alia*, that:

- the condition of double criminality is met where such sentence has been handed down for acts which relate, in the issuing Member State, to an offence requiring that those acts ***impair a legal interest protected*** in that Member State, while in the executing Member State such acts also constitute a criminal offence, but the protection of the same legal interest is not a constitutive element thereof;
- the executing judicial authority may not refuse to execute an EAW in case the sentence was imposed in the issuing Member State for the commission, by the requested person, of a single offence consisting of multiple acts, only some of which constitute a criminal offence in the executing Member State.[768]

In 2017, and on the same line, the CJEU interpreted the refusal ground of a lack of dual criminality in the context of **Framework Decision 2008/909/JHA6**[769], of 27 November 2008, on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the EU, as follows: the condition of double criminality must be considered to be met where the ***factual elements underlying the offence***, as reflected in the judgment handed down by the competent authority of the issuing State, would also, ***per se***, be ***subject to a criminal sanction*** in the territory of the executing State if they were present in that State.[770]

2.11 The *aut dedere aut judicare* principle

As recalled by Eugenio Selvaggi in his discussion paper on the refusal of extradition requests and possible solutions which served as a basis for discussions on the matter held during the first PC-OC special session on extradition, in 2014, academics attribute the expression *aut dedere aut punire* (which became later on *aut dedere aut iudicare* and is commonly used since the 1970s) to Ugo Grotius: firstly seen as sort of a "natural right" of the injured State to exact punishment[771], it is now considered a principle of ***customary international law***, applicable to ***international crimes*** and one of the major tools to prevent impunity and guarantee the redress of victims.

In accordance with this principle, a State cannot shield a person suspect of certain categories of crimes from prosecution and, if warranted, punishment and, in case it refuses extradition or transfer of jurisdiction over such person, it is required to exercise criminal jurisdiction itself, in order to avoid gaps and prevent impunity. According to Selvaggi, the "verb *iudicare* literally means *to judge* or *to try*, but it is widely accepted the idea that in the context at stake it includes inquiry and prosecution, but not necessarily bringing someone to trial or to punish him/her"[772]. In this era

[768] CJEU, **Case C-168/21, *KL (Procureur général près la cour d'appel d'Angers)***, Judgement of 14 July 2022.
[769] Eurojust, ***Case-law by the Court of Justice of the EU on the European Arrest Warrant***, December 2021, p.59.
[770] CJEU, **Case C-289/15, *Grundza***, Judgement of 11 January 2017.
[771] Hugo Grotius, *De Iure Belli ac Pacis*, quoted in **PC-OC(2014)05_en**, Special Session on Extradition, Workshop 2, *Discussion paper on the refusal of extradition requests and possible solutions*, prepared by Mr Eugenio Selvaggi (Italy), Strasbourg, 7 May 2014.
[772] **PC-OC(2014)05_en**, p. 3.

of international tribunals, this principle should be interpreted *lato sensu* to include the duty of the State to transfer the person to the jurisdiction of an international organ, such as the ICC.

In the context of the implementation of **ECE**, in 2014 PC-OC discussed whether the principle of *aut dedere aut judicare* should apply only if the request for extradition was rejected on the grounds of ***citizenship***, since this is the only situation referred to in **Article 6 (2)** of this Convention, excluding other causes of refusal, such as lack of double incrimination, place of commission of the crime, the exception of political offences, and the existence of human rights grounds for the refusal of extradition, as discussed in detail in Chapter 3. The discussion revealed that State legislation and practice in this regard varies enormously[773].

As indeed was mentioned in the context of these discussions, the "nationality exception appears to be out-of-step with the current needs of international community to avoid safe havens for criminals". Possible solutions have been suggested, such as ***extradition on consent*** or the application of the **"Dutch clase"** (extradition and consequent obligation to repatriate after the sentence was issued). Participating experts agreed that this clause could be a possible solution instead of having an unconditional prohibition of the extradition of nationals, and that maybe it would be better to give priority to the State where the offence was committed and conduct the proceedings there, provided that the person concerned could serve the sentence in his or her home country[774].

However, the developments in international criminal law have also demanded that many States adapt their domestic legislation and harmonise efforts to guarantee the prosecution and punishment of a significant number of international crimes. The principle *aut dedere aut judicare* is, for instance, underlining the principles of ***subsidiarity*** and ***complementarity*** which the **Rome Statute of the ICC** is based on (eg. Article 17) and which assert the jurisdiction of this Court when a State is ***unwilling*** or genuinely ***unable*** to carry out the investigation or prosecution. The same principle is today enshrined in a number of modern international treaties, of which we shall give only a few examples:

- **UN Convention against Transnational Organised Crime** (Article XVI.10);
- **UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishmen**t (Article 7 (1));
- **International Convention for the Protection of All Persons from Enforced Disappearance** (Article 11);
- **European Convention on the Suppression of Terrorism** (Articles 6 and 7);
- **Council of Europe Convention on the Prevention of Terrorism** (article 14);
- **Council of Europe Convention on Action against Trafficking in Human Beings** (Article 31);
- **Convention on the Protection of the Environment through Criminal Law** (Article 5).

Aside from extradition procedures, the entire functioning of the **European Convention on the Transfer of Proceedings in Criminal Matters** is based on a form of the *aut dedere, aut judicare* principle. It provides for the initiation of proceedings against an individual who has committed a crime, according to the domestic law of the requesting State, in another Contracting State, which would also have considered it an offence if it had been committed in its territory. It, therefore, favours proceedings in the requested State, rather than extradition.

It is interesting that in the framework of this Convention, the requesting State bases its entitlement to proceed to the request on **all forms of jurisdiction**: ***territorial*** jurisdiction, when the offence has been committed in its own territory; principle of ***active personality***, meaning that the offender is a national of the requesting State, despite acting outside its territory; principle of ***passive personality***, meaning that the victim is a national of the requesting Stae; and ***universal***

[773] **PC-OC (2014)07**, Special session on extradition - 66th plenary meeting of the PC-OC, Workshop reports, (…), Workshop 2: *Refusal of extradition requests, grounds and possible solutions to avoid impunity*, Strasbourg,17 September 2014, p.4.
[774] **PC-OC(2014)05_en**, p. 3 and **PC-OC (2014)07** (…), Workshop 2 (…), p.4.

jurisdiction, which is based on the nature of the offence itself, for which every State shares equal concern. **Article 6** leaves room for such an interpretation.

Article 8 of the **Convention** contains provisions which facilitate the application of the principle *aut dedere, aut judicare:*

> *1. A Contracting State may request another Contracting State to take proceedings in any one or more of the following cases:*
>
> > *a. if the suspected person is ordinarily resident in the requested State;*
> >
> > *b. if the suspected person is a national of the requested State or if that State is his State of origin;*
> >
> > *c. if the suspected person is undergoing or is to undergo a sentence involving deprivation of liberty in the requested State;*
> >
> > *d. if proceedings for the same or other offences are being taken against the suspected person in the requested State;*
> >
> > *e. if it considers that transfer of the proceedings is warranted in the interests of arriving at the truth and in particular that the most important items of evidence are located in the requested State;*
> >
> > *f. if it considers that the enforcement in the requested State of a sentence if one were passed is likely to improve the prospects for the social rehabilitation of the person sentenced;*
>
> *g. if it considers that the presence of the suspected person cannot be ensured at the hearing of proceedings in the requesting State and that his presence in person at the hearing of proceedings in the requested State can be ensured;*
>
> *h if it considers that it could not itself enforce a sentence if one were passed, even by having recourse to extradition, and that the requested State could do so;*

It has been noted tha the principle *aut dedere, aut judicare* can lead to ***practical difficulties*** in carrying out the proceedings domestically. An example was made in relation to cases where the person concerned has asylum-status in the requested State. Since, according to the domestic law of many States, it is not possible to reveal this fact to the requesting State, it can consequently be difficult to ask for the case file. Often, the solution found is to submit a request for the transfer of proceedings (see above)[775]. Other problems include the likelihood of evidence being in the requesting State, making any prosecution dependent on this State's cooperation, or a possible bar on the use of evidence gathered by this State, eg. if obtained through torture or ill-treatment[776]. Also, there is a risk of evasion of the requested person, particularly if extradition proceedings take a long time and it becomes necessary to release the person in order to prevent a violation of Article 5 of **ECHR** (*right to liberty and security of the person*) [777].

It is of critical importance that in the European system of human rights protection the *aut dedere, aut judicare* rule provides a solution in cases where the individual concerned runs a risk of being subjected to a violation of his or her rights as enshrined in the **ECHR**. Where a Contracting State considers that the individual will risk being denied justice or suffering prejudice in the requesting State, the rule fills the gap for the administration of justice. In this way, the principle completes the notion of the rule of law in the European system of transnational proceedings.

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[775] **PC-OC (2014)07** (…), Workshop 2 (…), p.4.
[776] See ECtHR, Case ***El Haski v. Belgium***, No. 649/08, Judgment of 25 September 2012, §85.
[777] See *Introductory speech on the 60th anniversary of the European Convention on extradition: Lessons learnt and challenges for the future*, Mr Vincent Glerum, Counsellor at the Tribunal of Amsterdam, in **PC-OC (2018)05**, Special session to celebrate the 60th anniversary of the European Convention on Extradition - 20 June 2018, Presentations and summaries of the panel discussions Strasbourg, 10 August 2018 [hereinafter, **PC-OC (2018)05**, "Introductory speech (…)", Mr Vincent Glerum], pp. 20-21.

However, one should not forget the precedent set by the International Court of Justice (ICJ) in the **Lockerbie judgment**. The ICJ did not rule on provisional measures for Libya against the US and UK. The Court focused on Security Council Resolution 748 (1992), which altered the obligations deriving from the existing extradition treaty between the parties involved (Montreal Convention). This power of the Security Council stems from the combination of Articles 25 and 103 of the **UN Charter**. The ICJ did not look into the obligations of the Parties to the dispute before the adoption of the resolution. Nevertheless, its decision may lend credibility to the argument that Libya failed at that time to demonstrate convincingly that it was capable of fulfilling its obligations under the Montreal Convention, namely to show good faith in its effort to prosecute the crimes itself.[778]

In 2010, the ECtHR examined a case in which a Russian national complained, *inter alia*, about the lack of sufficient investigation into the circumstances of the death of his daughter in Cyprus, the lack of adequate protection of his daughter by the Cypriot police while she was still alive and the failure of the Cypriot authorities to take steps to punish those responsible for his daughter's death and ill-treatment, as well as of the failure of the Russian authorities to investigate his daughter's alleged trafficking and subsequent death and to take steps to protect her from the risk of trafficking. The Court considered that Article 2 of **ECHR** does not require member States' criminal laws to provide for universal jurisdiction in cases involving the death of one of their nationals. Accordingly, the obligation to ensure an effective official investigation into the girl's death applied to Cyprus alone. For an investigation into a death to be effective, Member States must take such steps as are necessary and available in order to secure relevant evidence, whether or not it is located in the territory of the investigating State. The Court observed that both Cyprus and Russia were parties to the **Convention on Mutual Assistance in Criminal Matters** had, in addition, concluded a bilateral Legal Assistance Treaty. These instruments set out a clear procedure by which the Cypriot authorities could have sought assistance from Russia in investigating the circumstances of Ms. Rantseva's stay in Cyprus and her subsequent death. In the absence of a legal assistance request for this purpose, the Court found a violation of **Article 2** of the Convention (*right to life*) in its procedural limb by Cyprus, but no violation of this Article by Russia, since Russian authorities were not required under Article 2 of the Convention to secure the evidence themselves. On the other hand, the Court held that **Article 4** (*prohibition of slavery and forced labour*) had been violated by both Cyprus and Russia, in the first case by not affording to the victim practical and effective protection against trafficking and exploitation in general and by not taking the necessary specific measures to protect her; and in the second case a violation by Russia of its procedural obligations to investigate the alleged trafficking[779].

More recently, in a case envolving 33 Bosnia and Herzegovina nationals victims of forced or compulsory labour and trafficking in human beings in Azerbaijan, who complained that this State failed to comply with its procedural obligation under the Convention to investigate their complaints in this regard, the Court reiterated that **Article 4** also entails a *procedural obligation* to investigate where there is a credible suspicion that an individual's rights under that Article have been violated. It stated that, in addition to the obligation to conduct a domestic investigation into events occurring on their own territories, Member States are also subject to a duty in cross-border trafficking cases to cooperate effectively with the relevant authorities of other States concerned in the investigation of events which occurred outside their territories. ***In the context of positive obligations under Article 3 of the Convention, which are similar to those under Article 4 of the Convention, sufficiently detailed information contained in an inter-State legal-assistance request concerning alleged grave criminal offences which may have been committed on the territory of the State receiving the request may amount to an "arguable claim" raised before the authorities of that State, triggering its duty to investigate those allegations further***. In so far as the competent Azerbaijani department knew that many alleged victims had been sent back to Bosnia and Herzegovina and was informed about the criminal proceedings instituted in this country, the Court considered that it could have sent a formal legal-assistance request to the authorities of that country under the **Convention on Mutual Assistance in**

[778] Plachta, M., *The Lockerbie affair: when extradition fails are the United Nations' sanctions a solution?*, Annual report for 1999 and resource material series, No. 57, UNAFEI, Japan, September 2001, pp. 93-107.
[779] ECtHR, Case ***Rantsev v. Cyprus and Russia***, No. 25965/04, Judgment of 7 January 2010, §§241-244.

Criminal Matters, requesting the latter to identify and question such potential victims and to provide copies of their statements to the Azerbaijani law-enforcement authorities. By not doing so, it failed to comply with its procedural obligation to institute and conduct an effective investigation of the applicants' claims concerning the alleged forced labour and human trafficking, and the Court therefore found a a ***violation of Article 4 (2) under its procedural limb***[780].

2.12 The nationality of the individual

Most European States do not extradite their own nationals or do it only under certain conditions, such as solely for the purpose of prosecution and under the condition of "return", i. e., demanding their transfer back after having been definitely sentenced. Some European States can extradite their nationals to certain States only, on the basis of specific provisions of bilateral extradition treaties or agreements. The **ECE** somewhat reflects this reality by allowing, in its **Article 6**, that States Parties refuse the extradition of their nationals. In this case, the requesting Party may ask that the case be submitted to the competent national authorities of the requested State for the purpose of prosecution, if deemed appropriate.

However, restrictions on the extradition of nationals are becoming more flexible at the European level. The 1996 **European Convention on Extradition** between the Member States of the EU (now replaced in most cases by the EAW) has removed nationality as an obstacle to the surrender of the individuals concerned. And the **Convention on the Transfer of Sentenced Persons**[781] gives the opportunity for a person sentenced in the requesting State to serve the sentence within that State or in his or her home State.

In case ***national law prohibits the extradition of nationals*** (including persons with dual nationality) the ECtHR has considered that custody with the view to extradition is **not in accordance with a "procedure prescribed by law"** as required by **Article 5 (1)** of the **ECHR**. This reasoning applies even if the issue of nationality is disputed[782]. In **Garabayev v. Russia** (2008), in which the information about the applicant's nationality had already been available to the competent authorities at the time of the applicant's arrest, the Court considered that the procedural flaw in the order authorizing the applicant's custody was so fundamental as to render it arbitrary and *ex facie* invalid, a conclusion "further strengthened by the absence of judicial review of the lawfulness of the applicant's detention until his extradition had taken place."[783]. By contrast, the Court considers that the deprivation of citizenship (particularly if the person is not rendered stateless) and expulsion to another country, made in accordance with the law and with possibility of judicial review, does not violate **Article 5** of the **ECHR**[784].

The ECtHR has touched upon the issue of ***discrimination based on nationality*** in the context of extradition in case **Vlas and Others v. Romania** (2015), which concerned the extradition of a pregnant Moldovan citizen from Romania to Moldova for the purposes of prosecution for participation in organizing a pyramid scheme, while three of her co-defendants could not be extradited on account of their Romanian citizenship and, therefore, were prosecuted in Romania. In its examination, the ECtHR put an emphasis on the reasoning of the extradition decision with regard to the decision to refuse to try the applicant in Romania and have her extradited instead, which was based on the fact that the authorities in the requesting State were better placed to examine the case and hear numerous witnesses. The Court considered that the applicant and

[780] ECtHR, Case ***Zoletic and Others v. Azerbaijan***, No. 20116/12, Judgment of 7 October 2021, §§185, 191, 198, 206, 209-210.
[781] CoE, **Convention on the Transfer of Sentenced Persons,** 21 March 1983, Strasbourg, ETS No. 112.
[782] ECtHR, Case ***Abdulazhon Isakov v. Russia***, N.º 14049/08, Judgment of 8 July 2010, §§125-126.
[783] ECtHR, Case ***Garabayev v. Russia***, No.: 38411/02, Judgment of 7 June 2008, §89.
[784] ECtHR, ***Case K2 v. the United Kingdom***, No. 42387/13, decision of 7 February 2017; Case ***Said Abdul Salam Mubarak v. Denmark***, No.: 74411/16, decision of 22 January 2019.

her co-defendants were not in a similar situation and that the extradition was based on serious grounds, therefore failing to find any discrimination on the basis of nationality[785].

European Union

The influence of EU law on the extradition of citizens of the Union to third States has been made clear in landmark judgements recently issued by the CJEU, and led the European Commission to publish, in 2022, the **Guidelines on Extradition to Third States** on the basis of such judgements[786].

In its case-law, the CJEU has interpreted the provisions on **EU citizenship** (**Article 21(1) TFEU**) and **non-discrimination based on nationality (Article 18 TFEU**) in the context of extradition to a third State. It stated that ***a law that provides for the non-extradition of a Member State's own nationals – while allowing the extradition of EU citizens who are nationals of another Member State – constitutes unequal treatment and gives rise to a restriction of freedom of movement within the meaning of*** **Article 21** of the **TFEU**. The said restriction can be justified if it is based on a ***legitimate objective*** and if it is ***proportionate***. The CJEU agreed that *preventing the risk of impunity for persons who have committed an offence* is a legitimate objective in EU law. However, the CJEU also found that granting an extradition request is not the most proportionate measure to attain this aim. According to the CJEU, a more proportionate measure than extradition would be to apply all the ***cooperation*** and ***mutual assistance*** mechanisms provided for in EU criminal law.[787]

On 6 September 2016, the CJEU introduced, in its judgement on case **Petruhhin**, two specific obligations for Member States that do not extradite their own nationals and receive an extradition request ***for the purpose of prosecution*** of an EU citizen who is a citizen of another Member State and has exercised his or her right to free movement under **Article 21 (1)** of the **TFEU**:

a) That the ***Member State of nationality is informed*** of the request for extradition and, should this Member State so requests by ***issuing a EAW***, surrender that citizen to it, provided that such Member State has jurisdiction, pursuant to its national law, to prosecute that person for offences committed outside its national territory; thus, in this case the execution of an EAW prevails over extradition – in its reasoning, the CJEU stated that a law which provides for the non-extradition of a Member State's own nationals, but allows the extradition of EU citizens nationals of another EU Member State, constitutes unequal treatment and gives rise to a restriction of freedom of movement within the meaning of Article 21 of the TFEU;

b) That the requested Member State verifies that the extradition will ***not prejudice the rights referred to in Article 19*** of the **CFREU**, which establishes that:

> *No one may be removed, expelled or extradited to a State where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment.* [788]

The **Petruhhin** mechanism applies to **nationals of EU member States** (as well as of Iceland and Norway, see below) who exercise their right to ***free movement*** within the EU, including if merely in ***transit*** in an airport or receiving services as a ***tourist***, regardless of the fact of the person also holding the nationality of the requesting State (for, in the understanding of the CJEU, dual citizenship cannot deprive someone of his or her rights as a citizen of the Union). The timing when the person obtained the nationality of a Member State is irrelevant[789].

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[785] ECtHR, Case ***Vlas and Others v. Romania***, N.º 30541/12, decision of 6 January 2015, §§59-60.
[786] EC, Commission Notice - **Guidelines on Extradition to Third States** (2022/C 223/01), 8 June 2022 [hereinafter, "EC – **Guidelines on Extradition to Third States"**].
[787] Eurojust, ***Case-law by the Court of Justice of the EU on the European Arrest Warrant***, updated until 1 December 2021, p. 110.
[788] CJEU, Case **C-182/15, *Petruhhin***,, Judgement [GC] of 6 September 2016.
[789] EC – **Guidelines on Extradition to Third States**, p. 15.

In so far as the competent authority of the requested Member State is in possession of evidence of a ***real risk of inhuman or degrading treatment*** of individuals in the third State concerned, it is bound to ***assess*** the existence of that risk when it decides on the extradition request. To that end, the competent authority of the requested Member State must rely on **information** that is ***objective, reliable, specific and properly updated***. That information may be obtained from, *inter alia*, judgments of international courts, such as judgments of the **ECHR**, judgments of courts of the non-member State concerned, and also decisions, reports and other documents produced by bodies of the CoE or under the *aegis* of the UN[790].

In case the Member State of nationality issues an EAW, the requested Member State is bound to execute it, provided that such State has jurisdiction and that the EAW relates to at least the same offences as the extradition request. The reasoning behind this solution has a parallel in Strasbourg case law, for in the **Soering** case (1989), for instance, the possibility of extraditing the requested person to his State of nationality and prosecuting him there was considered to be a relevant factor in deciding whether extradition violated the **ECHR** [791].

The **focal points** nominated by States to integrate the **EJN** should be seized for the purposes of the **Petruhhin** mechanism or in case of unfounded or unlawful, in particular politically motivated extradition requests. States should swiftly inform the EJN of any changes in such focal points[792], and these can consult Eurojust and the EJN if they have any issues.[793]

Therefore, the following **obligations are incumbent upon the State of residence** (requested State) **under EU law**[794]:

1. Obligation to inform the other State concerned (State of nationality) of[795]:

- The existence of an extradition ***request***;
- All the ***elements of fact and law*** communicated by the third State requesting extradition;
- Any ***change*** in the situation of the person whose extradition is requested that might be relevant to the possibility of issuing an EAW.

Neither the requested Member State nor the State of nationality are required to ask the third State to send the related criminal ***investigation file*** or a copy of it[796].

2. Obligation to set a reasonable time limit[797]:

- Obligation to impose a ***reasonable time limit,*** taking into consideration all the circumstances of the case, on the expiry of which, if the State of nationality has not issued and EAW, the extradition will be carried out, if appropriate, without the need to wait for any formal waive by the Member State of nationality of its right to issue an EAW concerning, at least, the same offences as those referred to in the extradition request;
- While doing so, obligation to take into account all the circumstances of the case, including whether the person concerned may be in custody on the basis of the extradition procedure and the complexity of the case.

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[790] EC – **Guidelines on Extradition to Third States**, p. 6.
[791] See, for instance, **PC-OC (2018)05**, "Introductory speech (…)", Mr Vincent Glerum, p. 25.
[792] The updated list of the focal points is available at: https://www.ejn-crimjust.europa.eu/ejn/AtlasChooseCountry/EN.

[793] EC, **EU Guidelines on Extradition to Third States**, p. 21.
[794] CoE, **Help Online Course on International Cooperation in Criminal Matters**, Module 2 - Extradition and surrender, p. 41.
[795] CJEU, Case **C-398/19, *BY (Generalstaatsanwaltschaft Berlin)***, Judgement [GC] of 17 December 2020.
[796] CJEU, Case **C-398/19, *BY (Generalstaatsanwaltschaft Berlin)***, Judgement [GC] of 17 December 2020.
[797] CJEU, Case **C-398/19, *BY (Generalstaatsanwaltschaft Berlin)***, Judgement [GC] of 17 December 2020.

3. No obligation to refuse extradition and to conduct a criminal prosecution where its national law permits it to do so[798].

4. Obligation to verify that, if extradited, the person concerned will not be exposed to a serious risk of being subjected to the death penalty, torture or other inhuman or degrading treatment or punishment[799].

The recent CJEU judgement **BY C-398/19 Generalstaatsanwaltschaft Berlin (Extradition towards Ukraine)** has shed some light on the obligations incumbent on the requested Member States clarifying, among other aspects, that **Articles 18 and 21 TFEU** apply to the situation of a citizen of the European Union who is a national of one Member State, resides in another Member State and is the subject of an extradition request sent to the latter Member State by a third State, even where that citizen ***moved the centre of his or her interests to that other Member State at a time when he or she did not have Union citizenship*** (and therefore cannot be said to have been exercising his or her freedom of movement and residence in the territory of the EU at the time of establishment in the requested Member State).

Notwithstanding, the application of the **Petruhhin** case law remains challenging.

A number of **practical and legal issues** have notably been reported by States regarding the implementation of the consultation procedure, including:

- ***Different practices*** relating to the type of assessment carried out by the Member State of nationality when deciding whether to prosecute the requested person;
- Uncertainties as to the ***judicial cooperation instrument*** to be used to ensure prosecution in the Member State of nationality, particularly if the thresholds for issuing a national arrest warrant and/or an EAW are not met;
- Relevance of addressing not only the question of the jurisdiction, but also that of which ***country is best placed to prosecute*** and, consequently, prevent impunity;
- ***Tensions between obligations*** stemming from EU law, on the one hand, and obligations stemming from bilateral and multilateral extradition treaties, on the other hand[800].

Furthermore, as to the **language regime and costs**, an official language of the State of ***nationality*** is proposed as the language regime for documents transmitted between the requested State and the State of nationality. States can also notify the Commission if they decide to accept translations in one or more other official languages of the EU, Icelandic or Norwegian. The requested State and the State of nationality should each cover their own costs (mainly translation costs).

It has been considered that the CJEU still needs to clarify one **key issue**: what if the State of nationality decides ***not to issue an EAW*** and if the extradition to the third State is at the same time impossible given ***serious fundamental rights issues***? Should the obligations of Member States be extended in order to avoid situations of ***impunity***? [801]

Concerning **data protection**, **Directive (EU) 2016/680** on the protection of natural persons with regard to the processing of personal data by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and on the free movement of such data, applies[802].

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[798] CJEU, Case **C-398/19, *BY (Generalstaatsanwaltschaft Berlin)***, Judgement [GC] of 17 December 2020.
[799] CJEU, C-473/15 (***Peter Schotthöfer & Florian Steiner GbR***), Order of 6 September 2017; CJEU, **Joined Cases C-404/15 and C-659/15 PPU, *Aranyosi and Căldăraru***, Judgment of 5 April 2016;
[800] CoE, **Help Online Course on International Cooperation in Criminal Matters**, Module 2 - Extradition and surrender, p. 42.
[801] EC, **EU Guidelines on Extradition to Third States**, p. 21.
[802] EC, **EU Guidelines on Extradition to Third States**, p. 21.

In line with its case law on cases **Aranyosi and Căldăraru** (2016) [803], the competent authority of the requested Member State must rely on information that is ***objective, reliable, specific and properly updated***. That information may be obtained from, inter alia, judgments of international courts, such as judgments of the ECtHR, judgments of courts of the requesting third State, and also decisions, reports and other documents produced by bodies of the CoE or under the *aegis* of the UN[804].

It should be underlined that this duty of consultation with the Member State of nationality arises only when there is a ***legal basis*** for extradition (eg. bilateral or multilateral agreement) and if the requested Member State ***prohibits the extradition of its own nationals***. Since some States have provided for this "nationality exception" in (some) bilateral treaties only and may have different approaches depending on the purpose of extradition, this can mean that, depending on the legal basis and purpose of extradition, there may or not be "unequal treatment that gives rise to a restriction of free movement" within the meaning of **Article 21** of the **TFEU** and consequently, a need to consult or not, in relation to the same State[805].

It does, however, ***apply to all extradition requests***, either on the basis of: the Agreement on extradition between the EU and the USA; the Trade and Cooperation Agreement between the EU and Euratom, on the one part, and the UK, on the other part (TCA), which includes provisions reflecting the **Petruhhin** mechanism; multilateral agreements concluded by States; bilateral agreements concluded by States; or national law[806].

The actual application of **Petruhhin** requires that the EU member State of nationality ***actually exercises its extraterritorial jurisdiction*** over the offences committed in the requesting (third) State which, due to various legal and practical reasons, for example time constraints, is often not possible[807]. In fact, so far, in the vast majority of cases, the Member State of nationality has decided not to initiate criminal proceedings and not to issue an EAW against its national.

In its judgement on case **Ruska Federacija,** the CJEU extended these requirements to nationals of EFTA Member States which are parties to the Agreement on the European Economic Area and with which the EU has concluded a surrender agreement: **Iceland** and **Norway**, including if those citizens travel to receive services. When a Member State is required to rule on an extradition request by a third country concerning a ***national of such an EFTA State,*** it must verify that such person will not be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment. Before proposing to execute the request for extradition, the Member State must inform the EFTA State of the request, to enable that State to seek the surrender of its national[808].

This case law was further refined in the judgement on case **Raugevicius**[809], issued on 13 November 2018 and dealing with the request for extradition of a person with dual Russian and Lithuanian nationality from Finland (the requested State) to Russia (the requesting State) ***for the purpose of enforcing a custodial sentence.*** In such cases, the principle *ne bis in idem* can pose an obstacle to prosecution in another State. The CJEU considered that, if the requested Member State prohibits the extradition of its own nationals for the same purpose and makes provisions for the possibility that such a sentence pronounced abroad may be ***served in its territory,*** the requested citizen must receive the ***same treatment***, provided that he or she ***resides permanently*** in the territory of the requested State. Therefore, in this case, no consultation

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[803] CJEU, **Joined Cases C-404/15 and C-659/15 PPU, *Aranyosi and Căldăraru***, Judgment of 5 April 2016.
[804] CJEU, Case **C-182/15, *Petruhhin***,, Judgement [GC] of 6 September 2016, §59.
[805] Eurojust/EJN, ***Joint report of Eurojust and the European Judicial Network on the extradition of EU citizens to third countries***, The Hague, November 2020, [hereinafter, "Petruhhin report"], p. 9.
[806] EC – **Guidelines on Extradition to Third States"**, p. 14.
[807] **PC-OC Mod (2018) 06**, (Yet) Another Petruhhin? – Some thoughts on the AG's Opinion in Raugevicious (ECJ, Case C-247/17), Discussion paper by Mr. Erik Verbert (Belgium), Strasbourg, 14 September 2018 [hereinafter, "**PC-OC Mod (2018) 06**"].
[808] CJEU, Case **C-897/19 PPU, *Ruska Federacija***, Judgment of 2 April 2020.
[809] CJEU, Case **C-247/17, *Raugevicius***, Judgement [GC] of 13 November 2018.

mechanism is necessary, and the 1983 **Convention on the Transfer of Sentenced Persons** could be applicable, with the view to increase the person's chances of social rehabilitation[810].

Since this solution is applied when States invoke the nationality exception in relation to their own nationals only, leading to potential discrimination between such nationals and those of other States who have exercised their right to free movement, it is necessary that nationals of other States reside permanently in the requested State and demonstrate a certain degree of integration into this State's society, and are thus in a ***comparable situation*** with nationals of the requested State. A national of a State being arrested at an airport of a requested State, while only in transit, would not fulfil the criterion of being in a comparable situation. If a requested person cannot be regarded as residing permanently in the requested State, the issue of their extradition is to be settled based on the applicable national or international law[811].

In his opinion of 25 July 2018, **Advocate General Bot** (France), makes a clear distinction between the **Raugevicius** situation and **Petruhhin**. The opinion does not conclude with referral to the EU Member State of the nationality, a third State *vis-à-vis* the extradition proceedings, as a potential alternative for the extradition, but rather sees the (potential) application of *aut dedere, aut exequie* as an alternative for the extradition:

> "[…] in circumstances such as those at issue in the main proceedings, where a Member State to which a Union citizen who is a national of another Member State has moved receives an extradition request from a third State for the purpose of enforcing a custodial sentence imposed there, the requested Member State is required to examine whether, in the light of the connections between the sentenced person and the requested Member State, the enforcement of the sentence in that Member State is likely to further the person's social rehabilitation. If that is the case, that Member State must apply all the international cooperation instruments in criminal matters available to it vis-à-vis the requesting third State in order to secure the latter's consent to the sentence at issue being enforced on the former's territory, where appropriate after adjustment in the light of the penalty provided for in its criminal legislation for an offence of the same kind."

It should be noted that, in case **Raugevicius**, Finland was not a Party to the 1970 **European Convention on the International Validity of Criminal Judgments** – which imposes a general obligation to enforce convictions handed down in other State. Furthermore, as stated before, according to the case law of the CJEU, holding dual nationality of a Member State and a third State cannot deprive the person concerned of the freedoms he or she enjoys under EU law as a national of a Member State[812].

The CJEU again set jurisprudence in a case relating a request for extradition for the purpose of ***enforcing a custodial sentence*** in case C-237/21 **SM (Generalstaatsanwaltschaft München)** (2022)[813]. The referring German court asked the CJEU whether the principles governing the application of **Articles 18 and 21 TFEU** established in the **Raugevicius** judgment require that a request from a third State under the **ECE** seeking the extradition of an EU citizen for the purpose of enforcing a sentence is to be refused, even where the requested Member State is obliged by international law under that Convention to extradite the EU citizen, because it has defined the term "nationals" within the meaning of **Article 6(1)(b)** of the **ECE** as meaning that it refers only to its own nationals, not to other EU citizens[814].

THE CJEU ruled that **Articles 18 and 21** of the **TFEU** must be interpreted as meaning that:

- a Member State to which a request for extradition has been made by a third State for the purpose of ***enforcing a custodial sentence*** imposed on a national of another Member

[810] Eurojust/EJN, ***Petruhhin report***, p. 21.
[811] EC – **Guidelines on Extradition to Third States"**, p. 14.
[812] **PC-OC Mod (2018) 06**, pp. 2-3, 7, 9 and 14.
[813] CJEU, Case **C-237/21, SM (*Generalstaatsanwaltschaft München*),** Judgement of the Court [GC] of 22 December 2022.
[814] EC, **Guidelines on Extradition to Third States**, pp. 13-14.

State residing permanently in the first Member State, the national law of which prohibits only the extradition of its own nationals out of the EU and makes provision for the possibility that that sentence may be enforced in its territory provided that the third State consents to it, is required by those provisions ***actively to seek such consent from the third State*** which made the extradition request, by using all the mechanisms for cooperation and assistance in criminal matters which are available to it in the context of its relations with that third State;

- if such consent is ***not obtained***, that first Member State is ***not precluded*** by those provisions, in such circumstances, ***from extraditing that Union citizen***, in accordance with its obligations under an international convention, in so far as that extradition ***does not infringe the rights guaranteed by the CFREU***.

Furthermore, in case **Pisciotti** (2018) the CJEU applied the reasoning from the **Petruhhin** judgment to a situation where there was an ***extradition agreement in force*** between the EU and the third State requesting extradition. The Court clarified that EU law does not preclude the requested Member State from drawing a distinction, on the basis of a rule of ***constitutional law***, between its nationals and the nationals of other Member States, and from granting that extradition whilst not permitting extradition of its own nationals, provided that the requested Member State has already put the competent authorities of the Member State of which the citizen is a national in a position to seek the surrender of that citizen by issuing an EAW and the latter Member State has not taken any action in that regard. [815]

Article 5(3) of the **EAW FD** allows the executing authority to subject the execution of an EAW issued for the purposes of ***prosecution*** of a person who is a **national or resident of the executing Member State** to the guarantee that the requested person is ***returned*** to the executing Member State to ***serve*** there the custodial sentence or detention order passed against them in the issuing Member State. The CJEU holds that the return of the person concerned must take place ***as soon as the sentencing decision has become final***, unless concrete grounds relating to the rights of the defence or to the proper administration of justice make the presence of the person essential in the issuing Member State until any procedural steps coming within the scope of the criminal proceedings relating to the offence underlying the EAW (e.g. confiscation) have been definitively closed. Furthermore, the CJEU has ruled that where the execution of the EAW is subject to the condition set out in Article 5 (3) **EAW FD**, the executing Member State can adapt the duration of the sentence imposed in the issuing Member State only within the strict conditions set out in Article 8 (2) **FD 2008/909**[816]:

> *Where the sentence is incompatible with the law of the executing State in terms of its duration, the competent authority of the executing State may decide to adapt the sentence only where that sentence exceeds the maximum penalty provided for similar offences under its national law. The adapted sentence shall not be less than the maximum penalty provided for similar offences under the law of the executing State.* [817]

Both Eurojust and EJN have pledged themselves to assist and support national authorities with any practical and legal questions they may have[818].

See also comments on **ECE** Article 6 (Extradition of nationals).

[815] CJEU, Case **C-191/16, *Pisciotti***, Judgement [GC] of 10 April 2018.
[816] **Council Framework Decision 2008/909/JHA** of 27 November 2008 on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union.
[817] CJEU, **Case C-314/18, *SF***, Judgment of 11 March 2020.
[818] *Ibid*.

2.13 Amnesty and pardon

AP1 introduced a second paragraph into **Article 9** of ECE (*non bis in idem*), establishing as a mandatory ground for the ***refusal of extradition*** an amnesty pronounced or pardon granted in a third State, Contracting Party to the Convention, in relation to the offence for which the sought person has been condemned by final judgement in such third State.

AP2 introduced a wholly new Article to ECE, establishing that (emphasis added):

> *Extradition **shall not be granted** for an offence in respect of which an **amnesty has been declared** in the requested State and which that State had competence to prosecute under its own criminal law.*

It should be borne in mind that the granting of amnesties and pardons, although within the sovereign powers of a State, may give rise to issues of ***impunity*** that violate various human rights norms. A presidential pardon to CIA agents involved in the abduction from Italy and illegal transfer of a person to a detention centre in Egypt where he was repeatedly subjected to torture and ill-treatment, for instance, engaged the international responsibility of the Italian State[819].

Similarly, in an extradition case concerning a person sentenced to life imprisonment for murder and attempted murder who, upon surrender, was immediately granted Presidential pardon and given other privileges by the administration of the requesting State, the Court found that the conduct of the authorities of this State in effect ensured this person's impunity for serious crimes and was thus incompatible with the State's obligation under Article 2 of the Convention to effectively prevent offences against the lives of individuals.[820]

European Arrest Warrant

In accordance with **Article 3** of the EAW FD, the fact that the offence in relation to which the EAW is issued is covered by an amnesty in the executing Member State is a ground for ***mandatory non-execution of the EAW,*** providing that such State had jurisdiction to prosecute that offence.

The CJEU ruled that the principle *ne bis in idem*, under **Article 50** of the CFREU, does not preclude issuing an EAW against a person who was subject to a criminal prosecution initially discontinued by a final judicial decision adopted on the basis of an amnesty, and resumed following the adoption of a law revoking that amnesty and setting aside such judicial decision, in case the decision in question was adopted ***before any determination as to the criminal liability*** of the person concerned. Also, Directive 2012/13/EU on the right to information in criminal proceedings must be interpreted as not applying to a legislative procedure for the revocation of an amnesty or to a judicial procedure the purpose of which is to review compliance of that revocation with the national constitution[821].

2.14 Temporary surrender

Article 19 (2) of ECE provides that the requested Party may temporarily surrender the person claimed to the requesting Party in accordance with conditions to be determined by mutual agreement between the Parties.

Concerning the ***length*** of temporary surrender, the ECtHR considered that the obligation to return the surrendered person is activated, at the latest, by the termination of the judgement in the

[819] ECtHR, Case ***Nasr and Ghali v. Italy***, No. 44883/09, Judgment of 23 February 2016.
[820] ECtHR, Case ***Makuchyan and Minasyan v.Azerbaijan and Hungary***, No. 17247/13, Judgment of 26 May 2020, §§167-172, 196.
[821] CJEU, Case ***C-203/20, AB and Others***, Judgement of 16 December 2021.

requesting State, and that such return may take time, since it requires the cooperation of the requested State. Therefore, no violation of either Articles 5 (1) or 6 (1) was found in the case of a person who had been held in the requesting State for some two years after conviction. It was found relevant, in this context, that neither the applicant nor the requested State had taken any steps with the view to his earlier return and that several reminders had been sent to the requested State.[822]

The Court also found that, in practical terms and in the absence of concrete evidence to the contrary, the obligation to return a temporarily surrendered person should be assessed as a factor ***reducing the risk of ill-treatment*** in the receiving State[823]. On the other had, the fact that a person temporarily surrendered does not raise any ***complaints regarding ill-treatment*** while temporarily in the hands of the requesting State, and does not seek a medical examination immediately or soon after his return, in order to confirm any injuries, does not help any future allegation of risk of ill-treatment in the requesting State upon extradition to serve a custodial measure (a situation which, in any case, the Court views as quite different from a stay in a remand prison)[824].

A problem that was raised in a case examined by the Court in 2017 related to a conviction *in absentia* of a Dutch national in the Netherlands while in custody in Norway, whose temporary surrender could not be requested because **Article 11** of the **European Convention on Mutual Assistance in Criminal Matters** applies only to temporary transfers of witnesses and there was ***no legal title in the Netherlands*** to request the applicant's extradition with subsequent temporary surrender under **Article 19 (2)** of **ECE**. The Court considered that the refusal of the Dutch Court of Appeal to consider measures that would have enabled the applicant to make use of his right to attend the hearing on the merits entailed a violation of **Articles 6 (1) and (3) (c)** of the **ECHR**.

PC-OC has, in its **Guidance on good practices regarding the post-surrender phase in extradition proceedings** elaborated on best practices concerning the mechanism of temporary surrender and developed a model agreement to ease and enhance its use. The relevant recommendations are as followos:

> a. The right of the requested Party to make the surrender temporary and conditional on the return of the extradited person to the requested Party means that the ***return shall not be considered as extradition***, and will not bear the legal consequences of extradition;
>
> b. The condition of return might be set for the purpose of proceedings against the extradited person (temporary transfer of a witness in custody is regulated in the MLA Convention). However, it may not be necessary to issue a warrant of arrest or detention against the extradited person in the requested Party, as their departure from the requested Party is probably involuntary; In any case, any warrant determining ***preventive measures*** against the extradited person, anticipating the resumption of their trial upon their return, clearly suffices.
>
> c. No agreement between the two parties' authorities may bind the court in the requesting Party and ***prevent the release*** of the extradited person after being extradited, even though some States considered that the agreement must specify that the person must be kept in detention and sent back to the requested Party in all cases (including, for example, when they are nationals of the requesting Party). The PC-OC recommends that, if risk of flight of the person threatens to jeopardise the temporary surrender, the parties should consider that their agreement will expire if the person is released in the requesting Party;

[822] ECtHR, Case ***Paci v. Belgium***, N.º 45597/09, Judgment of 17 April 2018, §77.
[823] ECtHR, Case **Tershiyev v. Azerbaijan**, N.º 10226/13, Judgment of 31 July 2014, §56.
[824] ECtHR, Case ***Chankayev v. Azerbaijan***, No. 56688/12, Judgment of 14 November 2013, §§71-76, 78.

accordingly, the requesting Party undertakes to return them to the requested Party immediately[825].

The temporary surrender of a person requested by an EAW to the issuing Member State is admitted by **Article 24 (2)** of the **EAW FD**, and shall be effected under conditions to be determined by mutual agreement between the executing and the issuing judicial authorities. The agreement shall be made in writing and the conditions shall be binding on all the authorities in the issuing Member State.

2.15 Postponement of extradition

Extradition may, in certain circumstances, be postponed for several months or even, sometimes, for a few years, in accordance with **Article 19 (1)** of **ECE**, so that the person may be ***proceeded against*** or ***serve a sentence***, for an offence other than that which gave rise to extradition, ***in the requested State***.

The ECtHR examined the case of the extradition of a Cuban national from Italy to the USA. He had originally been arrested for the purposes of his prosecution in Italy; the USA requested his extradition for offences related to drug-trafficking and, later, submitted another request for extradition in relation to a charge of false statements. Both requests were granted, but extradition twice postponed pending his prosecution in Italy. The applicant complained to the ECtHR about the length of his detention on remand (Article 5 (1) (c) and (3) of the Convention). The Court considered that the applicant's detention on remand was never revoked and that at no stage was his deprivation of liberty based exclusively on the orders adopted within the extradition proceedings. Therefore, it fell within the scope of Article 5 (1) (c) of the Convention. The Court recalled that, under its own case-law, the issue of whether a period of detention is reasonable cannot be assessed *in abstracto*, but taking into account its special features. Continued detention can be justified in a given case only if there are specific indications of a genuine requirement of public interest which, notwithstanding the presumption of innocence, outweighs the rule of respect for individual liberty.

In this case, the applicant had been detained pending trial and extradition for little more than ***three years and two months***, approximately ten months and a half during the investigation and the remainder after his committal for trial. Having regard to the seriousness of the charges, to the number of defendants and to the difficulties of the fight against criminal organisations dealing with international drug-trafficking – in particular with regard to obtaining and producing evidence –, the Court accepted that the applicant's case, as submitted by the Government, was one of a certain complexity, and considered that the length of the preliminary investigations was not, as such, open to criticism. However, it also noted that a number of unjustified delays occurred after the preliminary hearing. In particular, it remained unexplained why the first hearing of the applicant's trial was fixed for more than nine months after the date of the committal for trial. Moreover, it took more than seven months to solve a question of competence *ratione loci*, which the Court found "excessive". Therefore, during an overall period of more than one year and four months, there was either a total stay of the proceedings, or a suspension of the examination of the merits of the case awaiting a ruling on a preliminary issue. In light of this, the Court considered that the duty of "special diligence" enshrined in Article 5 (3) had not been observed[826].

In a 2003 case, the requested State, who held the requested person in custody while serving a prison sentence for a crime committed in its territory, but had already decided to authorise his extradition as requested, meanwhile granted the temporary surrender of such person to the requesting State. The applicant complained to the ECtHR that, inter alia, he was not handed over

[825] **PC-OC (2023)11EN**, ***Guidance on good practices regarding the post-surrender phase in extradition proceedings, Strasbourg***, 15 November 2023, pp. 5-6.
[826] ECtHR, Case ***Sardinas Albo v. Italy***, No. 56271/00, Judgment of 17 February 2005, §§68-69, 95-97.

to the authorities of the requesting State ***directly after the decision on his extradition***. The Court noted that, under the law of the requesting State, an extradition decision can be enforced only with the prior consent of the courts in which criminal proceedings have been instituted against the person concerned in the requested State or after such person had served the penalties he was sentenced to in the same State. Therefore, the Court considered that applicant's detention had always been covered by one of the exceptions provided for in **Article 5 (1)** and found no violation of this provision[827].

Some ***practical challenges*** can have a **major impact** on the last phase of the surrender procedure. Those challenges might arise from "circumstances beyond the control of the Member States concerned (*force majeure* cases) or from the existence of **serious humanitarian reasons** requiring, for instance, the postponement of the surrender.

Also, although the **EAW FD** has been designed to provide for a speedy and efficient extradition-like procedure among EU Member States, the actual surrender of the person may also be postponed so that he or she may be prosecuted or serve a sentence in the executing Member State, for an act other than that referred to in the EAW (**Article 24 (1) EAW FD**). Furthermore, if the actual surrender of the person is impossible within the legal deadline (10 days after the decision on execution, in accordance with **Article 23 (2)** of the **EAW FD**), it may have to be postponed and a new surrender date arranged between the parties. Exceptionally, surrender may be temporarily postponed due to serious humanitarian reasons, for example if there are substantial grounds for believing that it would manifestly endanger the requested person's life or health. The execution of the EAW shall take place as soon as these grounds have ceased to exist (**Article 23 (4) EAW FD**).

The CJEU has ruled that the executing and issuing judicial authorities must agree on a new surrender date under **Article 23 (3)** of the **EAW FD** where the surrender of the requested person within 10 days of a first new surrender date agreed on pursuant to that provision proves impossible on account of the ***repeated resistance*** of that person, in so far as, on account of exceptional circumstances, that resistance could not have been foreseen by those authorities and the consequences of the resistance for the surrender could not have been avoided in spite of the exercise of all due care by those authorities, which is for the referring court to ascertain. Those authorities also remain obliged to agree on a new surrender date if the time limits prescribed in Article 23 have expired[828].

2.16 The post surrender phase

ECE is very scarce in provisions relating to the post-surrender phase of extradition. Aware of the importance good cooperation between the Parties even after extradition proceedings are terminated (in view of safeguarding the rights of the extradited individual, but also of preserving good inter-State relations in order to secure cooperation in criminal matters in the future), the Committee of Ministers issued recommendations with a bearing in this regard, in 1975 and 1986. These are

> **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.[829]

[827] ECtHR, Case ***Raf v. Spain***, No. 53652/00, Judgment of 17 June 2003, §§60-61.
[828] CJEU, Case **C-640/15, *Vilkas***, Judgment of 25 January 2017.
[829] CoE, Committee of Ministers, extradition **Resolution (75) 12 of the Committee of Ministers on the practical application of the European Convention on Extradition**, 21 May 1975.

2. That the time spent in ***detention*** by an individual ***solely for the purpose of extradition*** in the territory of the requested state or of a state of transit shall be taken into consideration when deciding the penalty involving deprivation of liberty or detention which he has to serve for the offence for which he was extradited.[830]

3. Time spent in ***custody pending extradition*** should be ***deducted from the sentence*** in the same manner as time spent in custody pending trial.[831]

In 2023, PC-OC adopted specific and all-encompassing guidance on the post-surrender phase. The **Guidance on good practices regarding the post-surrender phase in extradition proceedings** is reproduced in full in Part IV of this publication and we suggest its integral reading. We shall, however, highlight the main measures which experts recommend to facilitate a successful post-surrender conduct of affairs in extradition matters[832]:

1. ***Informal communications*** between State authorities should, in principle, be considered ***confidential***.

2. Whenever possible, the requested State should communicate, at an informal level, information concerning the ***content and terms of extradition*** decisions even ***before they become final***.

3. The ***central authority(ies)*** of the requested State should remain available to respond to inquiries from the requesting State to ***clarify terms of the extradition*** decision following surrender, when they are in a position to do so.

4. The requested State should endeavour to communicate ***medical and social information*** regarding the extradited person, as well as information on their behaviour in prison, where this information would be relevant for the authorities of the requesting State. The requesting State should communicate particular needs in this regard as early as possible.

5. When it comes to questions regarding the application of the ***rule of speciality***, direct communication between central authorities should be prioritised and occur at the earliest possible stage.

6. The central authorities of the requested State should promptly respond to requests for clarification, including at an informal level to help the requesting State in ***interpreting the extradition decision*** in the light of the national law of the requested State.

7. Consultations between all three parties would be beneficial in cases involving ***re-extradition***, including before submitting the request whenever possible. It is a good practice for Party B's request to be accompanied by information, such as a form or a checklist, drafted by Party C's authorities, detailing the relevant information in first-hand, and not by proxy.

8. When they are needed, ***guarantees*** should be provided by the central authorities of the requesting State. The central authorities of the requested State should always ***co-ordinate*** the provision of these guarantees (by indicating precisely how they should be worded) and their monitoring.

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[830] CoE, Committee of Ministers, extradition **Resolution (75) 12 of the Committee of Ministers on the practical application of the European Convention on Extradition**, 21 May 1975.
[831] CoE, Committee of Ministers, **Recommendation R (86) 13 concerning the practical application of the European Convention on Extradition in respect of detention pending extradition**, 16 September 1986.
[832] **PC-OC(2023)11**, *Guidance on good practices regarding the post-surrender phase in extradition proceedings*, Strasbourg, 2 October 2023, p. 4.

9. In cases where the requested Party indicates its need to have ***information about the outcome of the proceedings*** following extradition, the authorities of the requesting Party should endeavour to provide that information.

Chapter 3: Human rights guarantees as grounds for refusal of extradition

The **ECHR** obliges Contracting Parties to "secure to everyone within their jurisdiction" the rights and freedoms stipulated therein.[833] The meaning of everyone "within their jurisdiction" has repeatedly been interpreted by the Court as to permit the extraterritorial application of the Convention in various respects and on different occasions.[834] The issue of the extraterritoriality of the Convention in the framework of extradition concerns the duty – and therefore the responsibility, in case of breach – of the Contracting Parties not to expose anyone who is under their jurisdiction to an irremediable situation of objective danger, even outside their jurisdiction.[835] In such cases, the responsibility of the Contracting State is triggered due to its actions, which were such as to have as a direct consequence the exposure of an individual to proscribed ill-treatment.[836] More specifically, as regards the Court's case law, the notion has initially appeared in relation to Article 2 (the ***right to life***), Article 3 (prohibition of ***torture and inhuman and degrading treatment or punishment***;) Article 6 (the right to a ***fair trial***); and Article 8 (the right to ***private and family life***). Gradually, this responsibility has been extended to cover also cases of political, racial, religious or other ***discrimination*** and flagrant denials of the ***right to liberty***.

The first two of the rights listed above seem to entail ***absolute prohibitions*** to extradition whenever there seems to be a real risk of their violation, whereas for the remaining three a ***higher threshold*** has been introduced with the criteria of flagrancy or exceptional seriousness.

Concerning allegations of possible violations of other rights in the context of extradition, it is interesting to note that, in case **Z. and T. v. The United Kingdom** (2006)[837], the applicants, who were Christians, claimed that their expulsion to Pakistan would violate Article 9 of the **ECHR**, because they would be unable to live openly and freely as Christians. The ECtHR held that ***a violation of freedom of religion could only form a bar to expulsion to the extent that it constituted a violation of Articles 2 or 3 ECHR, a flagrant denial of a fair trial or a flagrant breach of Article 5 of the ECHR***. "Although the ECtHR did not wish to rule out the possibility that expulsion might in exceptional circumstances engage the responsibility of the returning State under Art. 9 ECHR, it found it difficult to visualise a case *in which a sufficiently flagrant violation of Art. 9 ECHR would not also involve treatment in violation of Art. 3 ECHR*".

It is often pointed out the underlying tension between, on the one hand, the aim of extradition – which is the prevention of impunity – and, on the other, the obligation to protect the human rights of the sought person. This led to a compromise in the text of the **ECE** itself, with Article 1 listing

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[833] **ECHR**, Article 1.

[834] ECtHR; Case ***Öcalan v. Turkey***, No: 46221/99, Judgment [GC] 12 of May 2005; Case ***Mamatkulov and Askarov v. Turkey***, Nos.: 46827/99 & 46951/99, Judgment [GC] of 4 February 2005; Case ***Mamatkulov and Abdurasulovic v. Turkey***, N.º 46827/99 46951/99, Judgement of 6 February 2003; Case ***Xhavara and 15 Others v. Italy and Albania***, 11 January 2001; Case ***Cyprus v. Turkey***, N.º 25781/94, Judgement [GC] of 10 May 2001; Case ***Issa and Others v. Turkey***, N.º 31821/96, Judgement of 16 November 2004; Case ***Ilaşcu, Lesco, Ivantoc and Petrov-Popa v. Moldova and Russia***, N.º 48787/99, Decision of 4 July 2001; Case ***Bankovic and Others v. Belgium and 16 Other Contracting States***, N.º 52207/99, decision of 12 December 2001; Case ***Soering v. the United Kingdom***, N.º 14038/88, Judgement of 7 July 1989; Lawson, R., "The concept of jurisdiction and extraterritorial acts of state", in Kreijen, G. (ed. in chief), *State, sovereignty, and international governance*, Oxford University Press, 2002, pp. 281-297; in the field of the **ICCPR**, see ***Sergio Euben Lopez Burgos v. Uruguay***, Communication No. R. 12/52, 6 June 1979, UN Doc. Supp. No. 40 (A/36/40), 12.1-12.3; *Francesco Cavallaro on behalf of Lilian Celiberti de Casariego v. Uruguay*, Communication No. 056/1979, 29 July 1981; *Delia Salidas de Lopez v. Uruguay*, Communication No. 52/979, 29 July 1981, UN Doc. **CCPR/C/OP/1**; in general see "**The legal consequences of the construction of a wall in the Occupied Palestinian Territory"**, Advisory Opinion, ICJ, 9 June 2004, paragraph 109; **Report of the Human Rights Committee, UN GAOR, 46th Session, Supp. No. 40**, paragraph 652; and UN Commission on Human Rights' Special Rapporteur on Human Rights in Kuwait under Iraqi Occupation, Walter Kalin, "Report on the situation of human rights in Kuwait under Iraqi occupation", UN Doc. **E/CN.4/1992/26**, paragraphs 55-59.

[835] EComHR, Case ***E. M. Kirkwood v. the United Kingdom***, N.º 10479/83, decision of 12 March 1984.

[836] ECtHR, Case ***Soering v. the United Kingdom***, N.º 14038/88, Judgement of 7 July 1989,. §§89-91.

[837] ECtHR, Case ***Z. and T. v. The United Kingdom***, N.º 27034/05, decision of 28 February 2006.

exhaustively the grounds for refusal of extradition, but Article 26 allowing for the possibility of reservations to any of the provisions of the Convention, thus providing the possibility to refuse extradition in case this is deemed to run contrary to the fundamental principles of a State's legal system[838]. Unlike the **EAW FD**, the **ECE** (1957) does not contain a general provision excluding extradition if there is a risk of infringement of the human rights of the requested person.

In spite of this, the requested/executing State, in particular, does have a duty and responsibility to consider potential human rights violations that might be inflicted upon the requested individual. The Parliamentary Assembly of the CoE has also addressed this issue and reaffirmed, in its **Resolution 2315 (2019)**, on "Interpol reform and extradition proceedings: building trust by fighting abuse", that States should ensure that extradition (or surrender) does not entail a breach of human rights, namely of those provided for under the **ECHR** and **CFREU**. Sub-paragraphs 9.4 and 9.5 of this resolution stipulate that:

> ***9.*** *Regarding the improvement of extradition and other proceedings in the field of international criminal law co-operation in general, the Assembly calls on the member States of the Council of Europe and the member States of its Group of States against Corruption (GRECO, enlarged partial agreement) to participate actively in the Council of Europe's co-operation activities in the criminal law field, in particular the PC-OC, with the aim of implementing good practices and avoiding problems identified by the PC-OC, in particular:*
>
> > ***9.4*** *by refusing any extraditions and other interstate legal assistance, particularly in the field of criminal law co-operation by which the targeted person would be exposed to a serious risk of flagrant denial of justice, cruel and inhuman punishment or discriminatory treatment on political, racial, ethnic or religious grounds, as well as violation of privacy, property, professional rights and deprivation of liberty by searches, seizures, transmission of private, sensitive or confidential information to the requesting State, and arrest;*
> >
> > ***9.5*** *by relying on diplomatic assurances by the requesting State only when they are specific, given by an authority having the power to enforce them, credible in view of the length and strength of bilateral relations between the requested and the requesting States and of the requesting State's track record of abiding by similar assurances; when the requesting State has an effective system of protection against torture and when compliance with the assurances can be objectively verified through diplomatic or other monitoring channels;*

If until its landmark case **Soering v. United Kingdom** (1989), the recognition, by the ECtHR, of the possibility of States engaging in extraterritorial responsibility for violations of human rights in the context of extradition was truly exceptional (having been declared admissible by the EComHR in only three cases which, for various reasons, did not reach the Court[839]), this judgment truly marks an inversion of such trend. In the **Soering** judgement, of 7 July 1989, the ECtHR found for the first time that the State's responsibility could be engaged if it decided to extradite a person who risked being subjected to ill-treatment in the requesting country. Despite significant developments in the Court's case law concerning the risk of torture and ill-treatment in transnational settings (see below), **Soering** remains the main authoritative interpretation on the matter.

Extradition may thus be denied on a number of human rights grounds, and tensions may arise between the cooperative and crime fighting roles of extradition and its protective function regarding the individual subject thereto, particularly – but not exclusively – when his or her right to life or freedom from torture are at stake.

It should also be stated that, despite the fact that the ECtHR has consistently underlined that it cannot impose **ECHR** standards on non-Party States[840], some consider that, in practice, it often

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[838] See, for example, in this vein, **PC-OC (2018)05**, "Introductory speech (…)", Mr Vincent Glerum, p. 15.
[839] See, for instance, **PC-OC (2018)05**, "Introductory speech (…)", Mr Vincent Glerum, p. 17.
[840] See Case ***Soering v. United Kingdom***, §86 and Case ***Al-Skeini and Others v. United Kingdom***, nº. 55721/07, Judgment [GC] of 7 July 2011.

does precisely the opposite.[841] Furthermore, when both States are Parties to the **ECHR** and a non-absolute right is at stake (such as the right to a fair trial), "the ECtHR seems to rely fairly heavily on the requesting State's obligation to respect the individual's fundamental rights and to provide an effective remedy against any violation of these rights as well as the possibility to lodge a complaint with the ECtHR against that State.[842]" In the case of extraditions to States not Parties to the **ECHR**, issues of jurisdiction *ratione loci* inevitably arise and the Court also takes into account the possibility to lodge complaints before the bodies of other regional human rights systems[843].

In cases concerning the application of instruments of mutual recognition between Member States of the EU – which require national courts to consider all the other Member States to be complying with the fundamental rights recognised by EU law – the ECtHR even presumes that EU law affords a level of protection that is equivalent to the protection afforded by the **ECHR**. This presumption can only be rebutted if, in a given case, the protection of fundamental rights has been ***manifestly deficient***. This line of case law was developed in the judgements on cases **Bosphorus v. Ireland** (2005) and **Avotiņš v. Latvia** (2016) and shows the Court striking a balance between the prevention of the risk of impunity within the area of Freedom, Security and Justice and the obligation to protect fundamental rights.[844]

European Arrest Warrant[845]

The CJEU has repeatedly held that the executing judicial authority may only refuse to execute an EAW in the exhaustively listed cases of mandatory non-execution, as laid down in Article 3 **EAW FD**, or of optional non-execution, as laid down in Articles 4 and 4a **EAW FD**. Despite the ***exhaustive*** nature of the list of refusal grounds, the CJEU's case-law has revealed that there are ***other exceptional circumstances*** where the executing authorities should refrain from executing EAWs, for instance on human rights grounds[846].

With respect to grounds for optional non-execution under Article 4 **EAW FD**, the CJEU has clarified that Member States are free to transpose them into their national law or not. However, when they do so, the executing judicial authority must have a ***margin of discretion*** as to whether or not it is appropriate to refuse to execute an EAW, having the opportunity to take into account the circumstances specific to each case[847] .

So far, the CJEU has provided interpretation with regard to the following refusal grounds and guarantees: children[848], national residents and persons staying in the executing Member State[849], *ne bis in idem*[850], extraterritoriality[851] and *in absentia* judgments[852]. Concerning the rule of double criminality, see sub-chapter 2.4.

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[841] **PC-OC Mod (2015) 07**, *Prison standards in extradition matters: discussion paper by Erik Verbert (Belgium)*, Strasbourg, 7 September 2015, p. 3.
[842] **PC-OC (2018)05**, "Introductory speech (…)", Mr Vincent Glerum, pp. 19-20.
[843] ECtHR, Case ***Peñafiel Salgado v. Spain***, No. 65964/01, Decision of 16 April 2002, §2.
[844] See **PC-OC (2018)05**, "Introductory speech (…)", Mr Vincent Glerum, p. 20.
[845] Eurojust, ***Case-law by the Court of Justice of the EU on the European Arrest Warrant***, updated until 1 December 2021, p. 59.
[846] CJEU, **Joined Cases C-404/15 and C-659/15 PPU, *Aranyosi and Căldăraru***, Judgment of 5 April 2016.
[847] CJEU, Case **C-665/20 PPU, X *(Mandat d'arrêt européen - Ne bis in idem)***, Judgment of 29 April 2021.
[848] CJEU, **Case C-367/16, *Piotrowski***, Judgment of 23 January 2018.
[849] CJEU, **Case C-66/08, Kozłowski**, Judgment of 17 July 2008; **Case C-123/08, *Wolzenburg***, Judgment of 6 October 2009; **Case C-42/11, *Lopes Da Silva Jorge***, Judgment of 5 September 2012; **Case C-579/15, *Popławski***, Judgment of 29 June 2017 (Popławski I); **Case C-514/17, *Sut***, Judgment of 13 December 2018; **Case C-573/17, *Popławski***, Judgment of 24 June 2019 (Popławski II).
[850] CJEU, **Case C-261/09, *Mantello***, 16 November 2010; **Case C-268/17, *AY***, Judgment of 25 July 2018; **Case C-665/20 PPU, *X* (Mandat d'arrêt européen - *Ne bis in idem*)**, Judgment of 29 April 2021.
[851] CJEU, **Case C-488/19, *JR***, Judgment of 17 March 2021.
[852] CJEU, **Case C-306/09, *IB***, Judgment of 21 October 2010; **Case C-399/11, *Melloni***, Judgment of 26 February 2013; **Case C-108/16 PPU, *Dworzecki***, Judgment of 24 May 2016.

Johannes Silvis, former Judge at the ECtHR, recalled in his lecture before the PC-OC at its special session on extradition held in 2014, that human rights "occasionally pop up as additional grounds for refusal of extradition requests, most notably in terrorist-cases. *Additional*, of course, only in as far as such grounds for refusal may not already be implicated in traditional grounds for refusal. While traditional grounds for refusal of extradition often reflect the interest of the requested state, this is not always thought (or recognized) to be so when human rights come into play."[853]

In 2015, while referring to the more restrictive and nationally-based concept of "fundamental rights", PC-Mod affirmed in wider and more definitive terms: "Fundamental rights constitute a horizontal condition to extradition. The establishment of a serious risk of a (flagrant) violation of one or more fundamental rights or the sufficient indication of a past violation that may affect the sought person's< situation in the requesting State must lead to the refusal of the extradition"[854].

The executing judicial authority may not refuse execution of an EAW on the basis of a ***ground for non-execution not provided for in the*** **EAW FD**, but solely in national legislation, except if the latter establishes that such execution is to be refused if it would lead to an infringement of a fundamental right enshrined in EU law[855].

On 15 March 2023, the Committee of Ministers of the CoE approved the **Policy Paper on the question of accession of non-member States to Council of Europe conventions on international co-operation in criminal matters**, elaborated by PC-OC. It is expected that this instrument, by establishing a pre-accession examination and screening mechanism – focused, inter alia, on the human rights situation of the candidate country – for third States wishing to become Parties to CoE conventions on international cooperation in criminal matters, will facilitate the task of national authorities having to take decisions in this regard and prevent extraditions likely to violate States' extraterritorial human rights obligations. By its very nature, this instrument shall be of particular relevance with regard to extradition. The first State to be submitted to this procedure was Chile, precisely upon its request to be invited to accede to the **ECE**[856].

3.1 Prohibition of discrimination

In accordance with **Article 3 (2)** of the **ECE**, extradition shall not be granted 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*.

This in line with paragraph 1 of Committee of Ministers' **Recommendation No. R 80 (9),** of 27 June 1980, in which this body recommends that the governments of Member States:

> *not to grant extradition where a request for extradition emanates from a state not party to the European Convention on Human Rights and where there are substantial grounds for believing that the request has been made for the purpose of prosecuting or punishing the person concerned on account of his race, religion, nationality or political opinion, or that his position may be prejudiced for any of these reasons;*

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[853] Silvis, Johannes, **"Extradition and Human Rights: Diplomatic Assurances and human rights in the extradition context"**, lecture presented on 20 May 2014 at the special session on extradition held during the 66th meeting of PC-OC, p. 1.
[854] **PC-Mod (2015) 07**, Prison standards in extradition matters – Discussion paper by Erik Verbert (Belgium), Strasbourg, 7 September 2015, p. 2.
[855] CJEU, Case **C-158/21, *Puig Gordi and Others***, Judgement [GC] of 31 January 2023.
[856] **PC-OC (2023)05**, *List of decisions taken at the 83rd meeting of the PC-OC*, Strasbourg, 4 May 2023, pp. 1-4.

It also goes along the provisions of other international instruments dealing with international cooperation in criminal matters, namely Article 5 of the **European Convention on the Suppression of Terrorism**, which stipulates that:

> *Nothing in this Convention shall be interpreted as imposing an obligation to extradite if the requested state has substantial grounds for believing that the request for extradition for an offence mentioned in Article 1 or 2 has been made for the purpose of prosecuting or punishing on account of his/her race, religion, nationality or political opinions or that that person's position risks being prejudiced for any of these reasons.*

The **explanatory report** of the **European Convention on the Suppression of Terrorism**[857] relates this prohibition to the derogation of rights to defence of the person in the receiving state. According to the Committee of Ministers' **Guidelines on human rights and the fight against terrorism**[858]: *Extradition may not be granted if there are serious reasons to believe that: … ii. the extradition request has been made for the purpose of prosecuting or punishing on account of his/her race, religion, nationality or political opinions or that that person's position risks being prejudiced for any of these reasons*."

In addition to this, the prohibition of discrimination is one of the basic tenets of international human rights law. Therefore, discrimination – based, ***namely***, on such grounds as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status – is expressly prohibited, in the enjoyment of Convention rights, by Article 14 of the **ECHR**, and, in the enjoyment of any right set forth by law, by **Protocol no. 12** to the Convention. It should be emphasized that this is a non-exaustive list of prohibited grounds of discrimination, which may and has been expanded as new forms of prejudice affecting groups of person emerge or gain visibility in contemporary societies. The prohibition of discrimination stands out prominently in the case law of the ECtHR[859] and, as stated before, has gradually emerged as a grounds to refuse extradition and deportation.

In 2008, the ECtHR examined the complaint of a prisoner serving a life sentence in Cyprus who alleged, inter alia, that he had been subjected to discriminatory treatment *vis-à-vis* both life prisoners and other prisoners, since most other life prisoners had been released having served their twenty-year sentence, by way of commutation of their sentences by the President of the Republic; and also because, following a legislative amendment introduced in 1996, he had, as a life prisoner, been excluded from the possibility of any remission of his sentence. The Court recalled that Article 14 of the Convention has no independent existence, but that its application does not presuppose a breach of any other provision and, to this extent it is autonomous. A measure which in itself is in conformity with the requirements of the Article enshrining the right or freedom in question may however infringe this Article when read in conjunction with Article 14 for the reason that it is of a discriminatory nature. Furthermore, the Court noted that Article 14 does not forbid every difference in treatment in the exercise of the rights and freedoms recognised by the Convention, but only those which have "no objective and reasonable justification". It does not prohibit distinctions in treatment which are founded on an objective assessment of essentially different factual circumstances and which, being based on the public interest, strike a fair balance between the protection of the interests of the community and respect for the rights and freedoms safeguarded by the Convention. In addition to this, the Contracting States enjoy a certain margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a difference in treatment; the scope of the margin of appreciation will vary according to the circumstances, the subject matter and its background, but the final decision as to observance of the Convention's requirements rests with the Court. In the present case, and regarding the applicant's first complaint (difference in treatment between him and other life prisoners released since 1993), the Court observed that the life prisoners referred to were all released following the commutation and remission of their sentences by the President of the Republic in the exercise of

[857] CoE, **European Convention on the Suppression of Terrorism**, 27 January 1977, ETS No. 90.
[858] Article 13, paragraph 3.ii, **Guidelines on human rights and the fight against terrorism**.
[859] See, eg., ECtHT, **Guide on Article 14 of the European Convention on Human Rights and on Article 1 of Protocol No. 12 to the Convention: Prohibition of discrimination**, CoE, Updated on 31 August 2023.

his wide prerogative and discretionary power under Article 53 § 4 of the Constitution, which is applied on a case-to-case basis. In view of this, and particularly bearing in mind the wide variety of factors taken into account in the exercise of the President's discretionary powers, such as the nature of the offence and the public's confidence in the criminal-justice system, the ECtHR considered that it could not be said that the exercise of this discretion gave rise to an issue under Article 14. With regard to the applicant's second complaint (difference in treatment between the applicant, as a life prisoner, and other prisoners), the Court found that the applicant could not claim to be in an analogous or relevantly similar position to other prisoners who are not serving life sentences, given the nature of a life sentence. Therefore, no violation of Article 14 of the Convention was found[860].

In 2005, a case was examined concerning the transfer of an Estonian national from Finland to Estonia under Article 3 of the Additional Protocol to the Convention on the Transfer of Sentenced Persons. The applicant argued that, in Finland, it would be possible to be released on parole after serving half his sentence, while in Estonia release on parole would only be possible after serving two-thirds of the sentence. He alleged discrimination on the basis that as not all foreign prisoners were transferred to their home country, while prisoners of Finnish origin were not transferred at all and prisoners of Estonian origin were transferred only in a random manner. On this issue, the ECtHR reiterated that Article 14 safeguards, among others, individuals placed in similar situations from any discriminatory differences of treatment in the enjoyment of the rights and freedoms recognised in the Convention and its Protocols, and considered that, in the instant case, the applicant could not be compared to prisoners of Finnish origin serving their sentences in Finnish prisons as the Transfer Convention concerns the transfer of prisoners back to their home countries. Its aim constitutes objective and reasonable justification for the difference in treatment of the applicant and prisoners of Finnish origin on the one hand and other prisoners of Estonian origin on the other. The Court accepted the Government's argument that the difference in treatment between, for example, prisoners of Estonian origin is due to the fact that the time-consuming arrangements for a transfer are a practical obstacle to transferring prisoners serving only short sentences prior to their release on parole in Finland. Therefore, the Court rejected this part of the application as manifestly ill-founded[861].

In case **Vlas and Others v. Romania** (2015), a pregnant Moldovan citizen, failed asylum seeker and holder of a special residence permit by reason of her marriage to a Romanian citizen with whom she had a son, also a Romanian citizen, was extradited from Romania to Moldova for the purposes of prosecution for participation in organizing a pyramid scheme. Three of the applicant's co-defendants could not be extradited from Romania on account of their Romanian citizenship and, therefore, were prosecuted in Romania. The applicant alleged being a victim of discrimination on the basis of nationality. The ECtHR recalled that the applicant's three Romanian co-defendants nationality were tried by the Romanian courts in accordance with the provisions of a Treaty on MLA between Romania and the Republic of Moldova, and of Romanian legislation, which prohibit the extradition of nationals. For these reasons, the Court did not find that the applicant and her three co-defendants were in similar situations. Furthermore, the first applicant requested to be tried in Romania and this request was denied by Romanian courts by reasoned decisions, namely that the continuation of the criminal proceedings in Romania was not justified since the facts had been committed in the Republic of Moldova, where the authorities could more easily examine the evidence and hear the numerous injured parties. Therefore, no violation of Article 14 of the Convention was found in this case, either.[862]

In 2017, the ECtHR examined the case of the exclusion of a naturalized British citizen with dual British and Sudanese citizenship from the territory of the UK and stripping him of his British citizenship. The applicant complained, inter alia, of violation of Article 14 in connection with Article 8 of the Convention, firstly on the basis that he was treated differently from British citizens

[860] ECtHR, Case ***Kafkaris v. Cyprus***, No. 21906/04, Judgment [GC] of 12 February 2008, §§154-155, 159-166.
[861] ECtHR, Case ***Veermäe v. Finland***, No. 38704/03, Decision of 15 March 2005, pp.13-14.
[862] ECtHR, Case ***Vlas and Others v. Romania***, No. 30541/12, Decision of 6 January 2015, §§59-60.

considered a threat to national security who did not hold a second nationality, as they could not be deprived of their British citizenship – as this had not been argued before domestic courts, the ECtHR considered such complaint inadmissible for failure to exhaust domestic remedies; secondly, the applicant argued that he was treated differently from non-national residents who enjoyed a suspensory appeal against the revocation of leave to remain in the United Kingdom – although this ground was argued at the domestic level before the Court of Appeal, the ECtHR considered this part of the complaint manifestly ill-founded, as the person had not been denied an in-country right of appeal because he was a British citizen, but because he had already left the UK of his own volition when the impugned decisions were taken, and a non-national resident who had his leave to remain cancelled while out of the country would be treated in the same manner[863].

Despite the scarcity of times the ECtHR did find that an extradition directly violated the principle of non-discrimination enshrined in the ECHR and its protocols, one must not forget the numerous occasions in which belonging to a particular group, for example ethnic or religious, aggravates the risk of subjection of the person to violations of Article 2 or 3 of the Convention upon surrender, and may in itself constitute a factor barring the extradition of a particular person to a particular country, in a given context (see below, sub-chapter 3.3: "Issues specific to certain States").

European Arrest Warrant

Article 12 of the Preamble to the **Council Framework Decision on the EAW** states that:

> *This Framework Decision respects fundamental rights and observes the principles recognised by Article 6 of the Treaty on European Union and reflected in the Charter of Fundamental Rights of the European Union, in particular Chapter VI thereof. Nothing in this Framework Decision may be interpreted as prohibiting refusal to surrender a person for whom a European arrest warrant has been issued when there are reasons to believe, on the basis of objective elements, that the said arrest warrant has been issued for the purpose of prosecuting or punishing a person on the grounds of his or her sex, race, religion, ethnic origin, nationality, language, political opinions or sexual orientation, or that that person's position may be prejudiced for any of these reasons.*

The CJEU has been called upon to rule on discrimination-related issues in several occasions, namely:

In 2007, the validity of the **EAW FD** was challenged in **Advocaten voor de Wereld**, which claimed that, insofar as the new law dispensed with the verification of the double criminality requirement for the so-called list offences (Article 2(2) **EAW FD**), it violated the principles of legality, equality and non-discrimination. The CJEU considered that this provision does not breach the principle of equality and non-discrimination, since the categories of offences listed therein are among those the seriousness of which, in terms of adversely affecting public order and public safety, justifies dispensing with the verification of double criminality. The distinction between listed and non-listed offences is thus objectively justified. Moreover, it was not the objective of the **EAW FD** to harmonise the substantive criminal law of the Member States. The former TEU did not make the application of the EAW conditional on harmonisation of the criminal laws of the Member States within the area of the offences in question[864].

Article 4 (6) of the **EAW FD** allows the executing judicial authority to refuse to execute an EAW if it has been issued for the purposes of the execution of a custodial sentence or detention order where the requested person is staying in, or is a ***national or a resident of, the executing Member State***. In 2009, the CJEU was asked whether the refusal of execution of an EAW in the case of residents in the executing Member State, being made subject to possession of a residence permit of indefinite duration and to a continuous, lawful residence period of 5 years in this State, while the same refusal ground is applied automatically to nationals, was compatible with the principle of non-discrimination on the grounds of nationality. The CJEU replied positively in the case of the requirement of a lawful residence for a continuous period of 5 years for non-nationals (since this pursues a legitimate objective – reintegration in society – and is proportionate), but considered that making the application of Article 4(6) of **EAW FD** subject to

[863] ECtHR, Case ***K2 v. the United Kingdom***, No. 42387/13, Decision of February 2017, §§68-72.
[864] CJEU, Case C-303/05, ***Advocaten voor de Wereld***, Judgment of 3 May 2007, §§57-59.

supplementary administrative formalities, such as a residence permit of indefinite duration, is not compatible with such principle[865].

The CJEU held that the terms *resident* and *staying in* are autonomous concepts of EU law[866]. Concerning the definition of the concept of ***resident***, the CJEU has stated that: "a requested person is *resident* in the executing Member State when he has established his actual place of residence there". According to the same Court, a person ***is staying*** in the territory of a Member State "when, following a stable period of presence in that State, he has acquired connections with that State which are of a similar degree to those resulting from residence". in order to ascertain whether there are connections between the requested person and the executing Member State which lead to the conclusion that that person is covered by the term 'staying', executing judicial authority to make an ***overall assessment of various objective factors characterising the situation of that person,*** including, in particular, the **length**, **nature** and **conditions** of his presence and the **family and economic connections** which that person has with the executing Member State.[867]

The CJEU also clarified that Article 4(6) **EAW FD** should be ***interpreted in light of the principle of non-discrimination on the basis of nationality*** (Article 18 TFEU). Therefore, although a Member State may decide to limit the situations in which an executing judicial authority may refuse to surrender a person who falls within the scope of that provision, it ***cannot automatically and absolutely exclude from its scope the nationals of other Member States staying or resident in its territory irrespective of their connections with i***t. The national court is required, taking into consideration the whole body of domestic law and applying the interpretative methods recognised by it, to interpret that law, so far as possible, in the light of the wording and the purpose of the **EAW FD**, with a view to ensuring that that framework decision is fully effective and to achieving an outcome consistent with the objective pursued by it.[868] And also that Member States cannot implement such provision in way which, first, does not authorise such a surrender and, second, merely lays down the obligation for the judicial authorities of the executing Member State to inform the judicial authorities of the issuing Member State that they are willing to take over the enforcement of the judgment where, on the date of the refusal to surrender, the execution has not in fact been taken over and where, furthermore, in the event that taking over that execution subsequently proves to be impossible, such a refusal may not be challenged[869].

The CJEU further held that Article 4(6) presupposes an ***actual undertaking*** on the part of the executing Member State ***to execute*** the custodial sentence imposed on the requested person. The mere fact that that a Member State declares itself *willing* to execute the sentence cannot be regarded as justifying such a refusal.[870] The fact that the offence on which the EAW is based is, under the law of the executing Member State, punishable by fine only is not an obstacle, provided that that fact does not prevent the custodial sentence imposed on the requested person from being enforced.[871]

3.2 Capital punishment and extrajudicial killings

Although the **ECHR** in itself does not exclude the application of the death penalty, it does restrict it to special conditions, according to Article 2. **Protocol 6** (**ratified** by all CoE Member States), however, does prohibit the imposition of this penalty in most circumstances, and **Protocol 13** (**ratified** by all CoE Member States except one, as of March 2024) does so in all circumstances

[865] CJEU, **Case C-123/08, *Wolzenburg***, Judgment of 6 October 2009, §§50-51, 67-73.
[866] CJEU, **Case C-123/08, *Wolzenburg***, Judgment of 6 October 2009; Case **C-66/08, *Kozłowski***, Judgment of 17 July 2008.
[867] CJEU, **Case C-66/08, *Kozłowski***, Judgment of 17 July 2008.
[868] CJEU, **Case C-42/11, *Lopes Da Silva Jorge***, Judgment of 5 September 2012.
[869] CJEU, **Case C-579/15, *Popławski***, Judgment of 29 June 2017 (Popławski I).
[870] CJEU, **Case C-579/15, *Popławski***, Judgment of 29 June 2017 (Popławski I); and **Case C-573/17, *Popławski***, Judgment of 24 June 2019 (Popławski II).
[871] CJEU, **Case C-514/17, *Sut***, Judgment of 13 December 2018.

whatsoever and without exception. Therefore, it results from the combined provisions of the Convention and its Protocols, as interpreted by the ECtHR, that Articles 2 (right to life) and 3 (prohibition of torture and ill-treatment) **prohibit the extradition or deportation of an individual to another State where substantial grounds have been shown for believing that such person would face a *real risk* of being subjected to the death penalty there.**[872]

It is interesting to note that, even before the Convention system prohibited the imposition of the death penalty in all circumstances, the Court considered that the manner in which it was imposed, namely the placement on the "death row", would go beyond the threshold imposed by Article 3 and thus engage the responsibility of the requested State if the person faced a "real risk" of being subjected to such treatment[873].

The Committee of Ministers of the CoE, in the framework of the fight against terrorism, adopted the "**Guidelines on human rights and the fight against terrorism**".[874] Article XIII (2) of the guidelines stipulates that (emphasis added):

> *2. The extradition of a person to a country where he/she risks being sentenced to the death penalty may not be granted. A requested State may however grant an extradition if it has obtained **adequate guarantees** that:*
>
> > *(i) the person whose extradition has been requested will not be sentenced to death; or*
> >
> > *(ii) in the event of such a sentence being imposed, it will not be carried out.*

The **credibility** of these guarantees has to be evaluated by the requested State when deciding whether to extradite. Guarantees provided competent prosecution authorities, including the Prosecutor General, who under national law is invested with the power to control the action of all prosecutors in the State, that prosecution will not be seek the death penalty, have been characterised as sufficiently credible.[875] In a case in which it was alleged that, in accordance with the doctrine of conspiracy in US federal criminal law, if, in the event of extradition and trial, it was considered proven that one of the applicant's alleged co-conspirators had murdered a US citizen, this would render such applicant liable to a capital charge, the Court accepted the extradition as compatible with Article 2, since the US prosecutors had already set out the charges which he would face upon extradition and made clear that the death penalty was not sought in respect to any of them[876]. The inclusion of additional assurances that the death penalty will not be contemplated in the sentencing phase also heightens the credibility of such assurances. [877]

However, diplomatic notes issued by the government carry, according to the Court, a "presumption of good faith" and the Court has found them credible in the case of a country, like the USA, with a "long history of respect for democracy, human rights and the rule of law, and which has longstanding extradition arrangements with Contracting States". In this context, the Court attached importance to the fact that such assurances were "specific, clear and unequivocal" and that, in the context of an extradition request, there have been no reported breaches of an

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[872] ECtHR, Case ***Al-Saadoon and Mufdhi v. the United Kingdom***, No. 61498/08, Judgement of 2 March 2010; , Case ***Shamayev and others v. Georgia and Russia***, N.º 36378/02, Judgment of 14 April 2005, §333.

[873] ECtHR, Case ***Soering v. United Kingdom***, N.º 14038/88, Judgment of 7 July 1989, §88.

[874] CoE, **Guidelines on human rights and the fight against terrorism**, adopted by the Committee of Ministers at its 804th meeting (11 July 2002).

[875] ECtHR, Case ***Chentiev and Ibragimov v. Slovakia***, Nos.: 21022/08 & 51946/08, Decision of 14 September 2010, pp. 13-14; Case ***Shamayev and others v. Georgia and Russia***, No. 36378/02, Judgment of 14 April 2005, §344 and Case ***Mamatkulov and Abdurasulovic v. Turkey***, Nºs 46827/99 46951/99, Judgment of 6 February 2003,§§75-77; ECtHR, Case ***Einhorn v. France***, No. 71555/01, Decision of 16 October 2001, §26.

[876] ECtHR, Case ***Babar Ahmad and others v. United Kingdom (Decision)***, Nos. 24027/07, 11949/08 & 36742/08, Decision (Partial) of 6 July 2010, §119.

[877] ECtHR, Case ***Harkins and Edwards v. United Kingdom***, Nos. 9146/07 & 32650/07, Judgment of 17 January 2012, §86.

assurance given by the requested Government to a Contracting State. It considered that the country having a "long-term interest in honouring its extradition commitments alone would be sufficient to give rise to a presumption of good faith against any risk of a breach of those assurances"[878]. The reliability of diplomatic assurances provided by prosecution/government authorities can also be reinforced, for instance, when they include precise and verifiable elements such as legal provisions in force at the moment of crime specifying that the death penalty is not applicable to the crime(s) of which the person is accused[879] and reference to the existence of bilateral treaties, incorporated into the law of the requesting State and prohibiting the alteration of the denomination of the offence into a capital felony[880]. The ECtHR considers that, even if the national courts, as entities independent from the political power, sentence the person to a heavier penalty, the executive should in such a case make use of its power of pardon and commute the sentence in accordance with the guarantees provided.[881]

In case **Cipriani v. Italy** (2009), concerning the extradition of an Italian national to the USA for the purpose of prosecution in which the applicant feared that the description of the offence he was accused of could be altered to a capital felony, the Court noted that the Italian authorities had warded off any risk of a death sentence on the grounds that the applicant was accused of crimes for which such a penalty was not applicable, that the principle of speciality included in the extradition Treaty between the USA prohibited the alteration of the denomination of the offense into a capital felony and that the Treaty had been implemented in US law and must therefore be observed by every US Court. According to the Court, these elements were precise and verifiable and their interpretation by Italian authorities was neither manifestly illogical nor arbitrary. Therefore, the diplomatic assurances provided by the US Department of Justice could be relied on to assess the existence of a real and tangible violation of Article 1 of Protocol No. 6[882].

In some cases, when competent prosecution authorities agree to reduce the principal charge against the sought person and clarify, via diplomatic note, that the death penalty therefore ceases to be applicable, this is considered a change in the factual basis of the case and any revival of the original charges against the applicant would be incompatible with the duty of good faith in the discharge of treaty obligations (Article 26 of the **Vienna Convention on the Law of Treaties**). Accordingly, the Court considers it justified to proceed on the basis that the person can now be tried solely for the charges indicated in the Diplomatic Note and specified in the new extradition decree. [883]

Assurances provided by the Deputy Prime Minister, also in charge of internal affairs, and engaging the executive power (to the effect that the person would not be subjected to the death penalty or to imprisonment of more than 25 years), have also been found credible, especially in a situation where legal provisions in force provided that any death sentence would automatically be commuted to life imprisonment where the person is extradited from a State which does not provide for the death penalty in its legal system[884].

As a rule, the ECtHR admits extraditions for capital crimes to States whose competent authorities have imposed an indefinite moratoria on this penalty, except if the applicant duly substantiates any fears that such moratoria might be lifted and the sentence executed.[885]

However, there may be exceptions to this rule, as in the case **Öcalan v. Turkey** (2005), in which the Court took into account the applicant's background as a founder and leader of the PKK. This

[878] ECtHR, Case ***Rrapo v. Albania***, No. 58555/10, Judgment of 25 September 2012, §§72-73.
[879] ECtHR, Case ***Kozhayev v. Russia***, No. 60045/10, Judgment of 5 June 2012, §§93-96.
[880] ECtHR, Case ***Cipriani v. Italy***, No. 22142/07, Decision of 30 March 2009, pp. 9-10; Case ***Einhorn v. France***, No. 71555/01, Decision of 16 October 2001, §26.
[881] ECtHR, Case ***Salem v. Portugal***, No. 26844/04, Decision of 9 May 2006, p. 7.
[882] ECtHR, Case ***Cipriani v. Italy***, No. 22142/07, Decision of 30 March 2009, pp. 9-10.
[883] ECtHR, Case ***Beverly McCallum v. Italy***, No. 20863/21, Decision [GC] of 21 September 2022, §§50-52.
[884] ECtHR, Case ***Salem v. Portugal***, No. 26844/04, Decision of 9 May 2006, p. 7.
[885] ECtHR, Case ***M.I. v. Bosnia and Herzegovina***, No. 47679/17, Decision of 29 January 2019, §57; Case ***Kaboulov v. Ukraine***, No. 41015/04, Judgment of 19 November 2009, §§102-103.

organisation had been engaged in a sustained campaign of violence causing many thousands of casualties, which made the applicant Turkey's most wanted person, convicted of the most serious crimes that existed in the Turkish Criminal Code and giving rise to a general political controversy – prior to the decision to abolish the death penalty – as to whether he should be executed. This fact, added to the circumstance that, in the Court's view, the death penalty had been imposed following an unfair procedure by a court whose independence and impartiality were open to doubt, and that he had to suffer the consequences of the imposition of such sentence for nearly three years, led the Court to conclude that the overall situation amounted to inhuman treatment in violation of Article 3 of the Convention, despite the fact that a long-standing moratorium was in force in Turkey and that it had found in previous cases that the risk of it being implemented was "illusory"[886].

On the contrary, the Court considers that, objectively, it cannot be said that an assurance to inform the judge at the sentencing stage of the wishes of the requested State for the death penalty not to be imposed eliminates the risk of such imposition.[887]

It also found for instance, that deportation/expulsion of people with political activity abroad and/or human rights defenders to Sudan can give rise to a violation of Articles 2 and 3 of the Convention, provided that such people have had such exposure as to attract the attention of the Sudanese intelligence services[888].

In the absence of any evidence to the contrary, the Court will not overturn conclusions which have been reached by domestic courts after an adversarial assessment of a request for extradition.[889]

Moreover, States are obliged to abstain from extraditing a person to a State, where he or she runs a real risk of being illegally executed[890]. The simple possibility of such a risk would not be in itself a violation of Article 2.[891] For example, whilst the conflict in the Republic of Chechnya is considered of extreme violence and those at risk of being deported can certainly be said to fear for their lives, the fact that individuals of Chechen origin could be extradited to Russia does not in itself render their extradition contrary to Article 2. The risk has to be precise and the evidence serious and confirmed.[892] In the same sense, the mere possibility of such a risk because of the alleged ambiguity of the relevant domestic legislation cannot in itself involve a violation of Article 2 of the Convention.[893]

In 2002, the Court declared inadmissible a complaint concerning an extradition from Germany to Italy in which the applicant alleged he was unfit for travel due to both physical and psychiatric problems, and at a high risk of suicide in case of extradition. In face of two conflicting medical reports and of an official medical examination requested by German health authorities which confirmed that the person showed signs of depression and anxiety, as well as chronic liver disease and recurrent lumbar sciatica, but was fit for detention and travel, the ECtHR concluded it had no reason to believe that the German authorities have disregarded the applicant's physical and mental condition, or failed to provide necessary medical care, noting also that extradition was due to take place to a State Party to the ECHR[894].

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[886] ECtHR, Case ***Öcalan v. Turkey***, No. 46221/99, Judgment [GC] of 12 May 2005, §§170-175.
[887] ECtHR, Case ***Soering v. United Kingdom***, 14038/88, Judgment of 7 July 1989, §98.
[888] ECtHR, Case ***A. I. v. Switzerland***, No. 23378/15, Judgment of 30 May 2017, §§56-58; Case ***N. A. v. Switzerland***, No. 50364/14, Judgment of 30 May 2017, §§47-51.
[889] ECtHR, Case ***Gasayev v. Spain***, No. 48514/06, Decision of 17 February 2009, pp. 6-7.
[890] ECtHR, Case ***Shamayev and others v. Georgia and Russia***, N.º 36378/02, Judgment of 14 April 2005, §372.
[891] ECtHR, Case ***Vilvarajah and others v. United Kingdom***, Nos 13163/87 & 13164/87 & 13165/87 & 13447/87 & 13448/87, Judgment of 30 October 1991, §111.
[892] ECtHR, Case ***Shamayev and others v. Georgia and Russia***, N.º 36378/02, Judgment of 14 April 2005, § 372.
[893] ECtHR, Case ***Baysakov and others v. Ukraine***, No. 54131/08, Judgment of Date: 8 February 2010, §82.
[894] ECtHR, Case ***Aronica v. Germany***, No. 72032/01, Decision of 18 April 2002, §1.

Violations of the right to life in its procedural aspect

In 2019, the Court passed judgement on a case concerning the refusal of Belgium to surrender, under an EAW, an alleged former member of ETA suspected of murdering a member of the Spanish military in 1981. The victim's children applied to the Court alleging that the refusal of the Belgium to execute the EAWs issued by the Spanish authorities in respect of the alleged murderer of their father was unjustified and unreasonable and, therefore, breached Article 2 of the Convention in its procedural aspect. The execution of this EAW had been refused by the Belgian court of appeal on the basis of Article 4(5) of the EAW Act, referring to the broader context of Spain's contemporary political history and the personal context of the suspect. who, while active in her twenties in the "armed Basque resistance movement", had become a 55-year-old professionally active woman with a normal life in Belgium. In addition, relying in particular on a report by the CPT on the periodic visit to Spain from 31 May to 13 June 2011, the court of appeals found that there were serious grounds for believing that the enforcement of the EAW would undermine the suspect's fundamental rights as guaranteed by Article 6 of the TEU.

The ECtHR considered that, in this case, the Belgian authorities had provided a reasoned reply to their Spanish counterparts and that their approach corresponds to the principles the Court has set out in its case-law according to which, in the context of the execution of an EAW by an EU Member State, the mutual recognition mechanism of the EU should not be applied automatically and mechanically, to the detriment of fundamental rights. From the point of view of the Convention, a risk of inhuman and degrading treatment of the person whose surrender is requested, because of the conditions of detention in Spain, may constitute a legitimate ground to refuse the execution of the EAW, and therefore to refuse cooperation with Spain. However, the Court also found that, the circumstances of the case and the interests in question should have led to the Belgian authorities to request further information on the application of the detention regime to the suspect, in particular with regard to the location and conditions of detention, in order to verify the existence of a concrete and real risk of violation of the Convention in the event of surrender; therefore, it considered that the examination carried out by the Belgian courts had not been sufficiently complete as to the factual basis invoked to refuse the surrender. The Court, however, emphasized that this finding of a violation of Article 2 of the Convention does not necessarily imply that Belgium had an obligation to surrender the suspect to the Spanish authorities and, more generally, that this judgment cannot be interpreted as reducing the obligation of States not to extradite a person to a country where there are substantial grounds for believing that the person concerned runs a real risk of being subjected to treatment contrary to Article 3 and, therefore, to ensure that such a risk does not exist[895].

It is interesting to note that, in a case concerning the transfer of a person sentenced to life imprisonment with possibility of parole after 30 years (condemned for murder and attempted murder) who, upon surrender, was granted Presidential pardon, promoted in the military ranks by the Minister of Defence in the course of a public ceremony, provided with the use of a flat belonging to the State housing fund and awarded eight years of salary arrears (corresponding to the time spent in prison in the requested State), the Court found that the conduct of the requesting State in effect granted this person impunity for serious crimes and was thus incompatible with the State's obligation under Article 2 of the Convention to effectively deter the commission of offences against the lives of individuals. On the contrary, authorities of the requested State were considered to have merely followed the procedure set out in the Convention on the Transfer of Sentenced Persons and, in the absence of any tangible evidence to the contrary, assume that another CoE member State would act in good faith[896]

In a 2019 case, the Court found that Turkey breached its duty to cooperate in the context of the procedural limb of Article 2 of the Convention, for the failure to provide a reasoned reply to the extradition requests by Cyprus in the context of the murder investigation of three Cypriot nationals

[895] ECtHR, Case ***Romeo Castaño v. Belgium***, No. 8351/17, Judgment of 9 July 2019, §§ 83-85, 89-90, 92.
[896] ECtHR, Case ***Makuchyan and Minasyan v.Azerbaijan and Hungary***, No. 17247/13, Judgment of 26 May 2020, §§167-172, 196.

of Turkish Cypriot origin.[897] The Court has stated very clearly that the lack of diplomatic relations does not absolve a Contracting State from the obligation under Article 2 to cooperate in criminal investigations.[898]

See Comments to Article 11 of **ECE**.

Blood Feuds

The ECtHR took an interesting decision in case **D. L. v. Austria** (2017), relating to an extradition from Austria to Kosovo, in which the applicant complained under Articles 2 and 3 of the Convention that he would run the risk of torture, inhuman or degrading treatment or even death if he were extradited to Kosovo, as the Kosovo authorities were not willing or able to afford him protection from a blood feud in place against him. Admitting that blood feuds still existed in Kosovo, the Court considered, on the one hand, that Kosovo authorities had demonstrated – even specifically with regards to the applicant – that they were capable of responding to threats against him; and, on the other hand, that, contrary to persons in liberty affected by blood feuds, who appear to have little State protection, as they would have to be constantly monitored, which is not considered feasible, the applicant's situation would be different, since he would be in a prison, where he would be monitored by the authorities twenty-four hours a day. Therefore, his imprisonment would actually offer him increased protection against a blood feud in Kosovo. [899]

At the EU level, the CJEU ruled in case **Schotthöffer** (2017) that a request for extradition originating from a third country concerning an EU citizen who resides in the territory of another Member State must be rejected by the latter Member State in case such citizen runs a serious risk of being subjected to the death penalty in the event of extradition. In this case, concerning an EU citizen residing in a EU country, the Court left no room for assurances[900].

3.3 Risk of torture or ill-treatment

General remarks

Torture and ill-treatment are expressly prohibited, in absolute terms, in some of the most important human rights texts and there are specific instruments aimed at preventing and combatting these abhorrent practices, adopted at the universal and at the regional levels. Article 3 of the **ECHR** reads as follows: *No one shall be subjected to torture or to inhuman or degrading treatment or punishment.*

As stated above, the leading authority in the ECtHR interpretation on matters concerning the risk of torture in the context of extradition is still largely based on case **Soering v. United Kingdom** (1989). In this Judgement, of 7 July 1989, the **ECHR** found for the first time that the State's responsibility could be engaged if it decided to extradite a person who risked being subjected to ill-treatment in the requesting country.

As found in this judgement, and subsequently reaffirmed numerous times by the Court, **the removal of an alien by a Contracting State may give rise to an issue under Article 3 of the Convention, and hence engage the responsibility of that State under the Convention, where substantial grounds have been shown for believing that the person in question, if removed, would face a *real risk* of being subjected to treatment contrary to Article 3 in the destination country.**

[897] ECtHR, Case ***Güzelyurtlu and Others v. Cyprus and Turkey***, No. 36925/07, Judgment [GC] of 29 January 2019, §§263-266.
[898] ECtHR, Case ***Saribekyan and Balyan v. Azerbaijan***, No. 35746/11, Judgment of 30 January 2020, §73.
[899] ECtHR, Case ***D. L. v. Austria***, N.º 34999/16, Judgment of 7 December 2017, §§63-64.
[900] CJEU, C-473/15 (***Peter Schotthöfer & Florian Steiner GbR***), Order of 6 September 2017.

Although in **Soering v. The United Kingdom** (1989) the Court showed an explicit awareness of the interests of the nations in bringing requested persons to justice[901], it has not ceased to recognize the ***absolute character*** of this provision, and the fact that it enshrines one of the fundamental values of democratic societies making up the CoE. It thus applies ***irrespective of the victim's conduct or of offence committed***[902], This recognition, and consequent need of a rigorous examination of any such cases, has been made very clear, for example, in case **Chahal v. United Kingdom** (1996), in which the Court also considered that ***Article 3 does not protect only against State ordered torture; it protects also in cases where the State has limited control over the day-to-day practices of its security forces***.[903] This principle has been extended to cover situations where the person to be removed fears ill-treatment at the hands of ***non-State actors***. Although the ECtHR will not easily assume that a State is not capable of protecting persons within its jurisdiction against private violence, the absolute character of the right guaranteed by Article 3 implies that the existence of the obligation not to expel is not dependent on whether the risk of ill-treatment stems from factors which involve the responsibility, direct or indirect, of the authorities of the receiving country. Article 3 may thus also apply in situations where the danger emanates from persons or groups of persons who are not public officials[904]. What is relevant in this context is whether an applicant is able to obtain protection against and seek redress for the acts perpetrated against him or her.[905] In fact, in situations where domestic authorities have a diminished capacity to protect their population this, in conjunction with the person's personal circumstances, may create a real risk of subjection to torture or ill-treatment which otherwise would not be present[906].

This ***evolution in the Court's case law on Article 3 matters*** was emphasised in the Court's Grand Chamber judgement on case **Saadi v. Italy** (2008), in which it expressly stated that the concepts of risk and dangerousness did not lend themselves to a balancing test because they were "notions that [could] only be assessed independently of each other"[907]. The Court found that the same approach must be taken to the assessment of whether the minimum level of severity has been met for the purposes of Article 3: this too can only be assessed independently of the reasons for removal or extradition. Indeed ***in the twenty-two years since the Soering judgment, in an Article 3 case the Court has never undertaken an examination of the proportionality of a proposed extradition or other form of removal from a Contracting State***. To this extent, the Court must be taken to have departed from the approach contemplated by paragraphs 89 and 110 of the **Soering judgment**.

Thus, Article 3 (as Article 2) of the Convention provide absolute protection, in the sense that they are not subject to any restrictions or to any derogation according to Article 15 of the Convention. Therefore, despite the daunting circumstances that states have to face nowadays in order to adequately respond to terrorism, the fundamental standards of protection provided by these two articles cannot be overlooked[908].

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[901] ECtHR, Case ***Soering v. United Kingdom***, N.º 14038/88, Judgment of 7 July 1989, §89.
[902] ECtHR, Case ***Sufi and Elmi v. United Kingdom***, Nos. 8319/07 & 11449/07, Judgment of 28 June 2011, §212; Case ***Vilvarajah and Others v. United Kingdom***, Nos. 13163/87 & 13164/87 & 13165/87 & 13447/87 & 13448/87, Judgment of 30 October 1991, §§108, 114-116.
[903] ECtHR, Case ***Chahal v. United Kingdom***, No. 22414/93, Judgment [GC] of 15 November 1996, §105.
[904] ECtHR, Case ***N. v. Finland***, No. 38885/02, Judgment of 26 July 2005, §§163-164.
[905] ECtHR, Case ***Sufi and Elmi v. United Kingdom***, Nos. 8319/07 & 11449/07, Judgment of 28 June 2011, §213; Case ***Abdolkhani and Karimnia v. Turkey (No. 1)***, No. 30471/08, Judgment of 22 September 2009, §74; and Silvis, Johannes, **"Extradition and Human Rights: Diplomatic Assurances and human rights in the extradition context"**, lecture presented on 20 May 2014 at the special session on extradition held during the 66th meeting of PC-OC, p 5.
[906] ECtHR, Case ***J. K. and Others v. Sweden***, No. 59166/12, Judgment [GC], 23 August 2016, §121.
[907] ECtHR, Case ***Saadi v. Italy***, No. 37201/06, Judgment [GC] of 28 February 2008, §139.
[908] ECtHR, Case ***Shamayev and others v. Georgia and Russia***, N.º 36378/02, Judgment of 14 April 2005, § 335; Case ***Ireland v. the United Kingdom***, No. 5310/71, Judgement of 18 January 1978, §163; Case ***Tomasi v. France***, No. 12850/87, Judgment of 27 August 1992, § 115; and Case ***Öcalan v. Turkey***, No. 46221/99, Judgment [GC] 12 of May 2005, §179.

The need for clarification of the Court's interpretation in Article 3, in light of the above mentioned divergences as regards **Soering** (1989), was underlined, for example, in the Court's assessment of case **Babar Ahmad and Others v. United Kingdom** (2012), in which three important distinctions have been considered: firstly, between ***extradition cases and other cases of removal*** from the territory of a Contracting State; secondly, between ***torture and other forms of ill-treatment*** proscribed by Article 3; and thirdly was between the assessment of the ***minimum level of severity*** required in the domestic context and the same assessment in the extra-territorial context. It is appropriate to consider each distinction in turn[909].

As to the first distinction, the ECtHR found that the question whether there is a real risk of treatment contrary to Article 3 in another State ***cannot depend on the legal basis for removal to that State***, even because, in practice, there may be very little difference between extradition and other removals and it would be inappropriate to apply different tests to materially similar cases.

Concerning the second distinction, attention is drawn to the provisions of **CAT**, whose Article 1 defines torture as: *any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions*. Article 16 of the same Convention bounds States Parties to prevent – mas does not define – *other acts of cruel, inhuman or degrading treatment or punishment* (broadly referred to as "ill-treatment") *when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity,* while Article 3 of the **ECHR** defines neither torture or ill-treatment, despite prohibiting subjection to both.

The ECtHR considered that the distinction between torture, on the one hand, and inhuman or degrading treatment, on the other, is ***more easily drawn in the domestic context*** where, in examining complaints made under Article 3, the Court is called upon to evaluate or characterise ***acts which have already taken place***. As in the ***extra-territorial context***, a ***prospective assessment is required, the Court found that it is not always possible to determine whether the ill-treatment which may ensue in the receiving State will be sufficiently severe as to qualify as torture***. For this reason, whenever the Court has found that a proposed removal would be in violation of Article 3 because of a real risk of ill-treatment which would be intentionally inflicted in the receiving State, it has normally ***refrained from considering whether the ill-treatment in question should be characterised as torture or inhuman or degrading treatment or punishment***. In various judgements the Court does not distinguish between the various forms of ill-treatment proscribed by Article 3 and underlines the absolute prohibition of all of them, either in extradition or other types of removal.[910] It has also found that a mere ***threat*** of conduct prohibited by Article 3, provided it is sufficiently real and immediate, may constitute at least inhuman treatment. Also "inhuman" is considered, inter alia, treatment that was premeditated, applied for hours at a stretch and caused either actual bodily injury or intense physical and mental suffering. On the other hand, treatment has been held to be "degrading" when it was such as to arouse in its victims feelings of fear, anguish and inferiority capable of humiliating and debasing them and possibly breaking their physical or moral resistance, or when it was such as to drive the victim to act against his will or conscience[911].

Regarding the distinction between the ***minimum level of severity*** required in the domestic context and the same assessment in the extra-territorial context, the Court underlined that there

[909] ECtHR, ***Babar Ahmad and Others v. The United Kingdom***, Nºs 24027/07, 11949/08 and 36742/08, Judgment of 10 April 2012, §§167-177.
[910] ECtHR, Case ***Chahal v. United Kingdom*** (1996), §§79-80; Case ***Mamatkulov and Askarov v. Turkey*** (2005), §67; Case ***Saadi v. Italy*** (2008), §125.
[911] ECtHR, Case ***Gäfgen v. Germany***, No. 22978/05, Judgment [GC] of 6 July 2010, §§89, 91.

is no room for balancing the risk of ill-treatment against the reasons for expulsion or the danger posed by the person in determining whether a State's responsibility under Article 3 was engaged. It recalled that the concepts of risk and dangerousness do not lend themselves to a balancing test because they were "notions that [could] only be assessed independently of each other" and considered that the same approach must be taken to the assessment of whether the minimum level of severity has been met for the purposes of Article 3: ***this too can only be assessed independently of the reasons for removal or extradition***.

The establishment of State responsibility requires an assessment of conditions in the requesting State against the standards of Article 3 of the Convention[912]. Nonetheless, the international responsibility of the non-Contracting requesting State does not have to be established in order for the contracting extraditing State to be held responsible in such cases.[913] Furthermore, a Contracting State cannot evade its own responsibility by relying on its obligations arising out, for example, of bilateral agreements. This was made very clear in Grand Chamber judgement on case **Hirsi Jamaa and Others v. Italy** (2012), in which the Court concluded that, even though the 2007 bilateral cooperation agreement between Italy and Libya on the fight against clandestine immigration provided for the return to Lybia of irregular migrants intercepted by Italian vessels in the high seas, the Contracting States' responsibility continues even after their having entered into treaty commitments subsequent to the entry into force of the Convention or its Protocols in respect of these States, and Article 3 of the ECHR was thus violated due to the exposure of such persons to torture or ill-treatment upon return to Lybia[914].

The Court considered that interpretative assistance can be derived from the approach that the ***Human Rights Committee*** has taken to the prohibition on torture and ill-treatment contained in Article 7 of the **ICCPR**, as reflected for instance in its General Comment No. 20 (Prohibition of torture, or other cruel, inhuman or degrading treatment or punishment). The HRC makes clear that Article 7 prevents *refoulement* both when there is a ***real risk of torture and when there is a real risk of other forms of ill-treatment***. Further, recent confirmation for the approach taken by the Court and by the HRC can be found in **Article 19 of the CFREU**, which provides that *no one may be removed, expelled or extradited to a State where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment.* The wording of this Article makes clear that it applies without consideration of the extradition context and without distinction between torture and other forms of ill-treatment. In this respect, Article 19 of the Charter is fully consistent with the interpretation of Article 3 which the Court has set out above. It is also consistent with the **Council of Europe Guidelines on human rights and the fight against terrorism.** This line of interpretation is also in line with Articles 3 and 16 § 2 of the **United Nations Convention Against Torture**, particularly when the latter Article provides that the provisions of the Convention are "without prejudice to the provisions of any other international instrument or national law which prohibits cruel, inhuman or degrading treatment or punishment or which relates to extradition or expulsion".

Therefore, in **Babar Ahmad and Others v. United Kingdom** (2012), the ECtHR concluded "(…) that the ***Chahal ruling*** (as reaffirmed in Saadi) should be regarded as ***applying equally to extradition and other types of removal*** from the territory of a Contracting State and should apply ***without distinction between the various forms of ill-treatment which are proscribed by Article 3***." However, in reaching this conclusion, the Court underlined that the ***absolute nature of Article 3 does not mean that any form of ill-treatment will act as a bar to removal from a Contracting State***, and once again stated its position of principle that the Convention does not purport to be a means of requiring the Contracting States to impose Convention standards on other States. Thus, ***treatment which might violate Article 3 because of an act or omission of a Contracting State might not attain the minimum level of severity which is required for there to be a violation of Article 3 in an expulsion or extradition case***. For example, a

[912] ECtHR, Case ***Mamazhonov v. Russia***, No. 17239/13, Judgment of 23 October 2014, §129;
[913] ECtHR, Case ***Mamatkulov and Askarov v. Turkey*** (2005), §67; Case ***Shamayev and others v. Georgia and Russia*** (2005), §33.
[914] ECtHR, Case ***Hirsi Jamaa and Others v. Italy***, No. 27765/09, Judgment [GC] of 23 February 2012, §129.

Contracting State's negligence in providing appropriate medical care within its jurisdiction has, on occasion, led the Court to find a violation of Article 3 but such violations have not been so readily established in the extra-territorial context. In this regard, reference has been made to the comparison between the Court's conclusions on the denial of prompt and appropriate medical treatment for HIV/AIDS in the 2008 judgements on cases **Aleksanyan v. Russia** and **N. v. the United Kingdom** [GC] [915].

In addition, the Court reiterated that it has been very cautious in finding that removal from the territory of a Contracting State would be contrary to Article 3 of the Convention, and that only rarely has it reached such a conclusion since adopting the **Chahal judgment** (in 1996). Save for cases involving the death penalty, it has even more ***rarely found that there would be a violation of Article 3 if an applicant were to be removed to a State which had a long history of respect of democracy, human rights and the rule of law.***[916]

Practitioners must, however, borne in mind that that a thorough ***assessment*** of the risk faced by the sought person constitutes a procedural obligation under Article 3 of the Convention and failure to discharge such obligation constitutes, in itself, a violation of the Convention[917] (in this context, of Article 13 in connection with Article 3).[918]. In a case where the applicant himself had not submitted any medical report and, during the domestic proceedings, the first instance court accepted both the extent of the applicant's injuries and the manner in which he claimed that such injuries had been caused, the Court considered that the failure of domestic authorities to await a medical report was not relevant for compliance with this obligation[919].

Temporary surrender is considered by the Court as a factor reducing the risk of ill-treatment in the receiving State[920].

In 2016, two landmark judgements gave a decisive impetus to the need of requested **EU Member States** to assess the prevailing conditions in the requesting State in order to ensure that the extradited person is not subject, upon extradition, to torture or other cruel, degrading or inhuman treatment, prohibited in absolute terms by, *inter alia*, Articles 4 and 19 (2) of the **CFREU** and 3 of the **ECHR**.

In Joined Cases **Pál Aranyosi** (C-404/15) and **Robert Căldăraru** (C-659/15 PPU) (2016), relating to the execution, not of an extradition request, but of an EAW, the CJEU explicitly concluded the following (emphasis added):

> "[…] where there is objective, reliable, specific and properly updated evidence with respect to detention conditions in the issuing Member State that demonstrates that there are deficiencies, which may be systemic or generalised, or which may affect certain groups of people, or which may affect certain places of detention, the ***executing judicial authority must determine, specifically and precisely***, whether there are ***substantial grounds to believe*** that the individual concerned by a European arrest warrant, issued for the purposes of conducting a criminal prosecution or executing a custodial sentence, **will be exposed, because of the conditions for his detention** in the issuing Member

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[915] ECtHR, ***Babar Ahmad and Others v. The United Kingdom***, Nºs 24027/07, 11949/08 and 36742/08, Judgment of 10 April 2012, §§176-177.
[916] ECtHR, ***Babar Ahmad and Others v. The United Kingdom***, Nºs 24027/07, 11949/08 and 36742/08, Judgment of 10 April 2012, §179.
[917] ECtHR, Case ***M.A.M. v. Switzerland***, No. 29836/20, Judgment of 26 April 2022, §§65, 76, 78; Case ***Shenturk and Others v. Azerbaijan***, No. 41326/17, 8098/18, 8147/18 & 8384/18, Judgment of 10 March 2022, §116.
[918] ECtHR, ***Batyrkhairov v. Turkey***, No. 69929/12, Judgment of 5 June 2018, §§47, 51-52; Case ***Paposhvili v. Belgium***, N.º 41738/10, Judgment [GC] of 13 December 2016, §§200-202 and 205; Case ***Tershiyev v. Azerbaijan***, No. 10226/13, Judgment of 31 July 2014, §72; Case ***Yoh-Ekale Mwanje v. Belgium***, No. 10486/10, Judgment of 20 December 2011, §§82-83 and 106-107; Case ***Tehrani v. Turkey***, Nos. 32940/08 & 41626/08 & 43616/08, Judgment of 13 April 2010, §66; Case ***Klein v. Russia***, No. 24268/08, Judgment of 1 April 2010, §§51, 53.
[919] ECtHR, Case ***S. H. H. v. United Kingdom***, No. 60367/10, Judgment of 29 January 2013, §82.
[920] Case ***Tershiyev v. Azerbaijan***, No. 10226/13, Judgment of 31 July 2014, §56.

> State, to a ***real risk of inhuman or degrading treatment***, within the meaning of Article 4 of the Charter, in the event of his surrender to that Member State. To that end, the executing judicial authority must request that ***supplementary information*** be provided by the issuing judicial authority, which, after seeking, if necessary, the assistance of the central authority or one of the central authorities of the issuing Member State, […] must send that information within the time limit specified in the request. The executing judicial authority must ***postpone*** its decision on the surrender of the individual concerned until it obtains the supplementary information that allows it to discount the existence of such a risk. If the existence of that ***risk cannot be discounted within a reasonable time***, the executing judicial authority must ***decide*** whether the surrender procedure should be brought to an ***end***."[921]

This case is of enormous importance given that the EAW system is based on the principle of mutual recognition, according to which each EU Member State accepts the application of the criminal law in force in the other Member States, even though the implementation of its own national law might produce a different outcome. Mutual recognition in turn is founded on the mutual trust of Member States that their national legal systems are capable of providing equivalent and effective protection of the fundamental rights recognised at EU level. Those principles justify that the EAW system operates between judicial authorities, has limited grounds for refusal and provides for short time limits for the decision on the EAW and for the actual surrender of the requested person. The swift execution of an EAW constitutes the rule, whereas the refusal to execute is intended to be a – strictly interpreted – exception[922].

The primary references in case **Aranyosi and Căldăraru** (2016) were previous judgements of the ECtHR in which this Court had found violations of Article 3 of the **ECHR** due to situations of ***prison overcrowding*** (see below) in Hungary and Romania[923]. Neither the **ECE**, nor the **EAW FD**, contains a general human rights based ground for refusal. The grounds for refusal are exhaustively listed in the **Framework Decision**. The **Framework Decision** also does not provide for the possibility of making execution of the EAW dependent on general assurances that human rights will be respected, and possible assurances are equally exhaustively listed. However, the contents of Article 4 of the **CFREU** are similar to those of Article 3 of the **ECHR** and, in accordance with Article 52 (3) of the **Charter**, the level of protection afforded cannot be lesser than that guaranteed by the former. This means that, despite the fact that the wording used by the CJEU avoids terms such as "refusal" and puts an emphasis on the provision of "information", in practice the solution devised by this Court affords a similar level of protection within EU Member States: as long as the real risk persists, the requested person cannot be surrendered[924].

In Case **Petruhhin** (2016), a question was raised as to whether, when the requested Member State intends to extradite a national of another Member State at the request of a third State, that first Member State must verify that the extradition will not prejudice the rights referred to in Article 19 of the Charter and, as the case may be, which criteria must be taken into account for the purposes of that verification[925]. Article 19/2 of the **CFREU** establishes the following:

> *No one may be removed, expelled or extradited to a State where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment.*

The CJEU considered that the "first Member State must verify that the extradition will not prejudice the rights referred to in Article 19 of the **Charter of Fundamental Rights of the European Union**". Basing itself in the jurisprudence of the **ECHR** in case **Saadi v. Italy** (2008), §147, the

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[921] CJEU, **Joined Cases C-404/15 and C-659/15 PPU, *Aranyosi and Căldăraru***, Judgment of 5 April 2016, pp. 17-18.
[922] See **PC-OC (2018)05**, "Introductory speech (…)", Mr Vincent Glerum, p. 21.
[923] See, e.g., ECHR, Case ***Varga and Others v. Hungary***, n.ºs 14097/12, 45135/12, 73712/12, 34001/13, 44055/13 and 64586/13, 10 March 2015, and ECHR, Case ***Constantin Aurelian Burlacu v. Romania***, n.º 51318/12, 10 June 2014.
[924] See **PC-OC (2018)05**, "Introductory speech (…)", Mr Vincent Glerum, p. 22.
[925] CJEU, Case **C-182/15, *Petruhhin***,, Judgement [GC] of 6 September 2016.

CJEU specified that "the existence of declarations and accession to international treaties guaranteeing respect for fundamental rights in principle are not in themselves sufficient to ensure adequate protection against the risk of ill-treatment where ***reliable sources*** have reported practices ***resorted to or tolerated*** by the authorities which are manifestly contrary to the principles of the **European Convention for the Protection of Human Rights and Fundamental Freedoms**"[926].

In both judgements, aligning its case law with that of the **ECHR** – and therefore affording at least the same degree of protection as the Strasbourg court's case law – the CJEU underlined the absolute nature of the prohibition of torture and inhuman or degrading treatment or punishment set out in Article 4 of the **Charter**, as well as in Article 3 of the **ECHR** and its close link to human dignity[927] Therefore, the CJEU considered that

> "[…] in so far as the competent authority of the requested Member State is in possession of evidence of a ***real risk*** of inhuman or degrading treatment of individuals in the requesting third State, it is ***bound to assess*** the existence of that risk when it is called upon to decide on the extradition of a person to that State (…)
>
> […] To that end, the competent authority of the requested Member State must rely on ***information that is objective, reliable, specific and properly updated***. That information may be obtained from, inter alia, judgments of international courts, such as judgments of the ECtHR, judgments of courts of the requesting third State, and also decisions, reports and other documents produced by bodies of the Council of Europe or under the aegis of the United Nations […]"[928].

Developing its case law on the execution of EAW by EU Member States, the ECtHR specified that, when applying EU law, States Parties to the ECHR must assess the obligations imposed by this Convention against the presumption of ***equivalent protection*** and subject to two conditions: the absence of room for manoeuver for the national authorities and the deployment of the full potential of the control mechanism provided for by the EU law. Concerning the first condition, the Court considers that the power of appreciation which the executing judicial authority has to postpone the execution of an EAW in case it is presented with a serious and substantiated complaint that there is a manifest insufficient protection of a right guaranteed by the Convention and that the law of the EU does not allow this insufficiency to be remedied, is exercised within the framework strictly defined by the case law of the CJEU (namely in case **Aranyosi and Căldăraru**) and in order to ensure the execution of a legal obligation in conformity with EU law, namely Article 4 of the **CFREU**, which provides protection equivalent to that resulting from Article 3 of the **ECHR**. Therefore, the ECtHR does not consider that the executing judicial authority has, in this context, an independent margin of manoeuver such as to lead to the non-application of the presumption of equivalent protection. Concerning the second condition, the ECtHR considers that a preliminary ruling by the CJEU would only be necessary in case of serious difficulty linked to the interpretation of the Framework Decision and the question of its compatibility with fundamental rights.

In case the presumption of equivalent protection applies, the ECtHR considers that its task is limited to determining whether the protection of the rights guaranteed by the Convention is vitiated in the present case by a manifest insufficiency capable of overturning this presumption, in which case respect for the Convention as a "constitutional instrument of European public order" in the field of human rights would prevail over the interest of international cooperation. In a case where there was a possibility that the applicant would be detained in a prison "experiencing an endemic rate of prison overcrowding", with the executing judicial authority limiting itself to recommend that the person be detained in an establishment offering identical if not better conditions than those required by the ECHR, this was not deemed sufficient to rule out a real risk of inhuman and

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926 CJEU, Case **C-182/15, *Petruhhin***,, Judgement [GC] of 6 September 2016, §57, emphasis added.
927 CJEU, **Joined Cases C-404/15 and C-659/15 PPU, *Aranyosi and Căldăraru***, Judgment of 5 April 2016, §§85-87, and CJEU, Case **C-182/15, *Petruhhin***,, Judgement [GC] of 6 September 2016, §86.
928 CJEU, **Joined Cases C-404/15 and C-659/15 PPU, *Aranyosi and Căldăraru***, Judgment of 5 April 2016, §§88-89, and CJEU, Case **C-182/15, *Petruhhin***,, Judgement [GC] of 6 September 2016, §58-59.

degrading treatment and the Court considered that the executing judicial authority had sufficiently solid factual basis to characterize the existence of a real risk that the applicant would be exposed to inhuman and degrading treatment as a result of his conditions of detention in the issuing country and could not, therefore, rely exclusively on the statements of the authorities of this State[929].

General principles applying to alleged or convicted terrorist offenders

As it results from the above, the Court is acutely conscious of the difficulties faced by States in protecting their populations from terrorist violence, which constitutes, in itself, a grave threat to human rights[930]. It considers it legitimate for Contracting States to take a firm stand against those who contribute to terrorist acts, which it cannot condone in any circumstances[931].

However, even where an individual is alleged to have connections with terrorist organisations, the Convention prohibits in absolute terms torture or inhuman or degrading treatment or punishment[932]. As the Court has affirmed on several occasions since its judgement in case **Chahal v. the United Kingdom** (1996), this rule allows for no exception.

It is not possible to make the activities of the individual concerned, however undesirable or dangerous, a material consideration or to weigh the risk of ill-treatment against the reasons put forward for the expulsion in order to determine whether the responsibility of the State is engaged under Article 3[933].

In **Saadi v. Italy** (2008) the Court stated clearly that it could not accept that a distinction be drawn under Article 3 between treatment inflicted directly by a signatory State and treatment that might be inflicted by the authorities of another State, and that protection against this latter form of ill-treatment should be weighed against the interests of the community as a whole. Since protection against the treatment prohibited by Article 3 is absolute, that provision imposes an obligation not to extradite or expel any person who, in the receiving country, would run the real risk of being subjected to such treatment. The Court has repeatedly held that there can be no derogation from that rule It must therefore reaffirm the principle stated in Chahal that it is not possible to weigh the risk of ill-treatment against the reasons put forward for the expulsion in order to determine whether the responsibility of a State is engaged under Article 3, even where such treatment is inflicted by another State. In that connection, the conduct of the person concerned, however undesirable or dangerous, cannot be taken into account, with the consequence that the protection afforded by Article 3 is broader than that provided for in Articles 32 and 33 of the 1951 United Nations Convention relating to the Status of Refugees.[934]

Pronouncing itself specifically on cases concerning the fight against **terrorism** in case **Othman (Abu Qatada) v. United Kingdom** (2012), the Court, along with a firm condemnation of such crime and "acutely conscious of the difficulties faced by States in protecting their populations from terrorist violence, which constitutes, in itself, a grave threat to human rights", considered that "States must be allowed to deport non-nationals whom they consider to be threats to national security", but reiterated the absolute nature of Article 3 **ECHR**:

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[929] ECtHR, Case ***Bivolaru and Moldovan v. France***, Nos.: 40324/16 & 12623/17, Judgment of 25 May 2021, §§97-98, 100- 103, 113- 116, 122-123, 125 and 126.
[930] ECtHR, Case ***Öcalan v. Turkey***, No. 46221/99, Judgment [GC] of 12 May 2005, §46.
[931] ECtHR, Case ***Daoudi v. France***, Nº 19576/08, Judgment of 3 December 2009, §65; Case ***O.D. v. Bulgaria***, Nº 34016/18, Judgment of 10 October 2019.
[932] ECtHR, Case ***A.M. v. France***, No. 12148/18, Judgment of 29 April 2019, §112.
[933] ECtHR, Case ***M.A. and Others v. Bulgaria***, No. 5115/18, Judgment of 20 February 2020, §70; Case ***Said Abdul Salam Mubarak v. Denmark***, No. 74411/16, Decision of 22 January 2019, §44; Case ***Trabelsi v. Belgium***, No. 140/10, Judgment of 4 September 2014, §§ 117-118; Case ***M. S. v. Belgium***, No. 50012/08, Judgment of 31 January 2012, §§126-127.
[934] ECtHR, Case ***Sidikovy v. Russia***, No. 73455/11, Judgment of 20 June 2013, §149; Case ***Saadi v. Italy***, No. 37201/06, Judgment [GC] of 28 February 2008, §138.

> (…) it is well-established that expulsion by a Contracting State may give rise to an issue under Article 3, and hence engage the responsibility of that State under the Convention, where substantial grounds have been shown for believing that the person concerned, if deported, faces a real risk of being subjected to treatment contrary to Article 3. In such a case, Article 3 implies an obligation not to deport the person in question to that country. ***Article 3 is absolute and it is not possible to weigh the risk of ill-treatment against the reasons put forward for the expulsion*** (…)[935].

The **Guidelines on human rights and the fight against terrorism**, adopted by the Committee of Ministers of the CoE in July 2002, also address this issue in the most clear terms, by establishing, in Article XIII (3), that:

> *3. Extradition may not be granted when there is serious reason to believe that:*
>
> > *(i) the person whose extradition has been requested will be subjected to torture or to inhuman or degrading treatment or punishment;*
> >
> > *(ii) the extradition request has been made for the purpose of prosecuting or punishing a person on account of his/her race, religion, nationality or political opinions, or that that person's position risks being prejudiced for any of these reasons.*

In a case examined in 2007, the applicant complained that his extradition from Germany to the USA would violate Article 3 of the Convention because, like other terrorist suspects, he would be subjected to interrogation methods amounting to torture at the hands of the United States authorities. The Court remarked that reports about the interrogation methods used by the US authorities on persons suspected of involvement in international terrorism concern prisoners detained by the US authorities outside the United States territory, notably in Guantánamo Bay (Cuba), Bagram (Afghanistan) and some other third countries. In view of assurances from the US authorities that the applicant would not be transferred to one of these facilities, an in the absence of reports denouncing the ill-treatment of terrorist suspects detained in regular detention facilities within the US, the Court concluded that the risk of ill-treatment had not been duly substantiated and therefore that there was no risk of violation of Article 3[936].

In an **expulsion** case of a man suspected of having links with terrorism, the Court has underlined that, to be valid, the waiving of certain procedural safeguards must be surrounded by sufficient guarantees in order to ensure that the renunciation was freely expressed. Since the person had been faced with the choice to stay in the expelling country, (which had denied him refugee status), with no hope of obtaining the right to reside there legally and no perspective of living there in freedom, or of returning to his country of nationality with the risk of being arrested there and exposed to ill-treatment (going to a third country turned out to be unrealisable), the Court concluded that the applicant could not be considered as having validly waived his right to the protection guaranteed under Article 3 of the Convention and his return to his home country must be considered a ***forced return***. The Court stated that, even in the most difficult circumstances, such as the fight against terrorism, and whatever the acts of the person concerned may have been, the Convention prohibits torture in absolute terms. It is therefore not possible to weigh the risk of ill-treatment against the reasons put forward for the expulsion. Since, in the case at hand, the existence of serious and established grounds for believing that there was a real risk of treatment contrary to Article 3 of the Convention was not disputed, the Court concluded that the authorities of the expelling State should have accompanied the applicant's return by a series of safeguards with a view to ensuring his security, among which the most important was seeking diplomatic assurances from the concerned State's authorities. By failing to take such action, those authorities did not do all that could reasonably be expected from them with regard to the Convention[937].

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[935] ECtHR, Case ***Othman (Abu Qatada) v. United Kingdom***, No. 8139/09, Judgment of 17 January 2012, §§183-185, emphasis added.
[936] ECtHR, Case ***Al-Moayad v. Germany***, No. 35865/03, Decision of 20 February 2007, §§66-71.
[937] ECtHR, Case ***M. S. v. Belgium***, No. 50012/08 of Judgment of 31 January 2012, §§124-127, 129, 131.

Risk assessment

In its judgment on the case **Cruz Varas and Others v. Sweden** (1991), dealing with an expulsion from Sweden to Chile, the ECtHR noted the following principles relevant to its assessment of the risk of ill-treatment in another State:

1. In determining whether substantial grounds have been shown for believing the existence of a **real risk** of treatment contrary to Article 3 the Court will assess the issue in the light of ***all the material placed before it*** or, if necessary, material obtained ***proprio motu***[938];
2. Since the nature of the Contracting States' responsibility under Article 3 in cases of this kind lies in the act of exposing an individual to the risk of ill-treatment, the existence of the risk must be assessed primarily with reference to those ***facts which were known or ought to have been known*** to the Contracting State ***at the moment of extradition or expulsion***; the Court is not precluded, however, from having regard to information which comes to light ***after*** such critical time. This may be of value in confirming or refuting the appreciation that has been made by the Contracting Party or the well-foundedness or otherwise of an applicant's fears[939];
3. Ill-treatment must attain a ***minimum level of severity*** to fall within the scope of Article 3. The assessment of this minimum is, in the nature of things, ***relative***; it depends on ***all the circumstances*** of the case, such as the duration of the treatment, its physical or mental effects and, in some cases, the sex, age and state of health of the victim. Further factors include the purpose for which the treatment was inflicted together with the intention or motivation behind it, as well as its context, such as an atmosphere of heightened tension and emotions[940]

The Court has also underlined that, in view of the **absolute character** of Article 3 of the **ECHR**, the nature of the offence allegedly committed by the applicants is irrelevant and their conduct, however undesirable or dangerous, cannot be taken into account in the context of risk assessment[941]. The examination of the existence of a risk of ill-treatment in breach thereof must necessarily be a ***rigorous*** one[942] and focus on the ***foreseeable consequences*** of the removal of the applicant to another State, taking into account the general situation therein at the relevant time, as well as the personal circumstances of the person, including his or her belonging to a group at risk of ill-treatment[943]. It attaches importance to the ***knowledge and experience*** of the authorities in dealing with similar cases, as well as to whether the personal circumstances of each person have been carefully considered by the authorities of the requesting/sending State[944]. In a

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[938] ECtHR, Case ***M.A.M. v. Switzerland***, No. 29836/20, Judgment of 26 April 2022, §65; Case ***S. K. v. Russia***, No. 52722/15, Judgment of 14 February 2017, §60; Case ***Chahal v. United Kingdom***, §97; Case ***Mamazhonov v. Russia***, No. 17239/13, Judgment of 23 October 2014, §130.

[939] See also ECtHR, Case ***Mannai v. Italy***, No. 9961/10, Judgment of 27 March 2012; Case ***Toumi v. Italy***, No. 25716/09, Judgment of 5 April 2011, §56 ; Case ***Trabelsi v. Italy***, No. 50163/08, Judgment of 13 April 2010, §49; Case ***Sellem v. Italy***, No. 12584/08, Judgment of 5 May 2009, §62; Case ***O. v. Italy***, No. 37257/06, Judgment of 24 March 2009, §§36-40; Case ***Ben Khemais v. Italy***, No. 246/07, Judgment of 24 February 2009, §§62-64.

[940] ECtHR, Case ***Gäfgen v. Germany***, No. 22978/05, Judgment [GC] of 6 July 2010, §88; Case ***Cruz Varas and others v. Sweden***, No. 15576/89, Judgment of 20 March 1991, §§75-76 and 83.

[941] ECtHR, Case ***Sufi and Elmi v. United Kingdom***, Nos. 8319/07 & 11449/07, Judgment of 28 June 2011, §212.

[942] ECtHR, Case ***N.M. v. Russia***, No. 29343/18, Judgment of 3 December 2019, §20; Case ***S.B. and S.Z. v. Russia***, Nos. 65122/17 & 13280/18, Judgment of 8 October 2019, §§33-34, 39; Case ***R.R. and A.R. v. Russia***, Nos. 67485/17 & 24014/18, Judgment of 8 October 2019, §§22-23, 27; Case ***S.S. and Others v. Russia***, Nos. 2236/16, 64042/17, 81344/17 & 4067/18, Judgment of 25 June 2019, §22; Case ***B.U. and Others v. Russia***, Nos. 59609/17, 74677/17 &76379/17, Judgment of 22 January 2019, §22; Case ***U.A. v. Russia***, No. 12018/16, Judgment of 22 January 2019, §§30-31; Case ***Chahal v. United Kingdom***, §96.

[943] ECtHR, ***A.K. and Others v. Russia***, Nos. 38042/18, 44546/18 & 20033/19, Judgment of 18 May 2021, §45; Case ***Khodzhayev v. Russia***, No. 52466/08, Judgment of 12 May 2010, §§104-105; Case ***Saadi v. Italy***, N.º 37201/06, Judgment of [GC] of 28 February 2008, §132; Case ***Sultani v. France***, No. 45223/05, Judgment of 20 September 2007, §67.

[944] ECtHR, Case ***Vilvarajah and Others***, §§108-109.

case in which the red notice published by Interpol indicated the provision of the Criminal Code which punished the applicant's conduct, but omitted that the punishment could include up to 74 lashes (which "amounts to torture"), an issue which authorities of the requested State failed to check, the Court considered that their scrutiny of the risk of torture or ill-treatment had not been rigorous enough, and this constituted a violation of Article 3 of the Convention.[945]

Even if the action and evaluation of the extraditing State at the moment of extradition are not doubted, they have to be evaluated in light of the information and evidence obtained after the extradition; for the ECtHR, the relevant moment is that of proceedings before the Court, but a full and *ex nunc* assessment is called for as the situation in a country of destination may change in the course of time. It is therefore necessary to consider information that comes to light after the internal authorities have reached a final decision.[946] The passing of time, in itself, does not reduce the risk, namely in cases of political activists[947]. The awareness and due action of the extraditing State concerning a reasonable risk may be proven by its request for guarantees to protect the applicant from execution of capital punishment or torture, or any other violation of his or her rights under the Convention.[948] This detailed and in-depth examination of the facts by the Court renders decision making by the requested State a serious task, obliging it to take all precautions necessary throughout its decision to extradite or not.

The Court must be satisfied that the assessment made by the authorities of the Contracting State is adequate and sufficiently supported by domestic materials as well as by materials originating from other, reliable and objective sources, and that the decision taken contains detailed reasoning[949]. As regards the general situation in a particular country, the Court has often attached importance to the information contained in recent reports from independent international human-rights-protection associations such as Amnesty International, or governmental sources, including the US State Department[950]. However, the Court has found insufficient the mere labelling of criminal proceedings, by one NGO, as "politically motivated" to substantiate a risk of violation of Article 3[951].

When assessing the available materials, the Court finds that consideration must be given to its source, in particular its ***independence, reliability and objectivity***. In respect of reports, the authority and reputation of the author, the seriousness of the investigations by means of which they were compiled, the consistency of their conclusions and their corroboration by other sources are all relevant considerations. Consideration must also be given to the presence and reporting capacities of the author of the material in the country in question. In this respect, the Court observes that States (whether the respondent State in a particular case or any other Contracting or non-Contracting State), through their diplomatic missions and their ability to gather information, will often be able to provide material which may be highly relevant to the Court's assessment of the case before it. It finds that the same consideration must apply, *a fortiori*, in respect of agencies of the UN, particularly if they are given direct access to the authorities of the requesting country and are able to carry out on-site inspections and assessments in a manner which States and non-governmental organisations may not be able to do. However, due to security reasons, it will not always be possible for investigations to be carried out in the immediate vicinity of a conflict and,

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945 ECtHR, Case ***G.S. v. Bulgaria***, No. 36538/17, Judgment of 4 April 2019, §§81, 84, 87-88, 90 and 92-94.
946 ECtHR, Case ***Sufi and Elmi v. United Kingdom***, Nos. 8319/07 & 11449/07, Judgment of 28 June 2011, §215; Case ***Y. P. and L. P. v. France***, No. 32476/06, Judgment of 2 September 2010, §65. Case ***Shamayev and others v. Georgia and Russia***, N.º 36378/02, Judgment of 14 April 2005, § 345.
947 ECtHR, Case ***Y. P. and L. P. v. France***, No. 32476/06, Judgment of 2 September 2010, §72.
948 ECtHR, Case ***Shamayev and others v. Georgia and Russia***, N.º 36378/02, Judgment of 14 April 2005, § 341.
949 ECtHR, Case ***Eshonkulov v. Russia***, No. 68900/13, Judgment of 15 January 2015, §39; Case ***Mamazhonov v. Russia***, No. 17239/13, Judgment of 23 October 2014, §§132, 135; Case ***Akram Karimov v. Russia***, No. 62892/12, Judgment of 28 May 2014, §§132, 134; Case ***Kasymakhunov v. Russia***, No. 29604/12, Judgment of 14 November 2013, §125; ECtHR, Case **Gaforov v. Russia**, No. 25404/09, Judgment of 21 October 2010, §129.
950 ECtHR, Case ***Sidikovy v. Russia***, No. 73455/11, Judgment of 20 June 2013, §146, §149; Case ***Azimov v. Russia***, No. 67474/11, Judgment of 18 April 2013, §§136-137.
951 ECtHR, Case ***Yefimova v.Russia***, No.: 39786/09, Judgment of 19 February 2013, §209.

for these reasons, the Court will not, therefore, disregard a report simply on account of the fact that its author did not visit the area in question and instead relied on information provided by sources. The Court also recognizes that, in some cases, these sources may wish to remain anonymous. However, in the absence of any information about the nature of the sources' operations in the relevant area, it will be virtually impossible for the Court to assess their reliability. Consequently, the approach taken by the Court will depend on the consistency of the sources' conclusions with the remainder of the available information[952]. Greater importance must necessarily be attached to reports which consider the human rights situation in the requesting country and directly address the grounds for the alleged real risk of ill-treatment. The weight to be attached to independent assessments must inevitably depend on the extent to which those assessments are couched in terms similar to Article 3 of the Convention[953]. The existence of ***domestic laws*** and the ratification of ***international treaties*** guaranteeing respect for fundamental rights are not in themselves sufficient to ensure adequate protection against the risk of ill-treatment where reliable sources have reported practices resorted to or tolerated by the authorities which are manifestly contrary to the principles of the ECHR[954].

The Court has never excluded the possibility that a general situation of violence in a country of destination will be of a sufficient level of intensity as to entail that any removal to it would necessarily breach Article 3 of the Convention[955]. Nevertheless, the Court would adopt such an approach only in the most extreme cases of general violence, where there was a real risk of ill-treatment simply by virtue of an individual being exposed to such violence on return[956]. The mere possibility of ill-treatment on account of a situation of violence or political unrest in the receiving State does not in itself give rise to a breach of Article 3 of the Convention. Where the sources available describe a general situation, an applicant's specific allegations in a particular case require corroboration by other evidence.[957] However, in cases where an applicant alleges that he or she is a member of a ***group systematically exposed*** to a practice of ill-treatment, the protection of Article 3 of the Convention enters into play when the applicant establishes, where necessary on the basis of the information contained in recent reports from independent international human-rights-protection associations or governmental sources, that there are serious reasons to believe in the existence of the practice in question and his or her membership of the group concerned; in these circumstances, the Court will not then insist that the applicant show the existence of further special distinguishing features if to do so would render illusory the protection offered by Article 3[958]. The Court's case law reflects the fact that those facing extradition

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952 ECtHR, Case ***Sufi and Elmi v. United Kingdom***, Nos. 8319/07 & 11449/07, Judgment of 28 June 2011, §233.

953 ECtHR, Case ***Klein v. Russia***, No. 24268/08, Judgment of 1 April 2010, §§51, 53.

954 ECtHR, Case ***Akram Karimov v. Russia***, No. 62892/12, Judgment of 28 May 2014, §132; Case ***Nizomkhon Dzhurayev v. Russia***, No. 31890/11, Judgment of 3 October 2013, §§117-118; Case ***Umirov v. Russia***, No. 17455/11, Judgment of 18 September 2012, §§ 99-100, 109 and 120; Case ***Khodzhayev v. Russia***, No. 52466/08, Judgment of 12 May 2010, §98.

955 See, in respect of Syria, ECtHR, Case ***S. K. v. Russia***, No. 52722/15, Judgment of 14 February 2017, §§59-60 and 62.

956 ECtHR, Case ***J. H. v. United Kingdom***, No. 48839/09, Judgment of 20 December 2011, §54.

957 ECtHR, Case ***Kislov v. Russia***, No. 3598/10, Judgment of 9 July 2019, §§90, 96; Case ***Mamazhonov v. Russia***, No. 17239/13, Judgment of 23 October 2014, §133; Case ***K. v. Russia***, No. 69235/11, Judgment of 23 May 2013, §§68-69 and 71-72; Case ***Kozhayev v. Russia***, No. 60045/10, Judgment of 5 June 2012, §§87-91 and 95; Case ***Rustamov v. Russia***, (2012), §§106-108; Case ***Khodzhayev v. Russia***, No. 52466/08, Judgment of 12 May 2010, §99; Case ***Saadi v. Italy*** (2008), §131; ECtHR, Case ***Shamayev and others v. Georgia and Russia*** (2005), §§350, 352, 360 and 371-372; Case ***Mamatkulov and Askarov v. Turkey*** (2005), §73; Case ***Mamatkulov and Abdurasulovic v. Turkey*** (2003), §§71-72; Case ***Vilvarajah and Others***, (1991), §107.

958 ECtHR, Case ***M.A. and Others v. Bulgaria***, No. 5115/18, Judgment of 20 February 2020, §§73, 74, 77; Case ***Ouabour v. Belgium***, No. 26417/10, Judgment of 2 June 2015, §§75-78; Case ***Rafaa v. France***, No. 25393/10, Judgment of 30 May 2013, §41; Case ***Zokhidov v. Russia***, No. 67286/10, Judgment of 5 February 2013, §138; Case ***Sufi and Elmi v. United Kingdom***, Nos. 8319/07 & 11449/07, Judgment of 28 June 2011, §217; Case ***Khodzhayev v. Russia***, No. 52466/08, Judgment of 12 May 2010, §100; Case ***Saadi v. Italy***, No. 37201/06, Judgment [GC] of 28 February 2008, §131-132; Case ***Muminov v. Russia***, No. 42502/06, Judgment of 11 December 2008, §95.

for the purpose of prosecution seem to incur in increased risk of torture and ill-treatment in the context of interrogations to obtain evidence, than those who are to serve a final conviction[959].

The ECtHR also emphasises that the assessment of due regard should be given to the possibility that a number of individual factors may not, when considered separately, constitute a real risk; but when taken ***cumulatively*** and when considered in a situation of general violence and heightened security the same factors may give rise to a real risk[960]. The situation of people with public exposure (particularly in the context of engaging in opposition movements abroad) and of interest to the authorities of the receiving country should be particularly scrutinized[961]. Public declarations of high ranking officials against a particular person or group of persons the individual belongs to may also be regarded as an indication that the person in question runs a serious risk of being subjected to ill-treatment while in detention and must be taken into account in a rigorous assessment of the risk by the requested State[962].

However, in case materials from reputed and authoritative sources (eg. CAT, UN Secretary-General, US State Department), compiled on the basis of serious investigations, consistently report problems that are so widespread and profound (eg. s credible reports of torture, ill-treatment of detainees, routine beatings and the use of force against criminal suspects, very poor prison conditions, including overcrowding, poor nutrition and untreated diseases) that the Court considers that any extradition to such countries, either for the purpose of prosecution or service of a sentence, may pose a real risk of violation of Article 3, and therefore the applicant may be exempted from substantiating specific personal grounds of fear: it is the case of extraditions to countries such as **China**[963] and **Turkmenistan**[964]. Important factors to determine whether the State is such situation are its lack of cooperation with international human rights mechanisms and systematic denial/failure to investigate allegations of torture and ill-treatment.

It is in principle for the ***applicant*** to adduce evidence capable of proving that there are substantial grounds for believing that, if the measure complained of were to be implemented, he would be exposed to a ***real risk*** of being subjected to treatment contrary to Article 3 (…)[965]. Where such evidence is adduced, it is for the Government to dispel any doubts about it[966]. Uncorroborated declarations do not constitute satisfactory *prima facie* evidence to prove real risk of ill-treatment[967]. In the absence of any evidence to the contrary, the ECtHR will not overturn conclusions which have been reached by domestic Courts after an adversarial assessment of a request for extradition[968]. However, a mere analysis, by domestic courts, of the human rights situation in the requesting State limited to a reference to the results of checks by various domestic authorities (eg. investigation undertaken by the Ministry for Foreign Affairs), or to various

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[959] ECtHR, Case ***Kislov v. Russia***, No. 3598/10, Judgment of 9 July 2019, §88.
[960] ECtHR, Case ***I v. Sweden***, No. 61204/09, Judgment of 5 September 2013, §66.
[961] ECtHR, Case **A. I. v. Switzerland**, No. 23378/15, Judgment of 30 May 2017, §§56-58; Case **N. A. v. Switzerland**, No. 50364/14, Judgment of 30 May 2017, §§47-51; Case **Al Husin v. Bosnia and Herzegovina**, No. 3727/08, Judgment of 7 February 2012, §§2-54.
[962] ECtHR, Case ***Klein v. Russia***, No. 24268/08, Judgment of 1 April 2010, §§54, 56.
[963] ECtHR, Case ***Liu v. Poland***, No. 37610/18, Judgment of 6 October 2022, §§74-78 and 80- 83.
[964] ECtHR, Case ***Allanazarova v. Russia***, No. 46721/15, Judgment of 14 February 2017, §§75-76, 81-82; Case ***Kolesnik v. Russia***, No. 26876/08, Judgment of 17 June 2010, §§72-73; Case ***Soldatenko v. Ukraine***, No: 2440/07, Judgment of 23 October 2008, §§71-73; Case ***Ryabikin v. Russia***, No.: 8320/04, Judgment of 19 June 2008, §§116, 118, 119 and 121.
[965] EComHR, Case ***E.G.M. v. Luxembourg***, No. 24015/94, Decision of 20 May 1994, p. 1.
[966] ECtHR, Case ***M. A. v. France***, No. 9373/15, Judgment of 1 February 2018, §§54-58; Case ***Mamazhonov v. Russia***, No. 17239/13, Judgment of 23 October 2014, §131; Case ***Sufi and Elmi v. United Kingdom***, Nos 8319/07 & 11449/07, Judgment of 28 June 2011, §214; Case ***Saadi v. Italy***, N.º 37201/06, §129; Case ***Rustamov v. Russia***, (…), §108; Case ***Ryabikin v. Russia***, (…), §112.
[967] EComHR, Case ***Lynas v. Switzerland***, No. 7317/75, Decision of 6 October 1976, p. 165, §1.
[968] ECtHR, Case ***Gasayev v. Spain***, No. 48514/06, Decision of 17 February 2009, pp. 6-7.

international reports, without any additional and individualized details, has not been found sufficient by the Court.[969]

Also, even when some of a person's statements are found not to be credible, that does not necessarily constitute grounds to doubt his or her overall credibility, or to dismiss all of his or her statements. While past persecution or mistreatment would weigh heavily in favour of a positive assessment of risk of future persecution, its absence is not a decisive factor. The fact that it has not been credibly established that the applicants were ill-treated or threatened in their country of origin in the past is not decisive for the Court when assessing whether there is a real risk of them being subjected to ill-treatment in the event of their removal, and does not exempt national authorities from carrying out an adequate assessment of the existence of a real risk of torture or ill-treatment in the requesting State[970].

In relation to asylum claims, the Court noted that, if the claim is based on a well-known general risk, when information regarding such a risk is freely ascertainable from a wide number of sources, the obligations incumbent on the States under Articles 2 and 3 of the Convention in expulsion cases entail that the authorities carry out an assessment of that risk of their own motion. By contrast, in relation to asylum claims based on an individual risk, it must be for the person seeking asylum to rely on and to substantiate such a risk. Accordingly, if an applicant chooses not to rely on or disclose a specific individual ground for asylum by deliberately refraining from mentioning it (eg. religious or political beliefs, sexual orientation or other grounds), the State concerned cannot be expected to discover this ground by itself[971]. However, considering the absolute nature of the rights guaranteed under Articles 2 and 3 of the Convention, and having regard to the position of vulnerability that asylum-seekers often find themselves in, if a Contracting State is made aware of facts relating to a specific individual that could expose him to a risk of ill-treatment in breach of the said provisions upon returning to the country in question, the obligations incumbent on the States Parties under Articles 2 and 3 of the Convention entail that the authorities carry out an assessment of that risk of their own motion. This applies in particular to situations where the national authorities have been made aware of the fact that the asylum-seeker may plausibly be a member of a group systematically exposed to practice of ill-treatment and there are serious reasons to believe in the existence of the practice in question and in his or her membership of the group concerned[972].

However, the Court's case-law under Article 3 of the Convention does not require domestic courts to establish with certitude that the asylum-seeker would be tortured if returned home – it needs only establish that there is a "real risk" of ill-treatment. The Court considers that requesting an applicant to produce **"indisputable"** evidence of a risk of ill-treatment in the requesting country would be tantamount to asking him to prove the existence of a future event, which is impossible, and would place a clearly ***disproportionate burden*** on him[973]. Any such allegation always concerns an eventuality, something which may or may not occur in the future. Consequently, such allegations cannot be proven in the same way as past events. The applicant must only be required to show, with reference to specific facts relevant to him and to the class of people he belongs to, that there was a ***high likelihood*** that he would be ill-treated[974]. However, should the request for "indisputable evidence" merely requires the provision of information regarding one's personal circumstances to substantiate the risk of ill-treatment in the receiving country, the Court does not

[969] Eg. Case ***Rustamov v. Russia***, §119.
[970] ECtHR, Case ***T.K. and Others v. Lithuania***, No. 55978/20, Judgment of 22 March 2022, §§80-81.
[971] In the same sense, and in an extradition case, see ECtHR, Case ***Latipov v. Russia***, No. 77658/11, Judgment of 12 December 2013, §103.
[972] ECtHR, Case ***M.A.M. v. Switzerland***, No. 29836/20, Judgment of 26 April 2022, §65; Case **F. G. v. Sweden**, No. 43611/11, Judgment [GC] of 23 March 2016, §§126-127.
[973] ECtHR, Case ***Rustamov v. Russia***, N.º 11209/10, Judgment of 3 July 2012, §117.
[974] ECtHR, Case ***Fozil Nazarov v. Russia***, No. 74759/13, Judgment of 11 December 2014, §38; Case ***Rakhimov v. Russia***, No. 50552/13, Judgment of 10 July 2014, §93; Case ***Ismailov v. Russia***, N.º 20110/13, Judgment of 17 April 2014, §81; Case ***Azimov v. Russia***, N.º 67474/11, Judgment of 18 April 2013, §128.

consider that this does not amount to proving the existence of a future event nor does it place a "disproportionate burden" on the person.[975].

Therefore, previous conclusions of national authorities as to the risk faced by the person in the context of asylum, extradition and deportation proceedings must be taken into account in subsequent assessments[976], notwithstanding that the risk assessment may not always coincide in all cases – for example, the risks faced by pre-trial detainees are usually higher when compared with convicted prisoners, for example given the possible resort to torture or ill-treatment for the purpose of collecting evidence, and persons extradited in the context of criminal proceedings usually face harsher conditions than people simply returned to their country of origin – depending, of course, of the overall human rights situation therein and the particular circumstances of each individual. Also, while extradition for political offences is expressly prohibited under Article 3 of the ECE (regardless of any risk encountered by the person), if an extraditable offence is at stake, and in the context of asylum and deportation/expulsion proceedings, a possible violation to the right to *non-refoulement* as an expression of the Contracting State's extraterritorial obligations under Article 3 of the ECHR, must be at stake.

An assessment as to whether there are substantial grounds for believing that the applicant faces a real risk of being subjected to treatment in breach of Article 3 inevitably requires that the Court assess the conditions in the receiving country against the standards of that Convention provision. These standards imply that the ill-treatment the applicant alleges he will face if returned must attain ***a minimum level of severity*** if it is to fall within the scope of Article 3. The assessment of this is relative, depending on ***all the circumstances*** of the case.[977] A refusal of domestic authorities to consider ill-treatment as a basis for granting refugee status, coupled with the refusal to examine the international reports in extradition proceedings and the rejection of expert opinions and witness statements as irrelevant, as well as a the "summary reasoning adduced by the domestic courts and their refusal to assess materials originating from reliable sources" lead the Court to doubt that the risk of ill-treatment was subject to rigorous scrutiny, either in the refugee status or the extradition proceedings[978].

Also, one should not forget the standards established in other international instruments relating to crossing international borders, such as the **1951 Refugee Convention**, which provides protection in view of such a general, well-founded fear. For requests for extradition regarding persons granted asylum in third States, please see Chapter 4.2, "Extradition and asylum".

In case the competent authorities of the requested State find that there is a "real risk" of the sought person being subjected to treatment prohibited by Article 3 upon extradition, **assurances** may be requested to prevent it. Considered by many as particularly problematic to prevent practices which are, by definition, illicit and clandestine, such as torture and ill-treatment, such guarantees are admitted by the ECtHR, provided that they fulfil a number of requisites. For further information, see sub-chapter 3.10: "The role of assurances".

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[975] ECtHR, Case ***Latipov v. Russia***, No. 77658/11, Judgment of 12 December 2013, §103.
[976] ECtHR, Case ***Labsi v. Slovakia***, No. 33809/08, Judgment of 15 May 2012, §§122-125.
[977] Ibid, ECtHR, Case ***Sufi and Elmi v. United Kingdom***, Nos. 8319/07 & 11449/07, Judgment of 28 June 2011, §213; Case ***Rustamov v. Russia***, (…), §106; Case ***Vilvarajah and Others***, §107; Case ***Cruz Varas and others v. Sweden***, N.º 15576/89, Judgment of 20 March 1991, §§75-76, 83.
[978] ECtHR, Case ***U. N. v. Russia***, No. 14348/15, Judgment of 26 July 2016, §39; Case ***Tadzhibayev v. Russia***, No.17724/14, Judgment of 1 December 2015, §§42-44; Case ***Turgunov v. Russia***, No. 15590/14, Judgment of 22 October 2015, §§50-54; Case ***Khamrakulov v. Russia***, No. 68894/13, Judgment of 16 April 2015, §§64-72; Case ***Mamadaliyev v. Russia***, No. 5614/13, Judgment of 24 July 2014, §§63-65; Case ***Kadirzhanov and Mamashev v. Russia***, Nos. 42351/13 & 47823/13, Judgment of 17 July 2014, §§93-94; Case ***Gayratbek Saliyev v. Russia***, No. 39093/13, Judgment of 17 April 2014, §§60-69; Case ***Abdulkhakov v. Russia***, No. 14743/11, Judgment of 2 October 2012, §148.

In its case-law, the CJEU developed the **two-stage examination** that the executing judicial authority is required to perform before taking a decision on the execution of the EAW[979]:

1. **General assessment**: existence of a general risk of inhuman or degrading treatment due to, for instance, general detention conditions in the issuing Member State; and
2. **Specific assessment**: existence of a specific risk for the individual concerned.

If there are elements that demonstrate a real risk of inhuman or degrading treatment, the court must first assess the existence of a general risk due to general detention conditions in the issuing Member State based on objective, reliable, specific and properly updated information (general assessment). Evidence of a real risk in relation to general detention conditions in the issuing Member State cannot, in itself, lead to a refusal to execute the EAW. If there is evidence available of a real risk in relation to general detention conditions, the executing authority must determine whether, in the particular circumstances of the case, there are substantial grounds to believe that the requested person, if surrendered, will run a real risk of being subject to inhuman or degrading treatment (specific assessment)[980].

Various forms of ill-treatment

The prohibition of extradition in case of a "real risk" of violation of Article 3 applies to the full range of maltreatment practices as defined in Article 3 and as interpreted by the established case law of the CoE's bodies. Such practices may take various forms, including:

- The "death row" phenomenon, which precedes the application of capital punishment. To determine whether this amounts to a violation of Article 3, the ECtHR has taken into account such factors as the manner in which the penalty is pronounced or carried out, the personality and the young age of the person in question and the disproportionality in relation to the gravity of the offence, as well as the conditions of detention pending the execution[981];
- Extradition to a State where the individual faces a whole life sentence without a *de jure* or *de facto* possibility of release (see sub-chapter 3.4, below);
- Poor conditions of, and ill treatment inflicted while in, detention (see "Prison conditions", below);
- Conditions of detention which are inadequate for the specific vulnerabilities of the individual concerned (see "Prison conditions", below);
- Female genital mutilation[982];
- Sexual abuse against institutionalised people, in particular children[983].

Conditions of detention and treatment of prisoners

The conditions of detention and treatment of prisoners presumably inflicted upon the requested person after surrender can constitute a form of ill-treatment prohibited by Article 3 of the **ECHR** and thus constitute an obstacle to extradition, at the expense of engaging the extraterritorial responsibility of the requested State for violating the Convention. As affirmed by PC-OC Mod, the "prison conditions in the requesting State may come into play when these conditions or the expected conditions are or are allegedly of such a kind that they can be considered by themselves

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[979] CJEU, Case ***C-128/18 Dorobantu***, Judgement [GC] of 15 October 2019; Case ***C-220/18 PPU ML (Conditions of detention in Hungary)***, Judgement of 25 July 2018; **Joined Cases C-404/15 and C-659/15 PPU, *Aranyosi and Căldăraru***, Judgment of 5 April 2016.

[980] Eurojust, ***Case-law by the Court of Justice of the EU on the European Arrest Warrant***, updated until 1 December 2021, p. 45.

[981] ECtHR, Case ***Soering v. the United Kingdom***, N.º 14038/88, Judgement of 7 July 1989, §104.

[982] ECtHR, Case ***Collins and Akaziebie v. Sweden***, No. 23944/05, Decision of 8 March 2007, pp. 12-14.

[983] ECtHR, Case ***X and Others v. Bulgaria***, No. 22457/16, Judgment [GC] of 2 February 2021, §179,

as a violation of Article 3 **ECHR**".[984] It is important to take note that the human rights standards in this regard are dynamic and may evolve over time[985].

It has been noted that the majority of ECtHR case law deals with prison conditions as an established violation of Article 3, rather than as a serious risk of a (future) violation of such Article, which is the evaluation that national authorities must undertake in the context of an extradition request. "Most cases deal with domestic situations, i. e. persons that have spent pre-trial detention or post-trial detention or other types of deprivation of liberty such as detention for the purpose of expulsion or police arrest in appalling conditions. In most cases specific aspects of the detention were under scrutiny such as (the lack of) adequate medical treatment or the lack of adequate access to outside communication and/or visits. With regard to mentally ill offenders a lack of adequate psychiatric treatment was scrutinized, for instance in a recent series of judgements re. Belgium."[986]

PC-OC Mod recalled that, in an international context, and especially as it concerns extradition, the **Soering v. United Kingdom**[987] judgement (1989) "remains the very basis for all ECtHR case law re. fundamental rights and extradition". At a time when the death penalty was still not prohibited in all circumstances under the **ECHR** or any of its adopted protocols, the Court found that "an extradition to the US for an offence which is punishable by the death penalty establishes a serious risk to expose the person sought (Soering) to the so-called ***death row phenomenon***. While it were not the material conditions of the detention (in death row) as such that were considered, the very long period of uncertainty – given the manifold appeal and pardon proceedings that are usually applied – and its severe psychological effects were deemed to pose a serious risk of violation of Article 3."[988]

More recently, the ECtHR has examined this issue, for example, in case **Babar Ahmad and Others v. United Kingdom** (2012), dealing with the extradition of six British nationals and one person of disputed nationality from the UK to the USA for the purpose of prosecution for various terrorist and terrorism-related offences. The applicants alleged, inter alia, that, if extradited to the US and convicted, they risked serving their prison terms in ADX Florence, a maximum security prison facility, and also being subjected to special administrative measures (SAMS) – two issues which, on their own or in combination, would violate Article 3 of the Convention due to ADX's restrictive conditions and lack of human contact. They also alleged a lack of sufficient procedural safeguards before placement. Almost all aspects of detention in such facility have been addressed in this application, including 23/24 hours solitary confinement, limits to the access to outside communication, alleged inadequate medical and psychological treatment and the application of special administrative (disciplinary) measures.

In his reasoning, the ECtHR underlined that, in order to fall under Article 3 of the Convention, ill-treatment must attain a ***minimum level of severity***. The assessment of this minimum level is ***relative***; it depends on all the circumstances of the case, such as the duration of the treatment, its physical and mental effects and, in some cases, the state of health of the victim. For a violation of Article 3 of the Convention to arise from an applicant's conditions of detention, the suffering and humiliation involved must go beyond that inevitable element of suffering or humiliation connected with a given form of legitimate treatment or punishment. Measures depriving a person of his liberty may often involve an element of suffering or humiliation. However, the State must ensure that a person is detained under conditions which are compatible with respect for his human dignity, that the manner and method of execution of the measure do not subject such person to distress or hardship exceeding the unavoidable level of suffering inherent to detention and that,

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[984] **PC-OC Mod (2015) 07**, *Prison standards in extradition matters – Discussion paper by Erik Verbert (Belgium)*, Strasbourg, 7 September 2015, p. 2.
[985] See, for instance, remarks of the representative of the ECtHR at PC-OC's second special session on extradition, **PC-OC (2018) 05**, p. 52.
[986] **PC-OC Mod (2015) 07**, *Prison standards in extradition matters – Discussion paper by Erik Verbert (Belgium)*, Strasbourg, 7 September 2015, p. 2.
[987] ECtHR, Case ***Soering v. the United Kingdom***, N.º 14038/88, Judgement of 7 July 1989.
[988] **PC-OC Mod (2015) 07**, *Prison standards in extradition matters* (…), p. 2.

given the practical demands of imprisonment, the person's health and well-being are adequately secured. When assessing conditions of detention, account has to be taken of the ***cumulative effects*** of these conditions, as well as of specific allegations made by the applicant[989].

In Case **Babar Ahmad and Others v. United Kingdom** (2012), the ECtHR evaluated the complaint regarding the eventual detention in ADX Supermax specifically with respect to solitary confinement, recreation and outdoor exercise and mental health issues during detention. It should be noted that it seemed undisputed, in this case, that the physical conditions at ADX Florence – size of the cells, lighting and sanitary facilities – met the requirements of Article 3.

The Court considered there was no basis for the applicants' submission that placement at ADX would take place without any procedural safeguards. The Federal Bureau of Prisons applied accessible and rational criteria when deciding whether to transfer an inmate to ADX. Placement was accompanied by a high degree of involvement of senior officials within the Bureau who were external to the inmate's current institution. Their involvement and the requirement that a hearing be held before transfer provided an appropriate measure of procedural protection. No evidence suggested that such a hearing was merely "window dressing". Even if the transfer process were unsatisfactory, there would be recourse to both the Bureau's administrative remedy programme and the federal courts, by bringing a claim under the due process clause of the Fourteenth Amendment, to cure any defects in the process. Nothing indicated that the US authorities would not continually review their assessment of the security risk which they considered the applicants to pose and the Federal Bureau of Prisons had well-established procedures for reviewing an inmate's security classification and carrying out reviews of that classification in six-monthly program reviews and three-yearly progress reports. Moreover, the United States' authorities had proved themselves willing to revise and to lift the special administrative measures which have been imposed on terrorist inmates thus enabling their transfer out of ADX to other, less restrictive institutions.

Concerning the prison conditions at ADX Florence, the ECtHR considered it was clear from the evidence submitted by both parties that the purpose of the regime in those units was to prevent all physical contact between an inmate and others, and to minimise social interaction between inmates and staff. This did not mean, however, that inmates were kept in complete sensory isolation or total social isolation. Although inmates were confined to their cells for the vast majority of the time, a great deal of in-cell stimulation was provided through television and radio channels, frequent newspapers, books, hobby and craft items and educational programming. The range of activities and services provided in fact went beyond what is provided in many prisons in Europe. Where there were limitations on the services provided, for example restrictions on group prayer, these were necessary and inevitable consequences of imprisonment. There were adequate opportunities for interaction between inmates. While inmates were in their cells talking to other inmates was possible, admittedly only through the ventilation system. During recreation periods inmates could communicate without impediment. Moreover, even the inmates under special administrative measures had the right to regular telephone calls, social visits and correspondence with their families. The isolation experienced by ADX inmates was, therefore, partial and relative. A for the mental health conditions of the applicants, it would not appear that the psychiatric services available at ADX would be unable to treat such conditions[990].

The conclusion was however different in the case of Aswat, who was among the applicants in case **Babar Ahmad and Others** (2012) and suffered from schizophrenia requiring him to be transferred to Broadmoor Hospital. His case was adjourned and later dealt with separately. In **Aswat v. the United Kingdom** (2012), the Court concluded that ***uncertainty*** over conditions of detention in the event of extradition to the US of this applicant as a suspected terrorist suffering from serious mental disorder would constitute a violation of Article 3. According to the ECtHR:

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989 989 ECtHR, Case ***Babar Ahmad and Others v. United Kingdom* (Judgment)**, Nos.: 24027/07, 11949/08, 36742/08, 66911/09 & 67354/09, Judgment of 10 April 2012, §§ 201-203.
990 ECtHR, Case ***Babar Ahmad and Others v. United Kingdom* (Judgment)**, Nos.: 24027/07, 11949/08, 36742/08, 66911/09 & 67354/09, Judgment of 10 April 2012, §§ 201, 202, 203, 220, 222 and 224.

> "57. While the Court in Babar Ahmad did not accept that the conditions in ADX Florence would reach the Article 3 threshold for persons in good health or with less serious mental health problems, the applicant's case can be distinguished on account of the severity of his mental condition. The applicant's case can also be distinguished from that of Bensaid v. the United Kingdom, no. 44599/98 (…) as he is facing not expulsion but extradition to a country where he has no ties, where he will be detained and where he will not have the support of family and friends. Therefore, in light of the current medical evidence, the Court finds that there is a real risk that the applicant's extradition to a different country and to a different, and potentially more hostile, prison environment would result in a significant deterioration in his mental and physical health and that such a deterioration would be capable of reaching the Article 3 threshold (…)." [991]

It is clear from the Court's case law that Article 3 of the Convention imposes on the State the obligation to ensure that all prisoners are detained in conditions compatible with respect for their human dignity and that the method of execution of the measure does not subject them to distress or to hardship of an intensity exceeding the unavoidable level of suffering inherent in detention[992]. As stated by the Court itself, "in the context of ill-treatment of prisoners, the following factors, among others, have been decisive in the Court's conclusion that there has been a violation of Article 3:

- the presence of ***premeditation***;
- that the measure may have been ***calculated to break the applicant's resistance*** or will;
- an ***intention to debase or humiliate*** an applicant, or, if there was no such intention, the fact that the measure was implemented in a manner which nonetheless caused feelings of ***fear***, ***anguish*** or ***inferiority***;
- the ***absence of any specific justification*** for the measure imposed;
- the ***arbitrary punitive nature*** of the measure;
- the ***length of time*** for which the measure was imposed – see also "life imprisonment"; and
- the fact that there has been a degree of ***distress or hardship of an intensity exceeding the unavoidable level of suffering inherent in detention***. [993]

Also, the Court observes that all of these elements depend closely upon the facts of the case and so will not be readily established prospectively in an extradition or expulsion context.

The ECtHR has further elaborated that Ill-treatment that attains a minimum level of severity usually involves actual bodily injury or intense physical or mental suffering. However, even in the absence of these, where treatment humiliates or debases an individual, showing a lack of respect for or diminishing his or her human dignity, or arouses feelings of fear, anguish or inferiority capable of breaking an individual's moral and physical resistance, it may be characterised as degrading and also fall within the absolute prohibition of Article 3 of the Convention, irrespective of the victim's behaviour[994].

Furthermore, the Court considers that serious **prison overpopulation** raises an issue under Article 3 of the Convention. Despite stating that it cannot decide how much personal space must be allotted to each prisoner, as that issue may rely on many factors, such as the length of the deprivation of liberty, the possibility for outdoor exercise or the mental and physical condition of the prisoner, the Court finds that an extreme lack of space in a prison cell weighs heavily as an aspect to be taken into account for the purpose of establishing whether the impugned detention conditions were "degrading" from the point of view of Article 3 of the Convention. Whereas the provision of four square metres remains the desirable standard of multi-occupancy accommodation, the Court has found that where the applicants have at their disposal ***less than***

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[991] ECtHR, Case ***Aswat v. the United Kingdom***, No. 17299/12, Judgment of 16 April 2013, §57; see also
[992] ECtHR, Case ***Samaras and Others v. Greece***, No. 11463/09, Judgment of 28 February 2012, §§ 56, 57, 59, 63 and 65; and Case ***Muršić v. Croatia***, No.: 7334/13, Judgment [GC] of 20 October 2016.
[993] ECtHR, Case ***Babar Ahmad and Others v. United Kingdom*** (Judgment) (…), §178; Case ***Harkins and Edwards v. United Kingdom***, Nos. 9146/07 & 32650/07, Judgment of 17 January 2012, §130.
[994] ECtHR, Case ***Ananyev and others v. Russia***, Nos.: 42525/07 & 60800/08, Judgment of 10 January 2012, §§139-142.

three square metres of floor surface, the overcrowding must be considered to be so severe as to justify of itself a finding of a violation of Article 3 of the Convention.

In deciding whether or not there has been a violation of Article 3 of the Convention on account of the lack of personal space, the Court has to have regard to the following three elements:

(a) each detainee must have an ***individual sleeping place*** in the cell;

(b) each detainee must dispose of at least ***three square meters of floor space***; and

(c) the overall surface of the cell must be such as to allow the detainees to ***move freely between the furniture*** items.

The absence of any of the above elements creates in itself a strong presumption that the conditions of detention amounted to degrading treatment and were in breach of Article 3 of the Convention. Even in cases where a larger prison cell was at issue – measuring in the range of three to four square meters per inmate –the Court found a violation of Article 3 of the Convention since the space factor was coupled with the established lack of ***ventilation and lighting***. Special attention must be paid to the availability and duration of ***outdoor exercise*** and the conditions in which prisoners could take it. Restrictions on access ***to natural light and air*** owing to the fitting of metal shutters seriously aggravated the situation of prisoners in an already overcrowded cell and weighed heavily in favour of a violation of Article 3 of the Convention[995].

Other aspects that must be taken into account are, for instance, the possibility to ***use the toilet privately***, the ***ventilation system***, quality of ***heating***, respect for ***basic sanitary requirements*** and the possibility to ***move outside of the dormitory*** is one of those elements. The Court must also weigh the form and the ***duration*** of the freedom of movement against the global duration of detention and the general conditions which prevail within the prison[996].

European Union

A wrong assessment of the factual basis will not only lead to a breach of EU law, but can also lead to a conviction of the executing Member State by the ECtHR[997]. The ECtHR convicted an executing Member State that – in front of a sufficiently solid factual basis to establish the existence of a real risk of inhuman or degrading treatment because of detention conditions in the issuing State – had decided to execute the EAW and had surrendered the requested person[998] . Yet in another case, the ECtHR, arguing that there was a lack of sufficient factual basis for a refusal, did not refrain from convicting an executing Member State, which had refused to execute an EAW, considering there had been a violation of Article 2 of the ECHR (in its procedural aspect) for failure to perform a sufficiently complete examination into the circumstances of the case[999]. The interaction and dialogue between both European Courts is undeniable. Throughout its case-law, the CJEU has repeatedly referred to the relevant ECtHR case-law, clearly acknowledging that the *acquis* of the ECtHR is essential for interpreting the corresponding rights of the Charter. But also the ECtHR, from its side, has acknowledged the importance of the principles of mutual trust and mutual recognition within the EU legal order which should prevail except when there is a serious

[995] ECtHR, Case ***Ananyev and others v. Russia***, Nos.: 42525/07 & 60800/08, Judgment of 10 January 2012, §§140, 143, 145, 148-150 and 154.
[996] ECtHR, Case ***Mironovas and Others v. Lithuania***, Nos. 40828/12, 29292/12, 69598/12, 40163/13, 66281/13, 70048/13 & 70065/13, Judgment of 8 December 2015, §§115-123; Case ***Samaras and Others v. Greece***, No. 11463/09, Judgment of 28 February 2012, §59.
[997] Eurojust, ***Case-law by the Court of Justice of the EU on the European Arrest Warrant***, updated until 1 December 2021, pp. 46-47.
[998] ECtHR, Case ***Bivolaru and Moldovan v. France***, Nos. 40324/16 & 12623/17, Judgment of 25 May 2021.
[999] ECtHR, Case ***Romeo Castaño v. Belgium***, No. 8351/17, Judgment of 9 July 2019, §§83-85, 89-90, 92.

and substantiated complaint that the protection of a Convention right has been manifestly deficient[1000].

At the EU level, it has also been recognized that the problem of prison overcrowding in the requesting State may pose serious problems in the context of extraditions. This became clearer since the CJEU passed its judgement in the above mentioned Joined Cases **Aranyosi and Căldăraru** (2016), relating to the execution of EAW to Romania and Hungary, States which the ECtHR had considered, in judgements issued on 10 June 2014[1001] and 10 March 2015[1002], respectively, had infringed fundamental rights "due to the prison overcrowding which is characteristic of their prisons"[1003]. It should be recalled that Article 4 of the **CFREU** corresponds to Article 3 of the **ECHR** and cannot, therefore, afford lesser protection than the latter (Article 52 (3) of the Charter)[1004].

Recalling that the absolute prohibition of inhuman or degrading treatment or punishment is part of the fundamental rights protected by EU law, including the **CFREU**, the CJEU states that where the authority responsible for the execution of a warrant has in its possession evidence of a real risk of inhuman or degrading treatment of persons detained in the Member State where the warrant was issued, that authority must assess that risk before deciding on the surrender of the individual concerned and that the consequence of the execution of such a warrant must not be that the individual suffers inhuman or degrading treatment[1005]. There is thus a positive obligation on the part of executing authorities to:

> "[…] ensure that any prisoner is detained in conditions which guarantee respect for human dignity, that the way in which detention is enforced does not cause the individual concerned distress or hardship of an intensity exceeding the unavoidable level of suffering that is inherent in detention and that, having regard to the practical requirements of imprisonment, the health and well-being of the prisoner are adequately protected […]"[1006].

In case the information available on the detention conditions prevailing in the issuing Member State (which should be "objective, reliable, specific and properly updated) reveals the existence of a real risk of ill-treatment resulting from the general detention conditions in the Member State concerned, the identification of that risk cannot, in itself, lead to the execution of the EAW being refused. It is necessary to make a further assessment, "specific and precise", of whether there are substantial grounds for believing that the individual concerned will in fact be exposed to such a risk because of the conditions in which it is envisaged that he or she will be detained. "The mere existence of evidence that there are deficiencies, which may be systemic or generalised, or which may affect certain groups of people, or which may affect certain places of detention, with respect to detention conditions in the issuing Member State does not necessarily imply that, in a specific case, the individual concerned will be subject to inhuman or degrading treatment in the event that he is surrendered to the authorities of that Member State."[1007]

In order to be able to assess the existence of a real risk in relation to the individual circumstances of the person subject to the EAW, the authority responsible for the execution of the warrant must

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[1000] ECtHR, Case ***Bivolaru and Moldovan v. France***, Nos. 40324/16 & 12623/17, Judgment of 25 May 2021, §§100-102; Case ***Pirozzi v. Belgium***, No. 21055/11, Judgment of 17 April 2018, §§63-64.
[1001] ECtHR, Case ***Voicu v. Romania***, N.º 22015/10, Judgment of 10 June 2014, §51, Case ***Bujorean v. Romania***, N.º 13054/12, Judgement of 10 June 2014, §29, Case ***Mihai Laurenţiu Marin v. Romania***, N.º 79857/12, Judgement of 10 June 2014, §36; and Case ***Constantin Aurelian Burlacu v. Romania***, N.º 51318/12, Judgment of 10 June 2014, §29.
[1002] ECtHR, Case ***Varga and Others v. Hungary*** (Nºs 14097/12, 45135/12, 73712/12, 34001/13, 44055/13, and 64586/13, Judgement of 10 March 2015, eg. §87.
[1003] See CJEU, **Press Release no. 36/16**, Luxembourg, 5 April 2016.
[1004] See, for instance, **PC-OC (2018)05**, "Introductory speech (…)", Mr Vincent Glerum, p. 22.
[1005] CJEU, **Joined Cases C-404/15 and C-659/15 PPU, *Aranyosi and Căldăraru***, Judgment of 5 April 2016, §88.
[1006] CJEU, **Joined Cases C-404/15 and C-659/15 PPU, *Aranyosi and Căldăraru***, Judgment of 5 April 2016, §90.
[1007] CJEU, **Joined Cases C-404/15 and C-659/15 PPU, *Aranyosi and Căldăraru***, Judgment of 5 April 2016, §§88-89 and 91-93.

ask the issuing authority to provide, as a matter of urgency, all the information necessary on the conditions of detention (Article 15 **EAW FD**). The request may also make reference to the existence, in the issuing Member State, of any national or international procedures and mechanisms for monitoring detention conditions, linked, for example, to visits to prisons, which make it possible to assess the current state of detention conditions in those prisons.[1008]. In, principle, such request should be submitted within the time limits set in Article 17 of the **EAW FD**.

Further aligning its case law with that of the ECtHR, the CJEU considers that. despite this case-by-case assessment, particular care must be taken if the information provided by the issuing judicial authority shows that the requested person will have ***less than 3 sq m of floor***, which ***gives rise to a strong presumption*** of a violation of Art. 3 **ECHR** and can only be refuted if certain compensating factors are present; it often gives rise to a postponement of a decision on the execution of an EAW. CJEU considers that deficiencies "may be systemic or generalised, or (…) may affect certain groups of people, or (…) certain places of detention"[1009]. In its judgement on case **Dorobantu** (2019), the CJEU went further on, to specify that, in its assessment, the executing judicial authority must "take account of all the relevant physical aspects of the conditions of detention in the prison in which it is actually intended that that person will be detained, such as the ***personal space*** available to each detainee in a cell in that prison, ***sanitary conditions*** and the extent of the detainee's ***freedom of movement within the prison***", not limiting its assessment to the review of obvious inadequacies. Not only should this authority request the information it deems necessary, it must also "rely, in principle, on the **assurances** given by the issuing judicial authority, in the absence of any specific indications that the conditions of detention infringe Article 4 of the Charter of Fundamental Rights." In the calculation of available space, the area occupied by ***sanitary facilities*** should not be taken into account, contrary to the space occupied by ***furniture***, but the detainees must always have the possibility of ***moving around normally*** within the cell.

Furthermore, the existence, in the issuing Member State, of a ***legal remedy*** to challenge the conditions of detention or of legislative or structural measures intended to reinforce the ***monitoring*** of detention conditions does not rule out the existence of a real risk of inhuman or degrading treatment; and, of course, due to the absolute nature of the prohibition of torture or ill-treatment, this risk ***cannot be weighed***, for the purposes of deciding on that surrender, against considerations relating to the efficacy of judicial cooperation in criminal matters and to the principles of mutual trust and recognition[1010]. In the absence of EU minimum rules on detention conditions, the executing authority must take account of the criteria laid down in the ECtHR's case law[1011].

In the ECtHR's view, the strong presumption of a violation of Article 3 arising from the allocation of less than 3 sq. m in multi-occupancy accommodation will normally be capable of being rebutted only where the requirements are cumulatively met, namely where short, occasional and minor reductions of personal space are accompanied by sufficient freedom of movement outside the cell and adequate out-of-cell activities and confinement in what is, when viewed generally, an appropriate detention facility"[1012]. One way found to solve this problem was the adoption, by one Member State, of a policy of designating prisons which do comply with the requirements of Article 3 **ECHR** for the detention of persons surrendered that Member State. It has been pointed out that, despite satisfying the need to prevent impunity and to protect the human rights of surrendered persons, such policy does raise issues of equality [1013].

[1008] CJEU, **Joined Cases C-404/15 and C-659/15 PPU, *Aranyosi and Căldăraru***, Judgment of 5 April 2016, §§91-946

[1009] CJEU, **Joined Cases C-404/15 and C-659/15 PPU, *Aranyosi and Căldăraru***, Judgment of 5 April 2016, ruling.

[1010] CJEU, Case ***Dumitru-Tudor Dorobantu***, C-128/18, Judgement of 15 October 2019, ruling.

[1011] See ECtHE, Case ***Muršić v. Croatia***, N.º 7334/13, Judgement [GC] of 20 October 2016.

[1012] ECHR, Case ***Muršić v. Croatia***, §132.

[1013] See **PC-OC (2018)05**, "Introductory speech (…)", Mr Vincent Glerum, p. 23.

If, in the light of the information provided or any other information available to it, the authority responsible for the execution of the warrant finds that there is, for the individual who is the subject of the warrant, a real risk of inhuman or degrading treatment, the execution of the warrant must be ***deferred*** until there has been obtained additional information on the basis of which that risk can be discounted. "In the meantime the requested person may be held in custody, but only in so far the duration of his detention is not excessive"[1014]. If the existence of that risk cannot be discounted within a reasonable period, that authority must decide whether the surrender procedure should be brought to an end"[1015]. This solution tries to strike a balance between the needs to prevent impunity and to afford a degree of protection, by the ECJ, at least equivalent to that afforded by the ECtHR, but also, by referring in this regard to the **Melloni judgement** (2013), to deter the national courts from compromising the effectiveness of the EAW through the application of higher standards of protection. In this judgement, the ECJ states, inter alia, the following:

> It is true that Article 53 of the Charter confirms that, where an EU legal act calls for national implementing measures, national authorities and courts remain free to apply national standards of protection of fundamental rights, provided that the level of protection provided for by the Charter, as interpreted by the Court, and the primacy, unity and effectiveness of EU law are not thereby compromised.[1016]

In 2017, in case **Domján v. Hungary** (2017), the ECtHR declared a complaint about prison overcrowding and other poor prison conditions inadmissible, having regard to a new ***domestic preventive and compensatory remedy***[1017]. However, the CJEU soon began to take a more stringent view on this point in the context of executions of EAW. In case **ML** (2018)[1018], it ruled that "the executing judicial authority cannot rule out a real risk that the person in respect of whom a European arrest warrant has been issued for the purpose of executing a custodial sentence will be subjected to inhuman or degrading treatment within the meaning of Article 4 of the **Charter of Fundamental Rights of the European Union**, merely because that person has, in the issuing Member State, a legal remedy permitting him to challenge the conditions of his detention, ***although the existence of such a remedy may be taken into account by the executing judicial authority for the purpose of deciding on the surrender of the person concerned***;" (emphasis added). The mere existence of a remedy, or of legislative or structural measures intended to reinforce the monitoring of conditions of detention, was also deemed insufficient by the CJEU to rule out in itself the existence of a real risk of inhuman or degrading treatment in case **Dumitru-Tudor Dorobantu** (2019)[1019].

Furthermore, according to the CJEU, Article 1(3) of **Council Framework Decision 2002/584/JHA of 13 June 2002 on the EAW and the surrender procedures between Member States**, as amended by Council Framework Decision 2009/299/JHA of 26 February 2009, read in conjunction with Article 4 of the **CFREU**, must be interpreted as meaning that (emphasis added):

> "when the executing judicial authority has objective, reliable, specific and properly updated information showing there to be ***systemic or generalised deficiencies in the conditions of detention*** in the prisons of the issuing Member State, it must, for the purpose of assessing whether there are substantial grounds for believing that, following the surrender to the issuing Member State of the person subject to a European arrest warrant, that person will run a ***real risk*** of being subjected to inhuman or degrading treatment within the meaning of Article 4 of the Charter, take account of ***all the relevant physical aspects*** of the conditions of detention in the ***prison in which it is actually intended*** that that person will be detained, such as the personal space available to each

[1014] See **PC-OC (2018)05**, "Introductory speech (…)", Mr Vincent Glerum, p. 22.
[1015] CJEU, **Joined Cases C-404/15 and C-659/15 PPU, *Aranyosi and Căldăraru***, Judgment of 5 April 2016, conclusion.
[1016] CJEU, Case **C-399/11 *Melloni***, judgment of 26 February 2013, § 60.
[1017] ECHR, Case ***Domján v. Hungary*** (dec.), no. 5433/17, 14 November 2017.
[1018] CJEU, Case **C-220/18 PPU *ML (Conditions of detention in Hungary)***, Judgement of 25 July 2018.
[1019] CJEU, Case **C-128/18 *Dorobantu***, Judgement [GC] of 15 October 2019.

> detainee in a cell in that prison, sanitary conditions and the extent of the detainee's freedom of movement within the prison. That assessment is not limited to the review of obvious inadequacies. For the purposes of that assessment, the executing judicial authority must request from the issuing judicial authority the information that it deems necessary […]"[1020]

Therefore, despite the fact that that executing judicial authority must proceed with its assessment of whether the concerned person will run a real risk of being subjected to ill-treatment on the basis of information showing the existence of systemic or generalised deficiencies in the conditions of detention of the issuing Member State, not limiting itself to consider obvious inadequacies only, its concrete assessment must limit itself to the ***prison where it is actually intended/likely that the person will be detained***, including on a temporary or transitional basis[1021]. Also, such conditions of detention to be assessed shall be solely those which are ***relevant*** for determining whether that person will be exposed to a real risk of inhuman or degrading treatment[1022].

Regarding the **personal space** available to each detainee, the CJEU considered that the executing judicial authority must take account of the minimum requirements under Article 3 of the **ECHR** as interpreted by the ECtHR and added that, in calculating available space, the ***area occupied by sanitary facilities should not be taken into account***, but that the calculation should ***include space occupied by furniture***. Detainees must always have the possibility of ***moving around normally*** within the cell.

While in 2018 the CJEU ruled that the executing judicial authority ***may*** take into account information provided by authorities of the issuing Member State such as, in particular, an ***assurance*** that the individual concerned will not be subjected to inhuman or degrading treatment within the meaning of Article 4 of the **CFREU**[1023], in 2019 its ruling gave further weight to such information and assurances, stating for example that the executing judicial authority ***must rely, in principle,*** on such assurances, in the absence of any specific indications that the conditions of detention infringe the said Article 4[1024].

However, and in view of the absolute nature of the prohibition of torture and ill-treatment, it must be borne in mind that a finding, by the executing judicial authority, that there are substantial grounds for believing that, following the surrender of the person concerned to the issuing Member State, that person will run such a risk, because of the conditions of detention prevailing in the prison in which it is actually intended that he will be detained, ***cannot be weighed, for the purposes of deciding on that surrender, against considerations relating to the efficacy of judicial cooperation in criminal matters and to the principles of mutual trust and recognition***.

The CJEU noted in its case-law that Member States are entitled to make provision in respect of their own prison system for ***minimum standards in terms of detention conditions that are higher*** than those resulting from Article 4 of the **CFREU** and Article 3 ECHR, as interpreted by the ECtHR. However, in the context of the **EAW FD**, a Member State may make the surrender to the issuing Member State of the person concerned by an EAW subject only to compliance with the latter requirements and not with those resulting from its own national law[1025].

PC-OC has elaborated a White Paper on Prison Overcrowding[1026] and discussed the impact of this problem on extradition, taking note of the different projects implemented by the CoE to improve prison conditions in member States by capacity development including legislation, training and exchange of good practices[1027].

[1020] CJEU, Case **C-128/18 *Dorobantu***, Judgement [GC] of 15 October 2019, ruling.
[1021] See also CJEU, ***Case ML***,, ruling.
[1022] CJEU, ***Case ML***, ruling.
[1023] See CJEU, ***Case ML***, ruling.
[1024] See CJEU, Case **C-128/18 *Dorobantu***, Judgement [GC] of 15 October 2019, ruling.
[1025] CJEU, Case **C-128/18 *Dorobantu***, Judgement [GC] of 15 October 2019.
[1026] **PC-CP (2015) 6 rev 7**, *White Paper on Prison Overcrowding*, Strasbourg, 30 June 2016.
[1027] **PC-OC (2017) 10**, *List of decisions taken at the 73rd meeting of the PC-OC*, p. 7.

For further guidance on the treatment of prisoners, account should be taken on the **standards and tools developed** by the Committee for the Prevention of Torture (CPT).

Inadequate healthcare

Decisions to remove an alien who is suffering from a serious mental or physical illness to a country where the facilities for the treatment of that illness are inferior to those available in the Contracting State may raise an issue under Article 3, but only in very exceptional cases, where the humanitarian grounds against the removal are compelling. This was considered to apply in a 1996 case dealing with the expulsion of an AIDS patient, in the terminal stages of his illness, from the UK to St. Kitts, where he could not receive adequate medical treatment for AIDS and AIDS-related infections. The applicant alleged that expulsion to St. Kitts would condemn him to spend his remaining days in pain and suffering in conditions of isolation, squalor and destitution, as he had no close relatives or friends in St. Kitts, no accommodation, no financial resources and no access to any means of social support; and that the withdrawal of his current medical treatment would hasten his death on account of the unavailability of similar treatment in St Kitts where hospital facilities were extremely limited and not capable of adequate medical treatment for AIDS-related infections, with the consequence that his death would thus not only be further accelerated, but also come about in conditions which would be inhuman and degrading.

The ECtHR considered that, "in view of these ***exceptional circumstances***" of this case and bearing in mind the critical stage now reached in the applicant's fatal illness, his expulsion to St. Kitts would amount to ill-treatment in violation of Article 3 of the Convention. Although it could not be said that the conditions which the applicant would face in the receiving country would constitute, in themselves, a breach of the standards of Article 3, his removal would expose him to a real risk of dying under most distressing circumstances. Nevertheless, the Court emphasized that ***aliens who have served their prison sentences and are subject to expulsion cannot in principle claim any entitlement to remain in the territory of a Contracting State in order to continue to benefit from medical, social or other forms of assistance provided by the expelling State during their stay in prison***.[1028]

The "high threshold" required by Article 3 in these cases has been further elaborated in case **Paposhvili v. Belgium** (2016) , with the Court stating that it should be understood to refer to situations involving the removal of a seriously ill person in which substantial grounds have been shown for believing that he or she, although not at imminent risk of dying, would face a real risk, on account of the absence of appropriate treatment in the receiving country or the lack of access to such treatment, of being ***exposed to a serious, rapid and irreversible decline in his or her state of health resulting in intense suffering or to a significant reduction in life expectancy***[1029].

No such exceptional circumstances were found, for example, in case **N. v. United Kingdom** (2008), relating to an expulsion to Uganda of an HIV-positive patient. Despite accepting that the quality of the applicant's life, and her life expectancy, would be affected if she were returned to Uganda, the Court noted that, according to information collated by WHO, antiretroviral medication was available in Uganda (although due to lack of resources it was received by only half of those in need and the applicant claimed that she would be unable to afford the treatment and that it would not be available to her in the rural area from which she comes). It also observed that the applicant was not, however, at the relevant time, critically ill, and that the rapidity of the deterioration which she would suffer and the extent to which she would be able to obtain access to medical treatment, support and care, including help from relatives, involved a certain degree of speculation, particularly in view of the constantly evolving situation as regards the treatment of HIV and AIDS worldwide. For these reasons, the Court considered that this case did not disclose

[1028] ECtHR, Case ***D. v. United Kingdom***, No. 30240/96, Judgment of 2 May 1997, §§53 and 54, and **PC-OC (2011) 21 Rev17**, p. 52.
[1029] ECtHR, Case ***Paposhvili v. Belgium***, No. 41738/10, Judgment [GC] of 13 December 2016, §183.

very exceptional circumstances revealed, for example, in D. v. the United Kingdom (above), and that the implementation of the decision to remove the applicant to Uganda would not give rise to a violation of Article 3 of the Convention[1030]. A similar conclusion was reached in case **Ahorugeze v. Sweden**, concerning a patient with heart problems extradited from Sweden to Rwanda[1031]. The Court further considered that the high threshold set for Article 3 of the Convention applies with equal force in cases involving a risk of suicide as in other cases[1032].

The Court's ruling in case **N. v. the United Kingdom** [GC] should be compared with its ruling in case **Aleksanyan v. Russia,** also from 2008 and dealing with the denial of prompt and appropriate medical treatment for HIV/AIDS. This reinforces the Court's case law to the effect that the ***absolute nature of Article 3 does not mean that any form of ill-treatment will act as a bar to removal from a Contracting State*** and, thus, that ***treatment which might violate Article 3 because of an act or omission of a Contracting State might not attain the minimum level of severity which is required for there to be a violation of Article 3 in an expulsion or extradition case***. Thus, a Contracting State's negligence in providing appropriate medical care within its jurisdiction has, on occasion, led the Court to find a violation of Article 3 but such violations have not been so readily established in the extra-territorial context.[1033].

In the more recent case **Yoh-Ekale Mwanje v. Belgium** (2011), concerning the expulsion of a Cameroonian national, who suffered from an advanced stage of HIV infection, from Belgium to Cameroon, did not entail *per se* a violation of 3 of the ECHR despite worsening the applicant's situation, because the person was not in a "critical condition" and was fit to travel. Notwithstanding, the Court did find a violation of Article 3 due to the fact that the Belgian authorities, when examining the case, did not undertake a careful and thorough examination of the applicant's individual situation before concluding that no risk would arise under Article 3 of the Convention if she were deported to Cameroon; therefore, the applicant had been deprived of an effective remedy[1034]. The fact that the circumstances, namely the life expectancy, of a person suffering from Type II diabetes and a number of related conditions, including hypertension, would be significantly reduced in case of removal from the Contracting State, was also not sufficient in itself to give rise to a breach of Article 3 of the Convention[1035]. Neither was the extradition of a 64 year old Pakistani national with a number of health conditions, including type 2 diabetes, asthma and sleep apnoea (according to the Court, "not unusual for a man of his age"), from the UK to the USA for the purposes of prosecution for drug-trafficking offences, considered to reach the minimum level of severity required by Article 3 of the Convention, namely because the US prison authorities had been alerted to his health difficulties and had confirmed that both of the facilities he could be detained in would be able to cater adequately to his needs and he would be provided with a CPAP machine used to treat sleep apnoea[1036].

Even though this extraterritorial effect of the Convention applies in contexts where risk to the individual of being subjected to any of the proscribed forms of treatment emanates from acts of the public authorities in the receiving State or from acts of non-state actors in the event that the authorities do not protect him or her adequately, the Court shows flexibility in the application of Article 3. It may therefore hold a violation of this article if the source of the risk in the receiving state stems from factors that cannot engage, either directly or indirectly, the responsibility of the public authorities of that State or do not in themselves infringe the standards of the article. In such cases, though, the Court has subjected all the circumstances surrounding the case to a rigorous

[1030] ECtHR, Case **N. v. United Kingdom**, Nº. 26565/05, Judgement [GC] of 27 May 2008, §§50-51.
[1031] ECtHR, Case ***Ahorugeze v. Sweden***, No. 37075/09, Judgment of 27 October 2011, §88.
[1032] ECtHR, Case ***Balogun v. United Kingdom***, No. 60286/09, Judgment of 10 April 2012, §§31 and 34.
[1033] ECtHR, Case ***Babar Ahmad and Others v. The United Kingdom***, Nºs 24027/07, 11949/08 and 36742/08, Judgment of 10 April 2012, §§176-177.
[1034] ECtHR, Case ***Yoh-Ekale Mwanje v. Belgium***, No. 10486/10, Judgment of 20 December 2011, §§82-83 and 106-107.
[1035] ECtHR, Case **Yefimova v.Russia**, No. 39786/09, Judgment of 19 February 2013, §§210, 212.
[1036] ECtHR, Case ***Muhammed Asif Hafeez v. the United Kingdom***, No. 14198/20, Decision of 28 March 2023, §§65-66.

scrutiny, especially the applicant's personal situation in the expelling state.[1037] It must be noted that the threshold set by Article 3 is even higher in cases that do not concern the direct responsibility of the contracting State for the infliction of harm than where they do[1038].

The Court has also examined extraterritorial obligations under Article 3 in the context of the extradition of a person with disabilities from the UK to Afghanistan. It recognized that humanitarian conditions would give rise to a breach of Article 3 of the Convention in very exceptional cases where the humanitarian grounds against removal are compelling – for example, where an applicant, wholly dependent on State support, finds himself faced with official indifference in a situation of serious deprivation or want incompatible with human dignity. However, the Court recalled that the socio-economic and humanitarian conditions in a country of return do not necessarily have a bearing, and certainly not a decisive bearing, on the question of whether the persons concerned would face a real risk of ill-treatment within the meaning of Article 3 of the Convention in those areas, and that Article 3 does not place an obligation on Contracting States to alleviate disparities in the availability of medical treatment in different States through the provision of free and unlimited health care to all aliens without a right to stay within their jurisdictions. The Court found relevant that the applicant had family members living in Afghanistan and that he himself remained in Afghanistan for four years after sustaining his injuries and that he supported and received medical treatment throughout that period. In the absence of any contrary evidence, the Court therefore concluded that this claim was, to a large extent, speculative and did not accept that it had been demonstrated that, as a result of his disabilities, the applicant would be subjected to an enhanced risk of indiscriminate violence in Afghanistan such as to engage Article 3 of the Convention[1039].

In case **Vlas and Others v. Romania** (2015), relating to the extradition of a pregnant Moldovan citizen from Romania to Moldova for the purposes of criminal prosecution, the applicant claimed that her arrest and extradition while seven months pregnant amounted to ill-treatment as it caused her severe anxiety aggravated by the absence of adequate medical supervision during her detention, and that her second child's anaemia was caused by this treatment. The Court stated that, according to the medical documents provided by the applicant, her second pregnancy was normal and she gave birth to a second child in Moldova; also, in the course of the extradition proceedings, the applicant was able to raise the arguments relating to her pregnancy before the domestic courts and the High Court, acting in the final instance, held, by a fully reasoned decision, that her extradition could not have an impact on her pregnancy. The Court thus concluded that the applicant's allegations that she did not receive adequate medical care during her extradition and that her second child suffers from anaemia as a result of this measure were not supported by any evidence[1040].

No violation was either found in case **M. T. v. Sweden** (2015), dealing with the expulsion of a failed asylum seeker from Sweden to Kyrgyzstan. The person suffered from chronic kidney failure and was in need of dialysis three times per week, having complained that, if expelled to Kyrgyzstan, he would not receive adequate medical treatment for his illness there and thus would die within a few weeks. The Court clearly found that blood dialysis treatment was available in Kyrgyzstan: free dialysis at public hospitals and also private centres where patients could receive it, albeit at a certain cost. It further noted the Government's submission that no enforcement of the expulsion order will occur unless the authority responsible for the enforcement of the expulsion deems that the medical condition of the applicant so permits and that, in executing the expulsion, the authority will also ensure that appropriate measures are taken with regard to the applicant's particular needs. Moreover, the Court attached significant weight to the Government's statement that the Migration Board would encourage and assist the applicant in making the necessary preparations in order to ensure that his dialysis treatment was not interrupted and he had access

[1037] ECtHR, Case ***D. v. United Kingdom***, No. 30240/96, Judgment of 2 May 1997, §49.
[1038] ECtHR, Case ***Bensaid v. the United Kingdom***, Nº. 44599/98, Judgment of 6 February 2001, §40.
[1039] ECtHR, Case ***S. H. H. v. United Kingdom***, No. 60367/10, Judgment of 29 January 2013, §§74-76, 86-87, 90 and 93.
[1040] ECtHR, Case ***Vlas and Others v. Romania***, N.º 30541/12, Decision of 6 January 2015, §39 and **PC-OC (2011) 21 Rev17**, pp. 220-221.

to the medical care he needed upon return. While the Court would stress that it is the applicant's responsibility to cooperate with the authorities and primarily for him to take the necessary steps to ensure the continuation of his treatment in his home country, it considered that in the very special circumstances of this, where the applicant would die within a few weeks if the dialysis treatment were interrupted, the domestic authorities' readiness to assist the applicant and take other measures to ensure that the removal can be executed without jeopardising his life upon return was particularly relevant to the Court's overall assessment.[1041]

The stringent view of the Court on cases related to insufficient health care constituting ill-treatment was patent in case **Tatar v. Switzerland** (2015), related to the expulsion of a person, suffering from schizophrenic disease syndrome, whose asylum status had been revoked because he had been sentenced for a serious crime, from Switzerland to Turkey. The applicant alleged, inter alia, that he would be at risk of death or ill-treatment if expelled to Turkey because his mental health would deteriorate quickly and he would be at high risk of severely harming or killing himself or another person. He claimed that in Turkey, places in psychiatric facilities were scarce and treatment consisted merely of administering medication. In his town of origin, Nurhak, especially, adequate treatment was not available. He claimed that, with the invalidity pension he received from Switzerland he would not be able to afford treatment, and that separation from his children and grandchildren, all residents in Switzerland, would lead to a further deterioration of his mental health. In its findings, the Court accepted that he applicant was suffering from a long-term mental illness, the deterioration of which could involve a relapse resulting in self-harm and harm to others, resulting in suffering and the possibility of self-harm that could, in principle, fall within the scope of Article 3. However, the Court stated:

> *(…) Having regard to the high threshold set by Article 3, particularly where the case does not concern the direct responsibility of the Contracting State for the infliction of harm, the Court does not find that in the present case there is a sufficient real risk that the applicant's removal in these circumstances would be contrary to the standards of Article 3. The Court observes that medical treatment for his condition would in principle be available to the applicant in Turkey. The government has submitted information on the general availability of psychiatric treatment available in specialised wards in bigger cities in Turkey. While such treatment might not exist in the applicant's former hometown, Nurhak, it could in principle be provided within a distance of around 150 km and in other parts of Turkey. This assessment has not been contested by the applicant. The mere fact that the circumstances concerning treatment for his long-term illness in Turkey would be less favourable than those enjoyed by him in Switzerland is not decisive from the point of view of Article 3 of the Convention (…).*
>
> *(…) Moreover, the Court takes note of the Government's submission that upon executing the expulsion the immigration authority will ensure that the applicant fulfils the medical condition to travel and that appropriate measures are taken with regard to the applicant's particular needs, in particular, that the competent Turkish authorities will be informed of the specifics of the applicant's health and be provided with a list of his required medical treatment. The Court further sees no reason to doubt the Government's assertion that they would make every effort to see to it that the applicant would not have to pause his treatment if expelled and that he would have access to the medical care he needs upon return to Turkey (…). The Court considers that in the special circumstances of the present case, where the applicant would suffer a significant deterioration of his mental health if his treatment were interrupted, the domestic authorities' readiness to assist the applicant and take other measures to ensure that the removal can be executed without jeopardizing his life upon return is particularly relevant to the Court's overall assessment.*
>
> *(…) the Court considers that in the present case the humanitarian grounds against his removal are not compelling.* [1042]

In 2021, a similar reasoning was applied in another schizophrenia-related case in which the Court, despite admitting that this constitutes "a serious mental illness" did not consider that the patient's condition can in itself be regarded as sufficient to bring the applicant's complaint within the scope of Article 3 of the Convention. The Court considered that the high threshold established in the

[1041] ECtHR, Case ***M. T. v. Sweden***, N.º 1412/12, Judgment of 26 February 2015, §§51 and 56, and **PC-OC (2011) 21 Rev17**, pp. 224.
[1042] ECtHR, Case ***Tatar v. Switzerland***, N.º 65692/12, Judgment of 14 April 2015, §§46-50.

Paposhvii judgement (see above had not been met) and that, although according to some of the relevant medical statements, a relapse was likely to result in "aggressive behaviour" and "a significantly higher risk of offences against the person of others" as a result of the worsening of psychotic symptoms, these could not be described as "resulting in intense suffering" for the applicant himself, and was firm in its position (despite three separate opinions) that the threshold should remain high for this type of case[1043].

No violation was either found in a 2023 judgement of a case concerning the extradition of a 64 year-old man suffering from a number of health conditions, including type 2 diabetes, asthma and sleep apnoea, from the UK to the USA, for the purposes of prosecution for drug-trafficking offences, with the Court stating such medical conditions were not unusual for a man of his age and taking into account that US prison authorities had been alerted to them and confirmed that he would be detained in a facility that would cater adequately to his needs and that he would be provided with a CPAP machine used to treat sleep apnoea[1044].

In the above mentioned case **Paposhvili v. Belgium** (2016), related to the expulsion of a leukaemia patient from Belgium to Georgia, the Court noted that the applicant had made two requests for regularisation of his residence status in Belgium on medical grounds, based primarily on the need to obtain appropriate treatment for his leukaemia and on the premise that he would have been unable to receive suitable care for his condition in Georgia. Such requests were refused by the Aliens Office on the grounds that the applicant was excluded from the scope of the applicable law due to the serious crimes he had committed; and set aside by the Aliens Appeals Board, called upon to examine the applicant's requests for a stay of execution of these decisions, without examination of the medical evidence submitted to it. The *Conseil d'État*, to which the applicant appealed on points of law, upheld the reasoning of the Aliens Appeals Board and specified that the medical situation of an alien who faced removal from the country and whose request for leave to remain had been refused should be assessed at the time of enforcement of the removal measure rather than at the time of its adoption. Against this background, the Court concluded that, although the Aliens Office's medical adviser had issued several opinions regarding the applicant's state of health based on the medical certificates he provided, these were not examined either by the Aliens Office or by the Aliens Appeals Board from the perspective of Article 3 of the Convention in the course of the proceedings concerning regularisation on medical grounds. And the fact that an assessment of this kind could have been carried out immediately before the removal measure was to be enforced does not address these concerns in itself, in the absence of any indication of the extent of such an assessment and its effect on the binding nature of the order to leave the country. Therefore, the Court considered that, ***in the absence of any assessment*** by the domestic authorities of the risk facing the applicant in the light of the information concerning his state of health and the existence of appropriate treatment in Georgia, the information available to those authorities was insufficient for them to conclude that the applicant, if returned to Georgia, would not have run a real and concrete risk of treatment contrary to Article 3 of the Convention, and found that this Article had been violated[1045].

It is thus obvious that ***assessing the individual's actual state of health is not a formality and that a truly individual assessment is necessary***[1046] and may be a decisive factor to assess compliance with the State's obligations under the Convention. In a case concerning the extradition of a Russian national with chronic severe cardiovascular problems from Armenia to Russia for the purposes of prosecution, in which Armenian authorities had expressed doubts in relation to the applicant's medical condition and the claimed risks throughout the domestic proceedings and in the proceedings before the Court, but did not initiate their own assessment of the applicant's state of health, refused the applicant's request seeking the appointment of a forensic medical

[1043] ECtHR, Case ***Savran v. Denmark***, No. 57467/15, Judgment [GC] of 7 December 2021, §§141, 143, 146- 147.
[1044] ECtHR, Case ***Muhammed Asif Hafeez v. the United Kingdom***, No. 14198/20, Decision of 28 March 2023, §§65-66.
[1045] ECtHR, Case ***Paposhvili v. Belgium***, N.º 41738/10, Judgment [GC] of 13 December 2016, §§200-202 and 205; and **PC-OC (2011) 21 Rev17**, pp. 238-239.
[1046] See Kubicek, *Recent trends* (…), in **PC-OC (2018) 05**, p.30.

expert and did not question the reliability of the medical certificates submitted by the applicant or the credibility of the medical professionals who had issued them, the Court found a violation of Article 3 of the Convention in view of the risk of a significant deterioration in the applicant's health if his removal from Armenia were to be effected. This conclusion was reached despite the fact that the applicant did not submit any medical documents concerning the history of his medical condition and that the Office of the Prosecutor General (PG) of Russia gave assurances that a doctor with the relevant specialisation would travel with a special convoy to provide the applicant with medical assistance if necessary during his transfer – which was considered insufficient since the PG was not in possession of any medical documents concerning the applicant's state of health when taking the decision and in view of the sharp decline in the applicant's state of health as a result of the anxiety caused by his prosecution[1047].

Disproportionate penalties

The Court considers that, in a sufficiently exceptional case, an extradition would be in violation of Article 3 of the Convention if the applicant faced a grossly disproportionate sentence in the receiving State. Consequently, while, in principle, matters of appropriate sentencing largely fall outside the scope of the Convention, a grossly disproportionate sentence can amount to ill-treatment contrary to Article 3 of the Convention at the moment of its imposition. However, "gross disproportionality" is a strict test and it will only be on "rare and unique occasions" that the test will be met. In a removal (extradition or expulsion) case, a violation would arise if the applicant were able to demonstrate that he or she was at a real risk of receiving a grossly disproportionate sentence in the receiving State. However, since the Convention does not purport to be a means of requiring the Contracting States to impose Convention standards on other States and that sentencing practices vary greatly between States and that there will often be legitimate and reasonable differences between States as to the length of sentences which are imposed, even for similar offences, only in very exceptional cases will an applicant be able to demonstrate that the sentence he or she would face in a non-Contracting State would be grossly disproportionate and thus contrary to Article 3 of the Convention[1048].

For the above reasons, no violation of Article 3, on such grounds, was found in case **Čalovskis v. Latvia** (2014), dealing with the extradition of a Latvian national from Latvia to the USA for the purposes of prosecution on charges of cybercrime-related offences. The applicant had alleged, inter alia, that, if extradited, he would be subjected to torture and a disproportionate prison sentence (up to 67 years, while the maximum prison sentence in Latvia would be 10 years), in breach of Article 3 of the Convention. The Court underlined that the applicant was not suspected of terrorism-related offences and considered that no reliable information has been furnished in relation to practices on the part of the US authorities with regard to persons suspected of cybercrime-related offences that could raise concern for his well-being in the context of Article 3 of the Convention. The Court reiterated that due regard has to be had for the fact that sentencing practices vary greatly between States and that there are often legitimate and reasonable differences between States as to the length of sentences imposed, even for similar offences. It considered that the applicant's argument based on a comparison of the penalties applicable in the United States and Latvia was not in itself sufficient to demonstrate a "gross disproportionality", which is a ***strict test*** that will only be met on "rare and unique occasions"[1049].

Case **Veermäe v. Finland** (2005), concerning the transfer of an Estonian national from Finland to Estonia under Article 3 of the Additional Protocol to the Convention on the Transfer of Sentenced Persons may also be of interest in this regard: the applicant argued that in Finland, it

[1047] ECtHR, Case ***Khachaturov v. Armenia***, No. 59687/17, Judgment of 24 June 2021, §§93, 95 and 103.
[1048] ECtHR, Case ***Babar Ahmad and Others v. United Kingdom*** (Judgment), Nos.: 24027/07, 11949/08, 36742/08, 66911/09 & 67354/09, Judgment of 10 April 2012, §236-238; Case ***Harkins and Edwards v. United Kingdom***, Nºs 9146/07 & 32650/07, Judgment of 17 January 2012, §134.
[1049] ECtHR, Case ***Čalovskis v. Latvia***, N.º 22205/13, Judgment of 24 July 2014. §§137, 141 and 142, and **PC-OC (2011) 21 Rev17**, pp. 212-214.

would be possible to be released on parole after serving half his sentence, while in Estonia release on parole would only be possible after serving two-thirds of the sentence. The Court considered that the possibility of a longer period of imprisonment in the administering State does not in itself render the deprivation of liberty arbitrary as long as the sentence to be served does not exceed the sentence imposed in the criminal proceedings. A flagrantly longer *de facto* sentence in the administering State could nevertheless give rise to an issue under Article 5 of the Convention. However, in view of the information concerning the Estonian practice in converting sentences, according to which a penalty imposed in Estonia would be likely to be less severe than a penalty imposed in Finland, the Court considered that there were no substantial grounds for believing that the sentence to be served would be flagrantly disproportionate, if disproportionate at all[1050]. A similar conclusion was reached in a case in which the transfer of a sentenced person amounted to an increase of 20% in the likely period of detention, but still well within the sentence imposed[1051].

However, the Court makes a distinction between cases in which a Contracting State is asked to refuse extradition to a jurisdiction where a grossly disproportionate sentence might be imposed; and cases where that same State is confronted with a request by a prisoner for transfer to serve a sentence imposed by a foreign court that might have been considered grossly disproportionate had it been assessed in the context of a prior extradition request. In the former case, it is within the State's power to prevent the "disproportionate" sentence being imposed. In the latter, the sentence has been imposed and might have to be served in harsh and degrading conditions, subject to limited early release provisions. When considering the degree of humiliation or suffering inherent in the impugned acts, the Court finds it is necessary to have regard to the degree of humiliation or suffering inherent in the alternative option. It would in the Court's view be paradoxical, and anathema to its obligation to interpret and apply the Convention rights in a manner that renders the guarantees practical and effective and not theoretical and illusory, if the protection afforded by Article 3 operated to prevent prisoners being transferred to serve their sentences in more humane conditions. Furthermore, it is the Court's view that a sentence cannot be deemed grossly disproportionate simply because it is more severe than the sentence which would be imposed in another State[1052].

Issues specific to certain States

In its vast case law on Article 3-related subjects as bars to extradition, the Court has addressed some issues that are very specific to some States. Here are some examples[1053]:

- **Belarus**: in 2010-2013, the Court held that although international reports supported concerns as to the human-rights situation in Belarus, those concerns were primarily related to political opposition activities and the exercise of political freedoms[1054]. In 2019, and in addition to this, the Court recognized particular concerns with the use of torture and ill-treatment to extract confessions to be used as evidence in court[1055].,
- **China**: as indicated before, the Court considers that, the extent to which torture and other forms of ill-treatment are credibly and consistently reported to be used in Chinese detention facilities and penitentiaries, entails a real risk of subjection to torture and ill-treatment of detainees, and justifies a general ban on extraditions to this country[1056]. The

[1050] ECtHR, Case ***Veermäe v. Finland***, No. 38704/03, Decision of 15 March 2005, pp.13-14.
[1051] ECtHR, Case ***Csoszánszki v. Sweden***, No. 22318/02, Decision of 27 June 2006, pp. 9, 11-13.
[1052] ECtHR, Case ***Willcox and Hurford v. United Kingdom***, Nos. 43759/10 & 43771/12, Decision of 18 January 2013, §§75, 78-79.
[1053] See Kubicek, *Recent trends* (…), in **PC-OC (2018) 05**, p.30.
[1054] ECtHR, Case ***K. v. Russia***, No. 69235/11, Judgment of 23 May 2013, §§ 68-69 and 71-72; Case ***Kozhayev v. Russia***, No. 60045/10, Judgment of 5 June 2012, §§87-91 and 95; Case ***Y. P. and L. P. v. France***, (expulsion) No. 32476/06, Judgment of 2 September 2010, §§ 62, 65, 67, 68, 71, 72 and 73; Case ***Galeyev v. Russia***, no. 19316/09, 3 June 2010, § 55.
[1055] ECtHR, Case ***Kislov v. Russia***, No. 3598/10, Judgment of 09 July 2019, §87.
[1056] ECtHR, Case ***Liu v. Poland***, No. 37610/18, Judgment of 6 October 2022, §§74-78 and 80-83.

situation of Uighurs in the region of XUAR was considered serious enough to entail a "real risk" of arbitrary detention and imprisonment, ill-treatment and even death, in the case of expulsion of persons of such ethnicity to their country of origin[1057].

- **Iran**: in a 2017, in a case concerning deportation to Iran of a failed asylum-seeker who had alleged that he would be in danger of ill-treatment if deported, due to his conversion from Islam to Christianity in Switzerland, the Court found that the general human rights situation in Iran does not, *per se*, prevent the deportation of any Iranian national, and considered that Christian converts would only face a real risk of ill-treatment upon return to Iran if they manifested their faith in a manner that would lead to them being perceived as a threat to the Iranian authorities, which requires a certain level of public exposure[1058]. The Court has found that there are serious reasons to believe that former or current PMOI members and sympathisers could be killed and ill-treated in Iran[1059] a violation was also found a violation of Article 3 in a 2012 case concerning the expulsion, from Sweden to Iran, of a regime critic previously arrested in 2003, with a background as a musician and prominent Iranian athlete (which increased the risk of his identification), who had left Iran illegally and without valid exit documentation. The Court found relevant, in this regard, reliable information indicating that Iranian authorities effectively monitor internet communications and regime critics both within and outside of Iran, notably through a specific intelligence "Cyber Unit" targeting regime critics on the internet, and the fact that Iranians returning to Iran are screened on arrival, as well as the applicants' the applicants belonging to several "risk categories": they were of Kurdish and Persian origin, culturally active and well-educated[1060];
- **Kazakhstan:** while in 2009-2010 the Court considered that, in view of the reports of, inter alia, various international human and domestic human rights NGOs, there were numerous credible reports of torture, ill-treatment of detainees, routine beatings and the use of force against criminal suspects by the Kazakh law enforcement authorities to obtain confessions, failure of competent Kazakh authorities to investigate these allegations, as well as very poor prison conditions, including overcrowding, poor nutrition and untreated diseases, and therefore the mere fact of being detained as a criminal suspect provided sufficient grounds to fear a serious risk of being subjected to treatment contrary to Article 3 of the Convention[1061], since 2011 it began recognizing some improvement in the human rights situation in the country. Therefore, despite remaining serious concerns about such situation, in particular with regard to political rights and freedoms, the Court considered that it is serious enough to call for a total ban on extradition to that country. Applicants, must thus produce evidence (eg. to prove they belong to the political opposition or other vulnerable group) to substantiate their concrete fears[1062];
- **Kyrgyzstan**: despite expressing concern about repeated incidents of ill-treatment in Kyrgyzstan, the Court has never found a sufficient basis to conclude that the general situation was such as to preclude all removals to that country. The Court has concluded in a number of judgments concerning the extradition to Kyrgyzstan of ethnic Uzbeks that they faced a real risk of ill-treatment as a consequence of their ethnic origin[1063]. As

[1057] ECtHR, Case ***M.A. and Others v. Bulgaria***, No.: 5115/18, Judgment of 20 February 2020, §§73-74, 77.
[1058] ECtHR, ***Case A. v. Switzerland***, No. 60342/16, Judgment of 19 December 2017, §§40-41, 43-44.
[1059] ECtHR, Case ***Keshmiri v. Turkey***, No. 36370/08, Judgment of 13 April 2010, §26; Case ***Tehrani v. Turkey***, Nos. 32940/08 & 41626/08 & 43616/08, Judgment of 13 April 2010, §66; Case ***Abdolkhani and Karimnia v. Turkey (No. 1)***, No. 30471/08, Judgment of 22 September 2009, §83.
[1060] ECtHR, Case ***S. F. and others v. Sweden***, No. 52077/10, Judgment of 15 May 2012, §§64, 69-70.
[1061] ECtHR, Case ***Baysakov and others v. Ukraine***, No. 54131/08, Judgment of 8 February 2010, §§49-51; Case ***Kaboulov v. Ukraine***, No. 41015/04, Judgment of 19 November 2009, §§111-113.
[1062] ECtHR, Case ***Oshlakov v. Russia***, N.º 56662/09, Judgment of 3 April 2014, §§85-87; Case ***Yefimova v.Russia***, No: 39786/09, Judgment of 19 February 2013, §§206-209; Case ***Dzhaksybergenov (aka Jaxybergenov) v. Ukraine***, No. 12343/10, Judgment of 10 February 2011, §37.
[1063] ECtHR, Case ***U. N. v. Russia***, No. 14348/15, Judgment of 26 July 2016, §38; Case ***Makhmudzhan Ergashev v. Russia***, No. 49747/11, Judgment of 16 October 2012, §§72-73, 75.

regards the current situation, the Court notes the absence of specific reporting on ethnicity-based torture of ethnic Uzbeks, as opposed to other ethnicity-based risks, such as insecurity, discrimination with respect to economic and security matters, ethnic profiling and political marginalisation. While in the aftermath of the ethnic clashes of June 2010 there was specific evidence indicating that ethnic Uzbeks were at a heightened risk of ill-treatment, the recent reports no longer contain such indications. Consequently, the Court has no basis for reaching a conclusion that ethnic Uzbeks constitute a group which is still systematically exposed to ill treatment[1064].

- **Tajikistan:** the Court has considered that "evidence from a number of objective sources undoubtedly illustrates that the overall human-rights situation in Tajikistan gives rise to serious concerns"[1065], but also emphasized, in 2022, that "the reports describing the general situation in Tajikistan do not lead to the conclusion that the situation there, as it stands, is such that the removal of any Tajik national to the country would contravene Article 3 of the Convention[1066]. It considers that individuals whose extradition is sought by Tajik authorities on charges of religiously or politically motivated crimes, as well as those of ethnic Uzbek origin[1067], constitute a vulnerable group facing a real risk of treatment contrary to Article 3 of the Convention in the event of their removal[1068];
- **Turkmenistan:** in 2017, the Court reiterated the importance of a total ban on extraditions to this country, "in view of the scale of the deficiencies found by both United Nations agencies and NGOs", and of the inexistence of any independent and effective mechanism for receiving complaints of torture, particularly from convicted prisoners and pre-trial detainees, and to initiate impartial and thorough investigations, as well as of the lack of cooperation with international monitoring mechanisms. In the Court's view, "any person detained in Turkmenistan for criminal charges runs a real risk of being subjected to treatment contrary to Article 3 of the Convention[1069];
- **Uzbekistan:** the Court acknowledged in 2010-2012 that ill-treatment of detainees is a pervasive and enduring problem in this country, described by reputable international experts as systematic. It cautioned against reliance on diplomatic assurances against torture from a State where torture is endemic or persistent. Despite noting, in 2019-2021, "cautious indications of improvement included in the independent reports"[1070], the risks continue to be particularly relevant in the case of prisoners charged with politically motivated crimes, belonging to "proscribed religious movements" or Muslims, persons who have been previously persecuted or whose families have, and whose accounts of ill-treatment are mutually consistent and appear to be credible[1071]. In 2012, the Court stated

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[1064] ECtHR, Case ***Khasanov and Rakhmanov v. Russia***, Nos. 28492/15 & 49975/15, Judgment [GC] of 29 April 2022, §§129-132.

[1065] ECtHR, Case ***Mamazhonov v. Russia***, No. 17239/13, Judgment of 23 October 2014, §136; Case **Gaforov v. Russia**, No. 25404/09, Judgment of 21 October 2010, §§135-138.

[1066] ECtHR, Case ***T.K. and Others v. Lithuania***, No.55978/20, Judgment of 22 March 2022, §73.

[1067] ECtHR, Case ***T.K. and Others v. Lithuania***, No.55978/20, Judgment of 22 March 2022, §83; Case ***Khaydarov v. Russia***, No. 21055/09, Judgment of 20 May 2010, §107.

[1068] ECtHR, Case ***N.K. v. Russia***, No. 45761/18, Judgment of 29 March 2022, §5; Case ***S.B. and S.Z. v. Russia***, Nos. 65122/17 & 13280/18, Judgment of 8 October 2019, §36; Case ***R.R. and A.R. v. Russia***, Nos. 67485/17 & 24014/18, Judgment of 8 October 2019, §17; Case ***S.S. and Others v. Russia***, Nos. 2236/16, 64042/17, 81344/17 & 4067/18, Judgment of 25 June 2019, §§17-20; Case ***B.U. and Others v. Russia***, Nos. 59609/17, 74677/17 &76379/17, Judgment of 22 January 2019, §; 17; Case ***Sidikovy v. Russia***, No. 73455/11, Judgment of 20 June 2013, §149; Case ***Iskandarov v. Russia***, No. 17185/05, Judgment of 23 September 2010, §§129-131; Case ***Khodzhayev v. Russia***, No. 52466/08, Judgment of 12 May 2010, §97, 101.

[1069] ECtHR, Case ***Allanazarova v. Russia***, No. 46721/15, Judgment of 14 February 2017, §§75-76, 75-76; Case ***Kolesnik v. Russia***, No. 26876/08, Judgment of 17 June 2010, §§72-73; Case ***Soldatenko v. Ukraine***, No: 2440/07, Judgment of 23 October 2008, §§71-73; Case ***Ryabikin v. Russia***, No.: 8320/04, Judgment of 19 June 2008, §§116, 118, 119 and 121.

[1070] ECtHR, ***A.K. and Others v. Russia***, Nos. 38042/18, 44546/18 & 20033/19, Judgment of 18 May 2021, §45; Case ***O.O. v. Russia***, No. 36321/16, Judgment of 21 May 2019, §51; Case ***Mamazhonov v. Russia***, No. 17239/13, Judgment of 23 October 2014, §136.

[1071] ECtHR, ***A.K. and Others v. Russia***, Nos. 38042/18, 44546/18 & 20033/19, Judgment of 18 May 2021, §45; Case ***N.M. v. Russia***, No. 29343/18, Judgment of 3 December 2019, §15; Case ***S.B. and S.Z. v.***

that it found "allegations that any criminal suspect in Uzbekistan runs a risk of ill-treatment are unconvincing"[1072]. When ordinary crimes are at stake and/or the applicants show no compelling evidence of likelihood of exposure to a real risk of ill-treatment, the Court often finds that their extradition does not violate Article 3 of the Convention[1073];

Concerning the situation in **Russia**, until recently the Court's case law reflected particular concerns with the situation certain categories of the population of the North Caucasus, and more particularly of Chechnya, Ingushetia and Dagestan, such as members of the armed insurgency, persons considered by the authorities to be such members, their relatives, or persons who have assisted them in one way or another; despite this, the Court found there was no general risk of torture or ill-treatment of such persons and that any risk had to be assessed on a case-by-case basis, often (but not always) accepting the use of assurances in this regard[1074]. In what concerns the treatment of prisoners in general, the Court noted in 2013 that the "absolute majority" of cases where a violation of Article 3 was found concerned remand prisons[1075].

However, it should be noted that, when assessing the situation in Russia, the ECtHR attached importance to the fact that this country was, until recently, a High Contracting Party to the ECHR which had undertaken to secure the rights provided for therein, and that forthcoming violations of Convention provisions could be addressed in a complaint against it[1076]. This, of course, is no longer the case since, in the aftermath of the Russian military operations in Ukraine in early 2022, the Committee of Ministers, making use of the procedure established under Article 8 of the Statute of the Council of Europe, decided that the Russian Federation ceased to be a member of the CoE as of 26 March 2022, with the consequence of ceasing to be a Party to the ECHR six months later. Any decisions on extradition to Russia must take into account this new legal and political context, and assess the risks of torture and ill-treatment accordingly.

The PC-OC held an in-depth discussion, in May 2022, on the practical consequences of this situation on co-operation with Russia. This discussion demonstrated that the Russian aggression against Ukraine had universally led to a significant limitation of co-operation with the Russian Federation, ranging from an outright suspension of all types of co-operation to a considerable limitation of co-operation granted or requested, in particular when it comes to extradition requests. Many delegations nevertheless reported that there was a need to provide for the possibility of

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Russia, Nos. 65122/17 & 13280/18, Judgment of 8 October 2019, §36; Case ***S.S. and Others v. Russia***, Nos. 2236/16, 64042/17, 81344/17 & 4067/18, Judgment of 25 June 2019, §§17-20; Case ***R.R. and A.R. v. Russia***, Nos. 67485/17 & 24014/18, Judgment of 8 October 2019, §17; Case ***O.O. v. Russia***, No. 36321/16, Judgment of 21 May 2019, §§43-45; Case ***B.U. and Others v. Russia***, Nos. 59609/17, 74677/17 &76379/17, Judgment of 22 January 2019, §; 17; Case ***U.A. v. Russia***, No. 12018/16, Judgment of 22 January 2019, §26; Case ***Kholmurodov v. Russia*** No.: 58923/14, Judgment of 1 March 2016, §§65-66; Case ***Bakoyev v. Russia***, No. 30225/11, Judgment of 5 February 2013, §§114-119; Case ***F. N. and Others v. Sweden***, No. 28774/09, Judgment of 18 December 2012, §§77-78; Case ***Abdulkhakov v. Russia***, No. 14743/11, Judgment of 2 October 2012, §§145-150; Case ***Abdulazhon Isakov v. Russia***, No. 14049/08, Judgment of 8 July 2010, §§109-111; Case ***Ismoilov and others v. Russia***, No. 2947/06, Judgment of 24 April 2008, §1278.

[1072] ECtHR, Case ***Shakurov v. Russia***, No. 55822/10, Judgment of 5 June 2012, §137.

[1073] ECtHR, Case ***Elmuratov v. Russia***, No. 66317/09, Judgment of 3 March 2011, §§82-84, 86-87; Case ***Mamatkulov and Askarov v. Turkey***, Nos. 46827/99 & 46951/99, Judgment [GC] of 4 February 2005, §§72-73.

[1074] ECtHR, ***Case W v. France***, No. 1348/21, Judgment of 30 August 2022, §§ 68, 70, 73-74, 78-79; ***M.I. v. Bosnia and Herzegovina***, No. 47679/17, Decision of 29 January 2019, §§45-46, 48-51, 53- 54; Case ***Ibragimov v. Slovakia***, No. 65916/10, Decision of 30 June 2015, §§62-63, 69-74; Case ***Tershiyev v. Azerbaijan***, No. 10226/13, Judgment of 31 July 2014, §§56-58; Case ***M. G. v. Bulgaria***, No. 59297/12, Judgment of 25 March 2014, §87-89 and 94; Case ***Zarmayev v. Belgium***, N.º 35/10, Judgment of 27 February 2014, §98, 101- 102, 105-106, 109 and 111; Case ***I v. Sweden***, No. 61204/09, Judgment of 5 September 2013, §§58, 62, 66-69; ***Bajsultanov v. Austria***, No: 54131/10, Judgment of 12 June 2012, §§65-67; Case ***Chentiev and Ibragimov v. Slovakia***, Nos. 21022/08 & 51946/08, Decision of 14 September 2010, pp. 13-14; Case ***Gasayev v. Spain***, No. 48514/06, Decision of 17 February 2009, pp. 6-7; Case ***Shamayev and others v. Georgia and Russia***, No. 36378/02, Judgment of 14 April 2005, §§338, 344, 350, 352 and 371.

[1075] ECtHR, Case ***Chankayev v. Azerbaijan***, No. 56688/12, Judgment of 14 November 2013, §73.

[1076] ECtHR, Case ***M.I. v. Bosnia and Herzegovina***, No. 47679/17, Decision of 29 January 2019, §54.

continuing co-operation with the Russian Federation on a case-by-case basis, for instance when the life or health of individuals are at stake, or when it comes to matters such as the preservation of data. Several delegations voiced the opinion that an authoritative decision to fully suspend the operation of the CoE Conventions on co-operation in criminal matters could only be taken by the Committee of Ministers of the CoE.

A number of delegations referred to recent decisions of domestic courts on this matter, already rejecting extradition and MLA requests by Russia, including by overturning previous decisions of lower courts. The PC-OC noted that common elements of reasoning in these judgments included the lack of trust in the will of the Russian Federation to comply with its obligations under international law or to satisfy the minimum requirements of rule of law in general, as well as the impossibility of monitoring compliance with assurances. Refusals appeared to have been primarily based on Article 3 of the **ECE** and Article 2.b of the **European Convention on Mutual Assistance in Criminal Matters**. A common problem voiced by delegations was compliance with their "aut dedere, aut judicare" obligation, given the difficulty of cooperating with Russia in general.[1077]

3.4 Life sentences

As stated before, according to the interpretation of the ECtHR, extraditions in cases involving the actual or possible imposition of life sentences may entail violations of a State Party's obligations under Article 3 of the **ECHR**, which establishes that *no one shall be subjected to torture or to inhuman or degrading treatment or punishment.*

An analysis of relevant jurisprudence demonstrates that the Court became gradually more demanding as to the possibility of imposing life sentences: firstly, at the domestic level; and later by transposing its interpretation to the international context when examining cases of extradition. However, the Court's interpretation on extraditions to States non Parties to the **ECHR** has been partly reversed in 2022, with the adoption of Grand Chamber Judgement on case **Sanchez-Sanchez v. the United Kingdom**, of 3 November 2022 (see below).

Prior to its judgement in case **Vinter and Others v. United Kingdom** (July 2013), when dealing with situations where there was a risk that life imprisonment without parole would be imposed in the requested State, the Court held that an Article 3 issue would arise only when it could be shown either that the applicant was at a real risk of receiving a grossly disproportionate sentence in the requesting State, or that, if a time came when his or her continued imprisonment could no longer be justified on any legitimate penological grounds, the life sentence would be irreducible *de facto* and *de jure* – with some underlining that *de facto* reducibility can be difficult to prove in practice, for example in case such offences are so rare in the requesting State that no persuasive statistics exist[1078]. Thus, the risk of serving a life sentence that had lost any penological justification had to be shown by the applicant at the moment of the impugned extradition, it being understood that the point at which the applicant's continued incarceration would no longer serve any purpose may never arise[1079].

[1077] **PC-OC (2022)04**, *List of decisions taken at the 81st meeting of the PC-OC*, Strasbourg, 20 May 2022, pp. 2-3.

[1078] Kubicek, Miroslav, *Recent trends in the case law of the ECHR of relevance to extradition proceedings, in* **PC-OC (2018) 05**, Special session to celebrate the 60th anniversary of the European Convention on Extradition – Presentations and summaries of the panel discussions, 20 June 2018 [hereinafter, "Kubicek, *Recent trends* (…), in **PC-OC (2018) 05**"], p. 27.

[1079] For examples of the Court's interpretation in cases of life imprisonment at the domestic level prior to ***Vinter and Others v. United Kingdom*** (2013), see Case ***Kafkaris v. Cyprus***, No. 21906/04, Judgment [GC] of 12 February 2008, §§97-99 and 102-103; and Case ***Törköly v. Hungary***, n.º 4413/06, Decision of 05 April 2011.

For example, in case **Babar Ahmad and Others v. United Kingdom** (2012)[1080], complaints included the allegation that, if extradited and convicted, the applicants (all charged with terrorism-related offences) would face sentences of life imprisonment without parole and/or extremely long sentences of determinate length in violation of Article 3 of the Convention. The Court admitted that, while in principle matters of appropriate sentencing largely fall outside the scope of the **Convention**, in a sufficiently exceptional case an extradition would violate Article 3 if the applicant faced a grossly disproportionate sentence in the receiving State. However, the Convention does not purport to be a means of requiring the Contracting States to impose Convention standards on other States. Due regard must be had to the fact that sentencing practices vary greatly between States and that there will often be legitimate and reasonable differences between States as to the length of sentences which are imposed, even for similar offences. The Court therefore considered only in "rare and unique occasions" will an applicant be able to demonstrate that the sentence he or she faces in a non-Contracting State would be grossly disproportionate and thus contrary to Article 3 of the Convention.

The Court distinguished ***three types*** of sentence: life sentences with ***eligibility for release*** after a minimum period has been served; which are clearly reducible and pose no problems in light to Article 3 of the Convention; ***discretionary sentences of life imprisonment without the possibility of parole,*** normally imposed for offences of the utmost severity; thus, any defendant who is convicted for such an offence must expect to serve a significant number of years in prison before he can realistically have any hope of release, irrespective of whether he is given a life sentence or a determinate sentence; ***mandatory sentences of life imprisonment without the possibility of parole***, which require greater scrutiny since they deprive the defendant of any possibility to put any mitigating factors or special circumstances before the sentencing court and, in effect, condemn the person to spend the rest of his days in prison, irrespective of his level of culpability and of the court's own view. Although the trend in Europe is clearly against such sentences, in the ECtHR's view, this does not mean that they are *per se* incompatible with the Convention, In the absence of any such gross disproportionality, an Article 3 issue will arise, in relation to sentences of the second and third types, only **when** it can be shown that: the applicant's continued imprisonment can no longer be justified on any ***legitimate penological grounds*** (such as punishment, deterrence, public protection or rehabilitation); **and** the sentence is ***irreducible*** *de facto* and *de iure*.

Given the seriousness of terrorism offences at stake in case **Babar Ahmad and Others v. UK** (2012) (particularly those carried out or inspired by Al-Qaeda) and the fact that the life sentences could only be imposed on these applicants after the trial judge considered all relevant aggravating and mitigating factors, the Court considered that discretionary life sentences would not be grossly disproportionate in their cases. An Article 3 issue could only arise if the two conditions set out above were met. Since none of the applicants had yet been convicted, much less had begun serving any sentences which could be imposed upon conviction, the Court considered that they had not shown that, upon extradition, their incarceration in the US would not serve any legitimate penological purpose. The ECtHR even admitted that, as submitted by the Government, if the applicants were convicted and given discretionary life sentences, it may well be that the point at which continued incarceration would no longer serve any purpose could never arise. It was considered even less certain that, if that point were ever reached, the US authorities would refuse to avail themselves of the mechanisms at their disposal to reduce such sentences. Accordingly, the Court concluded that the applicants had not demonstrated that there would be a real risk of their treatment reaching the threshold of Article 3 as a result of their sentences if they were extradited to the US.[1081]

A similar reasoning was followed in case **Harkins and Edwards v. United Kingdom** (2012), with the Court considering, as it had done in previous cases, that the possibility of

[1080] ECtHR, Case ***Babar Ahmad and Others v. United Kingdom***, Nos 24027/07, 11949/08, 36742/08, 66911/09 & 67354/09, Judgment of 10 April 2012.
[1081] ECtHR, Case ***Babar Ahmad and Others v. United Kingdom*** (Judgment), Nos. 24027/07, 11949/08, 36742/08, 66911/09 & 67354/09, Judgment of 10 April 2012, §§236-244.

commutation/remission/presidential pardon of sentence would be relevant in this context for the purposes of Article 3[1082].

In case **Vinter and others v. United Kingdom** (2013), relating to life sentences delivered in the ***domestic context***, the Court, while underlining that a life sentence does not become irreducible by the mere fact that it can be served in full, held, inter alia, that the penological justification for such a sentence had to be subject to review after a certain period of time. The Court considered that a whole life prisoner is entitled to know, at the outset of his sentence, what he or she must do to be considered for release and under what conditions, including when a review of the sentence will take place or may be sought. Where domestic law does not provide any mechanism or possibility for review of a whole life sentence, the incompatibility with Article 3 of the Convention on this ground arises at the moment of the imposition of the whole life sentence and not at a later stage of incarceration. That review should be no later than 25 years after the life sentence and be conducted preferably *within a wholly judicial framework*.[1083] This judgement led Marc Bossuyt to state that ***since 9 July 2013, the Court considers that also irreducible life sentences are inhuman punishments***.[1084]

Subsequently, in case **Trabelsi v. Belgium** (2014)**,** the Court applied the Vinter and others v. UK criteria to the extradition context, and found that the applicant's extradition would violate Article 3 of the Convention because none of the procedures provided for in the requesting State amounted to a review mechanism requiring the national authorities to ascertain, on the basis of ***objective, pre-established criteria*** of which the prisoner had ***precise cognisance at the time of imposition of the life sentence***, whether, while serving his sentence, he had changed and progressed to such an extent that continued detention could no longer be justified on legitimate penological grounds. The Court held, as it has done in all extradition cases since **Soering v. United Kingdom** (1989), that it must assess the risk incurred by the applicant under Article 3 *ex ante* – that is to say, in this case, before his possible conviction in the United States – and not *ex post facto*, [1085].

The adoption of **Vinter and Others** (2013) and **Trabelsi** (2014) judgements represented important landmarks in the case law of the ECtHR in life imprisonment-related matters. In the **domestic context**, the Court found violations of the **ECHR** in cases concerning the imposition of such penalties with the sole possibility of clemency decision by the President of the Republic, countersigned by the Minister of Justice, without any foreseeability as to the conditions under which clemency could be granted[1086], with the applicants having the possibility to have their situation reviewed only after serving 40 years of imprisonment[1087]; the replacement of the death penalty with life imprisonment, explicitly excluding the later from any form of release on parole, with the sole exception of release on humanitarian grounds or the possibility of adoption of

[1082] ECtHR, Case ***Beverly McCallum v. Italy***, No. 20863/21, Decision [GC] of 21 September 2022, §§51-54; Case ***Rushing v. The Netherlands***, No. 3325/10, Decision of 27 November 2012, §26; Case ***Harkins and Edwards v. United Kingdom***, Nos. 9146/07 & 32650/07, Judgment of 17 January 2012, §§140, 142; Case ***Salem v. Portugal***, No. 26844/04, Decision of 9 May 2006, p. 7; Case ***Nivette v. France***, No. 44190/98, Decision of 3 July 2001, pp. 6-7; Case ***Einhorn v. France***, No. 71555/01, Decision of 16 October 2001, §27.

[1083] ECtHR, Case ***Vinter and others v. United Kingdom***, Nos: 66069/09, 130/10 & 3896/10, Judgment [GC] of 9 July 2013, §§108-109 and 119-124.

[1084] Bossuyt, Marc, *The European Court of Human Rights and Irreducible Life Sentences* – The Trabelsi v. Judgement of 4 September 2014, Annex to **PC-OC Mod (2015) 07**, p. 5, emphasis added and 7.

[1085] ECtHR, Case ***Trabelsi v. Belgium***, No. 140/10, Judgment of 4 September 2014, §§129-130, 134-135 and 137.

[1086] ECtHR, Case ***László Magyar v. Hungary***, N.º 73593/10, Judgment of 20 May 2014, §58.

[1087] ECtHR, Case ***Bancsók and László Magyar (no.2) v. Hungary***, Nos. 52374/15 & 53364/15, Judgment of 28 October 2021, §46; Case ***Sándor Varga and Others v. Hungary***, Nos. 39734/15, 35530/16 & 26804/18, Judgment of 17 June 2021, §§48-50; Case **T.P. and A.T. v. Hungary**, N.º 37871/14 & 73986/14, Judgment of 4 October 2016, §§46, 48-50; Case ***Bancsók and László Magyar, (no.2) v. Hungary***, Nos. 52374/15 & 53364/15, Judgment of 28 October 2021, §§42, 48.

amnesty laws[1088]; imposition of an "aggravated life sentence" for terrorist activities without any mechanism or possibility of review[1089].

Also in the domestic context, no violations were, however, found in cases where a life sentence could be reviewed with the view to release on parole, at the earliest, after 40 years, when the prisoner would be 75 years of age and his life expectancy was shorter than that, and he had the possibility to be granted presidential clemency even earlier on the basis of the applicant's particular situation[1090]; imposition of life imprisonment with the possibility of judicial review – through the appointment of a panel of three medical experts – after 30 years of imprisonment, at the initiative of public prosecution or of the convicted person, with a view to verifying whether there are still legitimate grounds for continued imprisonment, in addition to the possibility to seek presidential pardon or demand a suspension of imprisonment for medical reasons[1091]; imposition of a life sentence with the possibility of the convicted person to request, at any time, the review of his detention by the Secretary of State, and appeal against any refusal thereof before the High Court, which would examine the merits of such request[1092];

In case **Harakchiev and Tolumov v. Bulgaria** (2014) a complaint was submitted on the grounds that a "whole life sentence" (the most severe custodial measure in force in Bulgaria since the abolition of the death penalty) had amounted, from the time of its imposition, to inhuman and degrading punishment in breach of Article 3 of the Convention, and that the exercise of the presidential power of clemency being unclear and unpredictable. The ECtHR concluded that, if the current and future Presidents and Vice-Presidents of Bulgaria continued to exercise the power of clemency in line with the precepts laid down by the Constitutional Court in 2012 and with the practices adopted in the same year, the whole life sentence could be regarded as *de facto* reducible, and since its imposition the person knew that that there was a mechanism providing for the possibility of release or commutation of sentence. While recognizing that that some of the applicable rules were not laid down in the Constitution or in a statute, but in a presidential decree, the Court considered it is not its task to prescribe the form which the requisite review should take. However, in this case, in spite of some variations in his ***prison regime***, in practice the applicant remained in permanently locked cells and isolated from the rest of the prison community, with very limited possibilities to engage in social contact or work, throughout the entire period of his incarceration. The deleterious effects of that impoverished regime, coupled with the unsatisfactory material conditions in which the applicant was kept, led the Court to believe that this must have seriously damaged his chances of reforming himself and thus entertaining a real hope that he might one day achieve and demonstrate his progress and obtain a reduction of his sentence. To that should be added the lack of consistent periodical assessment of his progress towards rehabilitation. In view of the foregoing considerations, the Court concluded that there had been a breach of Article 3 of the Convention, not on the basis of the Presidential clemency regime, but of the prison conditions[1093].

In the **extradition context**, the ECtHR refused to consider that the new case law developed in cases Vinter and Others (2013) and Trabelsi (2014) constituted "relevant new information" (in French, "faits nouveaux") for the purposes of the first limb of Article 35§2(b) of the Convention**,** and therefore concluded that a new complaint submitted in 2014 by one of complainants of Harkins and Edwards v. United Kingdom (2012) was substantially the same as the one examined in 2012[1094]. Despite this new case law, no violation was found either in cases **Findikoglu v. Germany** (2016) and **López Elorza v. Spain** (2017). In the first, concerning an extradition

[1088] ECtHR, Case ***Öcalan v. Turkey (N.º 2)***, Nºs 24069/03, 197/04, 6201/06 and 10464/07, Judgement of 18 March 2014, §§201-207.
[1089] ECtHR, Case ***Kaytan v. Turkey***, N.º 27422/05, Judgment of 15 September 2015, §§63, 66-67.
[1090] ECtHR, Case ***Törköly v. Hungary***, n.º 4413/06, Decision of 05 April 2011, p. 5.
[1091] ECtHR, Case ***Bodein v. France***, N.º 40014/10, Judgment of 13 November 2014, §60.
[1092] ECtHR, Case ***Hutchinson v. the United Kingdom***, N.º 57592/08, Judgment [GC] of 17 January 2017, §§45, 50, 52-53 and 69.
[1093] ECtHR, Case ***Harakchiev and Tolumov v. Bulgaria***, Nºs 15018/11 & 61199/12, Judgment of 8 July 2014, §§261, 266 and 267.
[1094] ECtHR, Case ***Harkins v. the United Kingdom***, N.º 71537/14, Decision [GC] of 15 June 2017.

Germany to the USA for the purposes of prosecution on charges of cybercrime-related offences in which the applicant had alleged that, if extradited, he would risk condemnation to a maximum prison sentence of 247.5 years of imprisonment, subject only to presidential pardon, the ECtHR considered that the applicant had not demonstrated that the maximum penalty would be imposed by a US court without due consideration of all the relevant mitigating and aggravating factors, even if he was found guilty of all of the offences listed in the indictment, and therefore did not even find relevant to examine whether or not the applicant would have any chance of being released if convicted[1095].

In the second, concerning an extradition from Spain to the USA for the purposes of prosecution for drug trafficking, the applicant complained that he faced a disproportionately long prison sentence (two sentences of life imprisonment). The Court, however, took into account the US Sentencing Guidelines, which recommend a fixed-term sentence between 15 years and 19 years and 7 months for the offences at issue; despite the fact that such Guidelines were not binding upon judges, the Court considered that the applicant has not advanced any reasons as to why the advisory sentencing range would not be applied in his case and that, in any event, in the unlikely case of the applicant being sentenced to life imprisonment, he could appeal against any sentence which was imposed as a result of an incorrect application of the sentencing guidelines. In the Court's view, this case differed from *Trabelsi v. Belgium* in a number of ways: firstly, the applicant was being prosecuted for drug-related crimes, while in *Trabelsi v. Belgium* terrorism-related charges were at stake, for which the applicable US Sentencing Guidelines called for a life sentence in respect of each of the first two offences; secondly, unlike *Trabelsi v. Belgium*, in the present case three of the applicant's co-conspirators had been already sentenced in a related case before the same US judge who was assigned to the applicant's case, and condemned to penalties of 72, 14 and 12 months of incarceration (i.e. lower than those set out in the guidelines referred to above), while Section 3553(a)(6) of Title 18 of the US Code recognises the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct, and the applicant failed to advanced any reasons as to why his situation was not comparable to that of the other co-conspirators. Therefore, the Court considered that, in this case, the risk of exposure to treatment incompatible with Article 3 was so "slight and hypothetical" that it could not be described as a "real risk".[1096].

The evolution in the Court's case law moving from a domestic to an extraterritorial context in requiring a review mechanism for life sentences in compliance with a number of requisites was the object of criticism and raised fears that it could impair judicial cooperation and give rise to impunity for grave crimes, at a time when enhancing cooperation was ever more important[1097].

Perhaps inspired by the above concerns, the ECtHR **reversed** this case law in its judgement on case **Sanchez-Sanchez v. the United Kingdom** (2022). Recalling that Vinter and others v. United Kingdom was not an extradition case, which is important distinction, the Court stated that, within the domestic context, the applicant's legal position, having already been convicted and sentenced, is known. Moreover, the domestic system of review of the sentence is likewise known, both to the domestic authorities and the Court. In the extradition context, on the other hand, when the applicant has not yet been convicted, a complex risk assessment is called for, "a tentative prognosis that will inevitably be characterised by a very different level of uncertainty when compared to the domestic context". According to the Court, this calls – as a matter of principle, but also out of practical concerns – for caution in applying the principles flowing from Vinter and others v. United Kingdom, which were intended to apply within the domestic context, to their fullest extent in the extradition context. These principles embrace both the ***substantive obligation*** of Contracting States to ensure that a life sentence does not over time become a penalty incompatible with Article 3, and also related ***procedural safeguards***, which are not ends in

[1095] ECtHR, Case ***Findikoglu v. Germany***, N.º 20672/15, Decision of 7 June 2016, §§37, 40.
[1096] ECtHR, Case ***López Elorza v. Spain***, N.º 30614/15, Judgment of 12 December 2017, §§112-118.
[1097] See Bossuyt, Marc, *The European Court of Human Rights and Irreducible Life Sentences* (…), pp. 8-12.

themselves but serve in their observance by Contracting States to avoid a breach of the prohibition of inhuman and degrading punishment.

Regarding the ***substantive obligation***, the Court reiterated that exposing an individual to a real risk of inhuman and degrading treatment or punishment would be contrary to the spirit and purpose of Article 3. This prohibition remains **absolute** and therefore no distinction can be drawn between the minimum level of severity required to meet the Article 3 threshold in the domestic context and the minimum level required in the extra-territorial context. On the other hand, the ***procedural safeguards*** would appear to be better suited to a purely domestic context and consequently do not arise in relation to an individual whose extradition has been requested by a third State, as this would be an over extensive interpretation of the responsibility of a Contracting State in such a context. It follows that Contracting States are not to be held responsible under the Convention for deficiencies in the system of a third State when measured against the full Vinter and others v. United Kingdom standard. The Court also recognised that to require a Contracting State to scrutinise the relevant law and practice of a third State with a view to assessing its degree of compliance with these procedural safeguards may prove unduly difficult for domestic authorities deciding on extradition requests.

Furthermore, the Court emphasized that that there are many factors that contribute to the imposition of a sentence and, prior to extradition, it is impossible to address every conceivable permutation that could occur or every possible scenario that might arise depending, for instance, on the person's cooperation with police or judicial authorities, his admission or denial of guilt, the judge's discretion to determine the appropriate sentence, the presentation of evidence in support of any mitigating factors, sentences delivered on co-defendants, and avenues for appeal.

Moreover, in the domestic context, in the event of a finding of a violation of Article 3, the applicant would remain in detention pending the application or introduction of a Convention-compliant review mechanism which could – but would not necessarily – lead to his release earlier than initially intended. Thus, the legitimate penological purposes of incarceration would not be undermined. In contrast, in the extradition context the effect of finding a violation of Article 3 of the Convention would be that a person against whom serious charges have been brought would never stand trial, unless he or she could be prosecuted in the requested State, or the requesting State could provide the assurances necessary to facilitate extradition. Allowing such a person to escape with **impunity** is an outcome which would be difficult to reconcile with society's general interest in ensuring that justice is done in criminal cases. It would also be difficult to reconcile with the interest of Contracting States in complying with their international treaty obligations, which aim to prevent the creation of safe havens for those charged with the most serious criminal offences.

A similar reasoning has been adopted by the Court in life sentence-related extradition cases since the Sánchez-Sanchez case, thus reverting to case law close to that adopted before Trabelsi[1098].

Therefore, while the principles set out in **Vinter and others v. United Kingdom** must be applied in domestic cases, an ***adapted approach is called for in the extradition context***, with two stages. Firstly, it has to be ascertained whether the applicant has adduced evidence capable of proving that there are substantial grounds for believing that, in the event of conviction, there is a ***real risk*** of a sentence of life imprisonment without parole. In this regard, it is for the applicant to demonstrate that such a penalty would be imposed. Such a risk will more readily be established if the applicant faces a mandatory sentence of life imprisonment. If this "real risk" is demonstrated, a second stage follows, At the second stage it must be ascertained whether, as from the moment of sentencing, there is a review mechanism in place allowing the domestic authorities to consider the prisoner's progress towards rehabilitation or any other ground for release based on his or her

[1098] ECtHR, ***Carvajal Barrios v. Spain***, No. 13869/22, Decision of 4 July 2023, §§79-98; Case ***Muhammed Asif Hafeez v. the United Kingdom***, No. 14198/20, Decision of 28 March 2023, §§54-55; Case ***Beverly McCallum v. Italy***, No. 20863/21, Decision [GC] of 21 September 2022, §§51-54.

behaviour or other relevant personal circumstances, as to mean that continued detention can no longer be justified on legitimate penological grounds[1099].

The Court did find a violation of Article 3 in a case in which the applicant had been condemned in the requested State to life imprisonment with the possibility of release on parole after serving 20 years, and then transferred to his State of nationality (Ukraine) whose authorities, despite recognizing the original sentence and despite a decision of its own Constitutional Court declaring the unconstitutionality of the Criminal Code Provision which did not allow the application of parole to life sentences, had not yet regulated the procedure and manner of the application of such rule on release to life prisoners has not yet been, with the consequence of domestic courts considering that they had no jurisdiction to decide on the release on parole of life prisoners, including the applicant[1100].

In cases of high unlikelihood of the imposition of life imprisonment, the ECtHR has admitted that no assurances are sought or provided, provided it is found unnecessary.[1101]

3.5 Judgements *in absentia*

Conviction *in absentia* with no possibility subsequently to obtain a fresh determination of the merits of the charge is considered by the ECtHR as a form of ***flagrant denial of justice***, in violation of Article 6 (3) (c) of the ECHR, which guarantees that everyone charged with a criminal offence has the right *to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require*. This "flagrant denial of justice" can give rise to a refusal of extradition (see below)[1102]. However, the legal discipline on these cases is tighter than in other situations of grave violations of the right to a fair trial, as **AP2** has supplemented the **ECE** with a further Article specifically related to judgements *in absentia*, reading:

> *1. When a Contracting Party requests from another Contracting Party the extradition of a person for the purpose of carrying out a sentence or detention order imposed by a decision rendered against him* in absentia*, the requested Party may refuse to extradite for this purpose if, in its opinion, the proceedings leading to the judgment did not satisfy the minimum rights of defence recognised as due to everyone charged with criminal offence. However, extradition shall be granted if the requesting Party gives an assurance considered sufficient to guarantee to the person claimed the right to a retrial which safeguards the rights of defence. This decision will authorise the requesting Party either to enforce the judgment in question if the convicted person does not make an opposition or, if he does, to take proceedings against the person extradited.*
>
> *2. When the requested Party informs the person whose extradition has been requested of the judgment rendered against him in absentia, the requesting Party shall not regard this communication as a formal notification for the purposes of the criminal procedure in that State.*

The explanatory report (paragraph 21) defines judgments *in absentia* in the largest possible way, i.e. as "judgments rendered after a hearing at which the sentenced person was not personally present".[1103]

The right of the accused to appear in person at their trial is an essential component of the right to a fair trial, but ***not an absolute right***. The accused can waive this right provided that certain safeguards are met, i. e., that the waiver is established in an unequivocal manner, that it is

[1099] ECtHR, Case ***Sanchez-Sanchez v. the United Kingdom***, No. 22854/20, Judgment [GC] of 3 November 2022, §§83, 85, 89- 99, 108 and 109. See also summary in **PC-OC (2011) 21 Rev17**, pp. 320-323.
[1100] ECtHR, Case ***Kupinskyy v. Ukraine***, No. 5084/18, Judgment of 10 November 2022, §§41-42.
[1101] ECtHR, Case ***King v. United Kingdom***, No. 9742/07, Decision of 26 January 2010, §19.
[1102] ECtHR, Case ***Einhorn v. France****, No. 71555/01,* Decision of 16 October 2001, §33
[1103] **PC-OC Mod (2014) 02rev**, p. 10.

accompanied by minimum safeguards commensurate to its importance and that it does not run counter to any important public interest.

According to the PC-OC, the purpose of this provision is to ensure that extradition of persons judged *in absentia* will not be denied if the requested State has sufficient guarantees that the extradition will not lead to a violation of their fundamental rights enshrined in the **ECHR** and in particular those specified in Article 6 (3) concerning the minimum rights of defence. It furthermore stated that it does not wish that ratification of the **AP2** leads to the creation of an additional obstacle to judicial co-operation[1104].

It is the responsibility of each requested Party to assess whether the proceedings leading to the judgment *in absentia* or the additional guarantees provided by the requesting State satisfy the rights of defence. PC-OC stresses that this assessment should be made in light of the **ECHR** and its case law, and that this is particularly relevant, for example, in cases where a person has chosen not to appear at his or her trial. To help States in this assessment, PC-OC asked its Working Group to prepare, and approved in May 2014, a paper containing "Criteria to assess whether proceedings leading to a judgment *in absentia* or the additional guarantees provided by the requesting State satisfy the rights of defence (in connection with Article 3 of the Second Additional Protocol to the European Convention on Extradition)" (**PC-OC Mod (2014) 02rev**). In it, it is suggested that guidance for the examination of an extradition request concerning a person tried *in absentia* – in order to allow a proper assessment of whether his or her fundamental rights of defence were guaranteed – could be found in the following sources (see above the section concerning the Article entitled "Judgements *in absentia*" introduced by **AP2**):

- the explanatory report to the Second Additional Protocol;
- relevant case law of the ECtHR;
- the information contained in the reply of the requesting State to the questionnaire on "*in absentia cases*" in connection with Article 3 of the Second Additional Protocol to the European Convention on Extradition (**PC-OC (2013) 01rev3 Bil**);
- **Resolution (75)11** of the Committee of Ministers on the criteria governing proceedings held in the absence of the accused.

The above criteria, as recommended by the Committee of Ministers, are as follows:

1. No one may be tried without having first been effectively served with a ***summons*** in time to enable him to appear and to prepare his defence, unless it is established that he has ***deliberately sought to evade justice***.
2. The summons must state the ***consequences*** of any failure by the accused to appear at the trial.
3. Where the court finds that an accused person who fails to appear at the trial has been served (*atteint*) with a summons, it must order an ***adjournment*** if it considers personal appearance of the accused to be indispensable or if there is reason to believe that he has been prevented from appearing.
4. The accused must not be tried in his absence, if it is possible and desirable to ***transfer*** the proceedings to another state or to apply for ***extradition***.
5. Where the accused is tried in his absence, ***evidence*** must be taken in the usual manner and the ***defence*** must have the right to intervene.
6. A judgement passed in the absence of the accused must be ***notified*** to him according to the rules governing the service of the summons to appear and the ***time-limit for lodging an appeal*** must not begin to run until the convicted person has had effective knowledge of the judgement so notified, unless it is established that he has deliberately sought to evade justice.
7. Any person tried in his absence must be able to ***appeal*** against the judgement by whatever means of recourse would have been open to him, had he been present.
8. A person tried in his absence on whom a summons has not been served in due and proper form shall have a remedy enabling him to have the ***judgement annulled***.

[1104] **PC-OC Mod (2014) 02rev**, p. 10.

9. A person tried in his absence, but on whom a summons has been properly served is entitled to a ***retrial***, in the ordinary way, if that person can prove that his absence and the fact that he could not inform the judge thereof were due to ***reasons beyond his control***.

We now proceed to indicate some examples of cases in which the ECtHR has found a **violation of Article 6** of the **ECHR** in cases involving judgements *in absentia*:

Case ***F. C. B. v. Italy*** (1991): it related to an Italian national sentenced *in absentia* in Italy while he was in custody in the Netherlands, a fact that the Milan Assize Court of Appeal had learnt from concurring sources (the applicant's counsel and two co-defendants), in addition to the request for co-operation presented to Italy by Dutch authorities, thereby informing them that the applicant was in prison in the Netherlands. The ECtHR took into consideration the following factors: that, in face of this information, the Court of Appeal had not adjourned the trial or investigated further to see whether the applicant had indeed consented to not being present, limiting itself to state that it had not been provided with proof that he was unable to attend; that Italian authorities did not draw the necessary inferences as regards the proceedings pending against Mr F. C. B. in Milan. This behaviour on the part of Italian authorities was thus considered scarcely compatible with the diligence which the Contracting States must exercise in order to ensure that the rights guaranteed by Article 6 of the Convention are enjoyed in an effective manner.[1105]

Case ***Somogyi v. Italy*** (2004): it concerned a judgement *in absentia* issued in Italy after the summons had been served in Hungary by post and the applicant failed to appear in court. He alleged having been convicted without being given the opportunity to defend himself before the Italian courts: he had not received any information about the opening of proceedings against him, since the notice of the date of the preliminary hearing had never been served on him and the signature on the reply slip acknowledging receipt of the letter from the preliminary investigations judge was not his. The ECtHR concluded that it could not be considered that the applicant's allegations concerning the authenticity of the signature were *prima facie* without foundation, particularly in view of the difference between the signatures he produced and the one on the return slip acknowledging receipt and the difference between the applicant's forename (Tamas) and that of the person who signed the slip (Thamas). In addition, the mistakes in the address were such as to raise serious doubts about the place to which the letter had been delivered. The Court emphasized that Article 6 of the Convention imposes on every national court an obligation to check whether the defendant has had the opportunity to apprise himself of the proceedings against him where, as in the instant case, this is disputed on a ground that does not immediately appear to be manifestly devoid of merit. In the instant case the means employed by the national authorities did not achieve the result required by Article 6 of the Convention. As regards the Government's assertion that the applicant had in any event learned of the proceedings through a journalist who had interviewed him or from the local press, the Court pointed out that to inform someone of a prosecution brought against him or her is a legal act of such importance that it must be carried out in accordance with procedural and substantive requirements capable of guaranteeing the effective exercise of the accused's rights, as is moreover clear from Article 6 (3) (a) of the Convention, and that vague and informal knowledge cannot suffice.[1106]

Case ***Hokkeling v. The Netherlands*** (2017): in this case, a Dutch national was sentenced *in absentia* in the Netherlands (only during the hearing of appeal) while he was in custody in Norway and there was no legal title for the Dutch authorities to request his temporary transfer to enable his personal participation at the court hearing. The ECtHR considered that, although the applicant's counsel was offered – and made use of – the opportunity to conduct the defence in the applicant's absence, he made requests both before and at the hearing for an adjournment in order to enable the applicant to attend in person, and the applicant was entitled to do so. The Court of Appeal's refusal to consider measures that would have enabled the applicant's personal attendance was, in the ECtHR's view, all the more difficult to understand given that the Court of Appeal increased significantly the applicant's sentence. Despite recognizing the legitimate

[1105] ECtHR, Case ***F. C. B. v. Italy***, No. 12151/86, Judgment of 28 August 1991, §33.
[1106] ECtHR, Case ***Somogyi v. Italy***, No. 67972/01, Judgment of 18 May 2004, §§70, 72, 74-75.

interests of the victim's surviving kin and of society as a whole in seeing the criminal proceedings against the applicant brought to a timely conclusion, the Court considered that, having regard to the prominent place which the right to a fair trial holds in a democratic society within the meaning of the Convention, it could not find that either the applicant's presence at hearings during the first-instance proceedings and the initial stages of the appeal proceedings or the active conduct of the defence by counsel could compensate for the absence of the accused in person, and there was therefore a violation of Article 6 (1) and (3) (c).[1107]

Case ***Yeğer v. Turkey*** (2022): it concerned the situation of a person's conviction *in absentia* after not being personally served with documents concerning criminal proceedings and being unable to obtain a fresh determination of the merits of his case. The Government argued that the applicant had knowingly and willingly absconded from the proceedings and had thus waived his right to be present, because he had (i) moved out of his residential address on account of his debts; (ii) failed to inform the authorities of his address change; and (iii) gone abroad for an extended period of time. The Court noted, firstly, that, at no stage of the proceedings did the domestic courts assess those points, on which the Government relied before the Court to support their above-noted assertion; secondly, it was not clear whether he had moved out of his apartment owing to the debts that formed the basis of the criminal proceedings against him; thirdly, even assuming that the applicant could potentially be reproached for failing to inform the authorities of his address, the Court considered that it would be too great a leap to attach to such a failure the *rationale* that the applicant was either aware of the criminal proceedings or intended to evade justice. Fourthly, the same consideration also holds true in respect of the mere fact of being abroad – a fact that was not contested by the applicant – which does not in and of itself suffice to provide an unequivocal indication in respect of the Government's argument. Given the absence of any objective factors allowing a conclusion to be drawn as regards the applicant's knowledge of the criminal proceedings, the Court could not conclude that the applicant had unequivocally waived his right to appear and defend himself or evaded justice, and no domestic court verified whether the applicant had indeed been informed of the criminal proceedings in person or had otherwise had effective knowledge thereof. In view of all this, the Court found this situation contrary to the elementary principles of the right to a fair trial under Article 6 of the Convention.[1108]

And here are examples of cases in which the ECtHR found **no violation of Article 6** of the ECHR in cases involving judgements *in absentia*:

Case **Einhorn v. France** (2001): it concerned an extradition from France to the USA for the purposes of serving a sentence of life imprisonment imposed *in absentia* for a capital offence. Extradition was first denied but later granted on the basis of a fresh extradition request following a change in the laws of Pennsylvania and under the condition that the applicant would be granted re-trial and the death penalty would not be sought, imposed or carried out. The applicant complained, inter alia, that the law allowing for the re-trial of persons sentenced *in absentia* in Pennsylvania was a specially passed law with retrospective effect, which had been enacted with the sole aim of influencing the judicial outcome of the extradition proceedings instituted against him in France, thereby breaching his right to a fair trial; and that, even if the applicant could in fact have a new trial in Pennsylvania, such a trial would not satisfy the requirements of Article 6 of the Convention in view of the "pressure of legal and media attention" which the case had generated in the USA and which a jury would not be able to avoid. In relation to the above, the Court concluded that, while serious questions arise as to the conformity of the law with the Pennsylvania Constitution, they do not, in the absence of a finding by the competent courts of Pennsylvania, prove that it is unconstitutional. It cannot be inferred from them, without going thoroughly into the question whether the statute is constitutional, that there are "substantial grounds" for believing that the applicant will be unable to obtain a retrial in Pennsylvania or that the denial of justice he fears is "flagrant". The Court considered that it was patently not for the respondent State to

[1107] ECtHR, Case ***Hokkeling v. The Netherlands***, No. 30749/12, Judgment of 14 February 2017, §§59, 61-62.
[1108] ECtHR, Case ***Yeğer v. Turkey***, No. 4099/12, Judgment of 7 June 2022, §§32, 34-36.

determine such an issue before granting extradition, and it could not be argued that such a duty arose from its obligations under the Convention.[1109]

Case **Kislov v. Russia** (2019): in this case, the applicant had been present at part of his trial in Belarus and exercised his right to defend himself. As to his subsequent absence from the remainder of the trial, nothing suggested that he then fled Belarus on account of any treatment in breach of Article 3 of the Convention or risk thereof, and the applicant failed to substantiate why the Convention would require the criminal proceedings in Belarus to be taken up again. Furthermore, the applicant submitted no explanation to the Court as to why his privately retained counsel in Belarus no longer represented him after his departure for Russia; what prevented his counsel from exercising other procedural rights on the applicant's behalf and in his interests, despite his absence; or why the applicant did not seek restoration of the time-limit for a review in the cassation appeal proceedings. It appears that he could have made such an application by post, as he did as regards a supervisory review in his case. The Court therefore concluded that the applicant's conviction despite his absence did not amount to a "flagrant denial of justice" in breach of Article 6 of the Convention. Nor would the unavailability of a retrial amount to such a denial of justice, be it in relation to such absence from the trial, or because of the other procedural irregularities examined[1110].

Case ***Dijkhuizen v. the Netherlands*** (2021): in this MLA-related case, the Court has found that an applicant's refusal to participate at his appeal hearing via videoconference, maintained over a period of eleven months and twice stated by his counsel in open court, constituted a waiver of his right to take part in the hearing in his own case and was in conformity with guarantees commensurate with the importance of the right thus waived. It further considered that the Court of Appeal was entitled to disregard the request made by the applicant's counsel in his closing speech to prolong the proceedings yet again so that the applicant could participate by videoconference[1111].

Assurances

In the case of judgements *in absentia*, an ***assurance*** is to be regarded as ***sufficient*** if it is made clear that there is an **effective possibility of retrial**, or rehearing, in the requesting State, according to its applicable law. The person has to be **expressly informed of his or her right to a retrial**, or a rehearing, (including the applicable **time frame**), in which he or she has the **right to participate** and which allows the **merits** of the case, including **fresh evidence**, to be **re-examined**, and which may lead to the original decision being **reversed**[1112].

Recalling that Contracting States are obliged to refuse their co-operation if it emerges that the conviction is the result of a flagrant denial of justice, the ECtHR did attach importance to government assurances asserting that it could and would refuse cooperation if it was a question of enforcing a judgment which was manifestly contrary to the provisions of Article 6 or the principles embodied therein. The Court found confirmation of these assurances in some decisions of the courts of the requested State refusing to allow extradition of a person who had been convicted *in absentia* in a country where there was no possibility of retrial[1113].

European Arrest Warrant

Council Framework Directive 2002/584/JHA of 13 February 2002 on the European arrest warrant and the surrender procedures between Member States, as amended by Council Framework Decision 2009/299/JHA of 26 February 2009, also contains a detailed ***Article 4a***, on "Decisions rendered following a trial at which the person did not appear in person". It

[1109] ECtHR, Case ***Einhorn v. France***, No. 71555/01, Decision of 16 October 2001. §§31, 33-34.
[1110] ECtHR, Case ***Kislov v. Russia***, No. 3598/10, Judgment of 9 July 2019, §§118-119.
[1111] ECtHR, Case ***Dijkhuizen v. the Netherlands***, No. 61591/16, Judgment of 8 June 2021, §§55, 60-61.
[1112] **PC-OC Mod (2014) 02rev**, p.11; see also ECtHR, Case ***Labsi v. Slovakia***, No. 33809/08, Judgment of 15 May 2012, §§41, 58.
[1113] ECtHR, Case ***Drozd and Janousek v. France and Spain***, No. 12747/87, Judgment (Plenary) of 26 June 1992, §110.

establishes, inter alia, that the ***executing judicial authority may refuse the execution of EAW*** issued for the purpose of executing a custodial sentence or a detention order if the trial took place in such circumstances, ***unless*** the ***EAW itself states*** that the person was, in due time, either **summoned in person** and thereby informed of the scheduled date and place of the trial which resulted in the decision, or by other means actually received official information of the scheduled date and place of that trial in such a manner that it was unequivocally established that he or she was aware of the scheduled trial; and was **informed** that a decision may be handed down if he or she does not appear for the trial. Or if, being aware of the scheduled trial, had given a mandate to a **legal counsellor**, who was either appointed by the person concerned or by the State, to defend him or her at the trial, and was indeed defended by that counsellor at the trial. Or after being served with the decision and being expressly **informed about the right to a retrial**, or an appeal, in which the person has the right to participate and which allows the merits of the case, including fresh evidence, to be re-examined, and which may lead to the original decision being reversed: expressly stated that he or she does ***not contest*** the decision; or did ***not request*** a retrial or appeal within the applicable time frame. Or was not personally served with the decision but **will be personally served with it without delay after the surrender and will be expressly informed of his or her right to a retrial,** or an appeal, in which the person has the right to participate and which allows the merits of the case, including fresh evidence, to be re-examined, and which may lead to the original decision being reversed; will be informed of the time frame within which he or she has to request such a retrial or appeal, as mentioned in the relevant EAW – in this case, the person may request to receive a copy of the relevant judgement before surrender, but this shall not be considered a formal service thereof, namely for the actuation of time limits. If a retrial is requested, the detention until proceedings are finalised shall be reviewed in accordance with the law of the issuing Member State.

The CJEU has clarified, first of all, that an executing judicial authority may make the surrender of a person subject to **the joint application of the conditions laid down in Articles 5(1) and 5(3) EAW FD**[1114] (opportunity to apply for a retrial of the case in the issuing Member State and surrender on condition of return after being heard in the case of nationals or residents in the executing Member State). The CJEU also interpreted Article 4a (1) **EAW FD**, explaining that this provision has harmonised – in an ***exhaustive*** way – the circumstances in which the execution of the EAW must be regarded as not infringing the rights of the defence. This means that executing judicial authorities cannot impose any additional requirements based on national law and which are not foreseen in EU legislation (eg. conviction rendered *in absentia* being open to review in the issuing Member State)[1115]. It also means that the executing authority cannot refuse the execution of the EAW on the mere grounds that the issuing authority does not provide the guarantee of a right to a new trial within the meaning of Articles 8 and 9 of **Directive 2016/343/EU**[1116], where the requested person prevented his summons in person and did not appear in person at the trial due to his flight to the executing Member State[1117].

Specifically in relation to the service of summons in proceedings leading to judgements rendered *in absentia*, the CJEU considered, in 2016, that the expressions *summoned in person* and *by other means actually received official information of the scheduled date and place of that trial in such a manner that it was unequivocally established that he or she was aware of the scheduled trial* (in Article 4a(1)(a) (i), above) constitute autonomous concepts of EU law and must be interpreted uniformly throughout the EU. Furthermore, it also ruled that a summons not served directly on the person concerned but handed over, at the latter's address, to an adult belonging to that household who undertook to pass it on to him, when it cannot be ascertained from the

[1114] CJEU, Case **C-306/09, *IB***, Judgment of 21 October 2010.
[1115] CJEU, Case ***Melloni, C-399/11***, Judgement [GC] of 26 February 2013.
[1116] **Directive (EU) 2016/343** of the European Parliament and of the Council of 9 March 2016 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings.
[1117] CJEU, Case **C-416/20 PPU, *Generalstaatsanwaltschaft Hamburg***, Judgment of 17 December 2020.

EAW whether or not such person did so, and when, does not in itself satisfy the conditions set out in that provision.[1118]

The CJEU further explained how the expression *trial resulting in the decision* set out in Article 4a (1) **EAW FD** should be interpreted. It ruled that this term relates only to the proceedings that led to the decision which finally determined the guilt of the person concerned and imposes a penalty on them[1119]. It does not concern, for example, a decision revoking the suspension of that sentence[1120].

Furthermore, the executing judicial authority may refuse to surrender the requested person to the issuing Member State where it is apparent that the proceedings resulting in a second criminal conviction of that person, which was decisive for the issue of the EAW, took place *in absentia*, unless the EAW contains, in respect of those proceedings, one of the statements referred to in subparagraphs (a) to (d) of that provision. But such authority is precluded from refusing surrender on the grounds that the proceedings resulting in the revocation of the suspension of the custodial sentence for the execution of which the EAW was issued took place *in absentia*, or from making the surrender of that person subject to a guarantee that he or she will be entitled, in that Member State, to a retrial or to an appeal allowing for the re-examination of such a revocation decision or of the second criminal conviction which was handed down against that person *in absentia* and which proves decisive for the issue of that warrant[1121].

In **exceptional circumstances**, an executing judicial authority must refrain from giving effect to an EAW if it finds that there exists, for the individual in respect of whom the EAW has been issued, a real risk of breach of the fundamental right to an independent tribunal and, therefore, of the essence of the fundamental right to a fair trial. The CJEU developed a two-stage examination that the executing judicial authority is required to perform before taking a decision on the execution of the EAW, i. e. a systemic assessment (whether there is a real risk, connected with a lack of independence of the courts of the issuing Member State on account of deficiencies of that kind, of such a right being breached) and a specific assessment (whether, in the particular circumstances of the case, there are substantial grounds for believing that, following the individual's surrender to the issuing Member State, the requested individual will run that risk)[1122].

In a 2021 decision on a case relating to the execution of an EAW issued by Italy and addressed to Portuguese authorities, in which the applicant complained, inter alia, that Portuguese authorities applied the mutual recognition mechanism automatically and mechanically, to the detriment of her fundamental rights, acting on the wrong assumption that she would benefit from a new trial upon surrender, the ECtHR agreed that it was apparent both from the decision of the Court of Appeal of 12 January 2016 and from the final judgment of the Supreme Court of 10 March 2016 that the Portuguese courts had initially believed that the applicant would benefit from a new trial, contrary to what was indicated in point 3.4. of the EAW form, namely that the applicant was simply informed of her right to a new procedure. (…). However, the Court found no element of bad faith on the part of the domestic authorities in this case. On the contrary, the Court came to believe that the authorities endeavoured to correctly apply the national legislation and to respect the applicant's rights at the domestic level. Following the letter from the Italian central authority clarifying the procedural rights of a person convicted *in absentia* in Italy, the Court of Appeal of Lisbon noted in its decision of 6 October 2016, that it was up to the Italian authorities to guarantee the applicant's procedural rights, in accordance with Italian law, and that any request for clarification in this respect should be addressed to the Italian authorities and not to the

[1118] CJEU, Case **C-108/16 *Dworzecki,*** PPU, Judgement of 24 May 2016.
[1119] CJEU, Case **C-571/17, *Ardic***, Judgment of 22 December 2017; Case **C-270/17, *Tupikas***, Judgment of 10 August 2017; Case **C-271/17, *Zdziaszek***, Judgment of 10 August 2017-
[1120] CJEU, Joined Cases **C-514/21 (*LU*) and C-515/21 (*PH*), *(Minister for Justice and Equality)***, Judgement of 23 March 2023.
[1121] CJEU, Joined Cases **C-514/21 (*LU*) and C-515/21 (*PH*), *(Minister for Justice and Equality)***, Judgement of 23 March 2023.
[1122] CJEU, Case ***Minister for Justice and Equality v LM (Deficiencies in the system of justice)***, C-216/18 PPU, Judgement [GC] of 25 July 2018.

Portuguese authorities, since the decision authorizing the surrender had become final, by virtue of the exhaustion of domestic remedies. The Lisbon Court of Appeal therefore corrected the error contained in the decision declaring the EAW enforceable by taking into account the applicant's arguments as to the circumstances which, according to her, prevented the execution of the EAW. (…) As a superabundant point, in so far as the applicant alleges a flagrant denial of justice in Italy which should have resulted in the refusal by the Portuguese judicial authorities to execute the EAW issued against her, the Court observed that, according to the information from the Italian Central Authority, the applicant had received all the notifications relating to her trial and had appointed a lawyer to represent her; she therefore had sufficient knowledge of the proceedings and charges against her. Therefore, the ECtHR did not consider that the principle of mutual recognition had been applied to the detriment of the applicant's fundamental rights.[1123]

In a case concerning an Italian national arrested in Belgium on the basis of an EAW issued for the purposes of his surrender to Italy in order to serve a sentence of imprisonment (and pay a fine) imposed in his absence in 1998, the ECtHR also considered that no violation of Article 6 of the Convention had occurred. The Belgian court had been competent to refuse the transfer in that context and had concluded that such surrender would not amount to a "flagrant denial of justice" on account of the ensuing unavailability of a retrial as the applicant had been officially informed of the date and place of the hearing before the appeal court. He had not attended it but had been represented before it by a lawyer of his choosing, who had assisted him at the first-instance trial and had then obtained a+ reduction of the sentence on appeal. These factors were sufficient for the Court to find that, in the present case, the execution of the EAW by the Belgian courts had not been tainted by a manifest insufficiency capable of reversing the presumption of equivalent protection provided under the EAW system.[1124]

3.6 Flagrant denial of justice

Flagrant denials of justice are particularly serious forms of violations of ***the right to a fair trial,*** provided for, inter alia, in **Article** 6 of the **ECHR**, as follows:

> *1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.*
>
> *2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.*
>
> *3. Everyone charged with a criminal offence has the following minimum rights:*
>
> > *(a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;*
> >
> > *(b) to have adequate time and facilities for the preparation of his defence;*
> >
> > *(c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;*

[1123] ECtHR, Case ***De Sousa v. Portugal***, No. 28/17, Decision of 7 December 2021, §§80-81, 83-84, 88.
[1124] ECtHR, Case ***Pirozzi v. Belgium***, No. 21055/11, Judgment of 17 April 2018, §§66-67, 70-71.

> *(d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;*
>
> *(e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court.*

The Convention does not require the Contracting Parties to impose its standards on third States or territories[1125]. As a rule, the Contracting Parties are not obliged to verify whether a trial to be held in a third State following extradition, for example, would be compatible with all the requirements of Article 6. According to the Court's case-law, however, an issue might ***exceptionally*** arise under Article 6 as a result of an extradition or expulsion decision in circumstances where the individual would risk suffering a flagrant denial of a fair trial, i.e. a ***flagrant denial of justice***, in the requesting country. This principle was first set out in case **Soering v. United Kingdom** (1989), with the Court underlining that the right to a fair trial in criminal proceedings, as embodied in Article 6 of the **ECHR**, "holds a prominent place in a democratic society".[1126]. Such view was confirmed shortly afterwards, *mutatis mutandis*, in case **Drozd and Janousek v. France and Spain** (1992), in whose judgement the Court recalled that the "Contracting States are (…) obliged to refuse their co-operation if it emerges that the conviction is the result of a flagrant denial of justice".[1127] Since then, it has been confirmed by the Court in a number of cases[1128].

National extradition proceedings should provide for fair trial guarantees. However, the extradition procedure is not, as such, a procedure for the purpose of the determination of one's civil rights or obligations or a criminal charge. Therefore, ***Article 6 (1) does not apply to extradition procedures***[1129] and, consequently, the authorities of the requested State are not obliged to authorise the production before them in extradition proceedings of evidence of facts relating to the substance of the charge or the criminal prosecution[1130]. However, the ECtHR has ruled that Article 6 (2) – the **presumption of innocence** –is applicable where extradition proceedings are a direct consequence, and concomitant with, the criminal investigation pending against an individual in the receiving State (see Chapter 1.3 "Presumption of innocence).

"Flagrant denial of justice" is a ***stringent test of unfairness which goes beyond mere irregularities or lack of safeguards in the trial procedures*** such as might result in a breach of Article 6 if occurring within the Contracting State. It has been has been considered synonymous with a trial which is manifestly contrary to the provisions of Article 6 or the principles embodied therein[1131] and requires a breach of the principles of a fair trial guaranteed by such Article which is ***so fundamental as to amount to a nullification, or destruction of the very essence, of the***

[1125] ECtHR, Case ***Drozd and Janousek v. France and Spain***, No. 12747/87, Judgment of 26 June 1992, §110.
[1126] ECtHR, Case ***Soering v. the United Kingdom***, N.º 14038/88, Judgement of 7 July 1989, §113.
[1127] ECtHR, Case ***Drozd and Janousek v. France and Spain***, No. 12747/87, Judgment (Plenary) of 26 June 1992, §110.
[1128] ECtHR, Case ***Mamatkulov and Askarov v. Turkey***, Nos. 46827/99 & 46951/99, Judgment [GC] of 4 February 2005, §§90-91; Case ***Al-Saadoon and Mufdhi v. the United Kingdom***, No. 61498/08, Judgment of 2 March 2010, §149; Case ***Ahorugeze v. Sweden***, No. 37075/09, Judgment of 27 October 2011, §115; Case ***Othman (Abu Qatada) v. United Kingdom***, No. 8139/09, Judgment of 17 January 2012, §258.
[1129] ECtHR, Case ***Findikoglu v. Germany***, No. 20672/15, Decision of 7 June 2016, §44; Case ***Vlas and Others v. Romania***, No. 30541/12, Decision of 6 January 2015, §42; Case ***Ketchum v. Romania***, No. 15594/11, Decision of 11 June 2013, §30; Case ***Aronica v. Germany***, No. 72032/01, Decision of 18 April 2002, §3; Case ***Peñafiel Salgado v. Spain***, No. 65964/01, Decision of 16 April 2002, §1; Case ***Maaouia v. France***, No. 39652/98, Judgment [GC] of 5 October 2000, §§33-37; Case ***E.G.M. v. Luxembourg***, No. 24015/94, Decision of 20 May 1994, p. 1; EComHR, Case ***H. v. Spain***, No.: 10227/82, Decision of 15 December 1983, p. 2.
[1130] EComHR, Case ***Lynas v. Switzerland***, No. 7317/75, Decision of 6 October 1976, p. 168, §5.
[1131] ECtHR, Case ***Sejdovic v. Italy***, Judgement [GC] of 1 March 2006, §84; Case ***Stoichkov v. Bulgaria***, Judgement of 24 June 2005, §56; Case ***Drozd and Janousek v. France and Spain***, No. 12747/87, Judgment (Plenary) of 26 June 1992, §110.

right guaranteed by that Article[1132]. In assessing whether this stringent test of unfairness has been met, the Court considers that the same standard and burden of proof should apply as in cases of risk of treatment proscribed by Articles 2 and 3. Therefore, it is for the applicant to adduce evidence capable of showing that there are substantial grounds for believing that, if he or she is removed from a Contracting State, he or she would, in the particular circumstances of his or her case, be exposed to a real risk of being subjected to a flagrant denial of justice[1133]. Where such evidence is adduced, it is for the government to dispel any doubts about it[1134]. However, if authorities of the requested State are aware of information, emanating from diverse, objective and concurring sources, which establishes that there is a "real risk" of flagrant denial of justice (eg. because evidence obtained by torture has or there is a real risk that may be used in the trial proceedings), they are required to verify that this will not be case[1135].

In order to determine whether there is a risk of a flagrant denial of justice, the Court must examine the ***foreseeable consequences*** of sending the applicant to the receiving country, bearing in mind the ***general situation*** there and his or her ***personal circumstances***. The risk of a flagrant denial of justice must be primarily assessed by reference to the facts which the Contracting State knew or should have known at the time of extradition or expulsion[1136] or, if these are deferred following an indication by the Court under Rule 39, also when it considers the case[1137]. Where the expulsion or transfer has already taken place by the date on which it examines the case, however, the Court is not precluded from having regard to information which comes to light subsequently[1138]. Furthermore, the Court also concluded that Article 6 of the Convention applies only to the ***trial itself***, not to the sentence pronounced. [1139]

The Court has, so far, never found that ***an extradition*** would be in violation of Article 6[1140]. Nor has it been required to define the concept of "flagrant denial of justice" in more precise terms. Despite this, its case law provides various examples of situations which would be considered as such, namely:

- detention of a person because of suspicions that he or she has been planning or has committed a criminal offence without having any access to an independent and impartial tribunal to have the legality of his or her detention reviewed and, if the suspicions do not prove to be well-founded, to obtain release [1141]

[1132] ECtHR, Case ***Othman (Abu Qatada) v. United Kingdom***, No. 8139/09, Judgment of 17 January 2012, §260; Case ***Ahorugeze v. Sweden***, No. 37075/09, Judgment of 27 October 2011, § 115.
[1133] ECtHR, Case ***Zarmayev v. Belgium***, No. 35/10, Judgment of 27 February 2014, §120; Case ***Yefimova v.Russia***, No. 39786/09, Judgment of 19 February 2013, §§223-224; Case ***Dzhaksybergenov (aka Jaxybergenov) v. Ukraine***, No. 12343/10, Judgment of 10 February 2011, §44.
[1134] ECtHR, Case ***Saadi v. Italy***, No. 37201/06, Judgment [GC] of 28 February 2008, §129; Case ***J. K. and Others v. Sweden***, No. 59166/12, Judgment [GC], 23 August 2016, §91; Case ***Ahorugeze v. Sweden***, No. 37075/09, Judgment of 27 October 2011, §116; Case ***Othman (Abu Qatada) v. United Kingdom***, No. 8139/09, Judgment of 17 January 2012, §§272-280; Case ***El Haski v. Belgium***, No. 649/08, Judgment of 25 September 2012, §86.
[1135] ECtHR, Case ***El Haski v. Belgium***, No. 649/08, Judgment of 25 September 2012, §99.
[1136] ECtHR, Case ***Al-Saadoon and Mufdhi v. the United Kingdom***, No. 61498/08, Judgment of 2 March 2010, §125; Case ***Saadi v. Italy***, No. 37201/06, Judgment [GC] of 28 February 2008, §130, 133.
[1137] ECtHR, Case ***Mamatkulov and Askarov, v. Turkey***, Nos. 46827/99 & 46951/99, Judgment [GC] of 4 February 2005, §90.
[1138] ECtHR, Case ***J. K. and Others v. Sweden***, No. 59166/12, Judgment [GC], 23 August 2016, §83; Case ***Al-Saadoon and Mufdhi v. the United Kingdom***, No. 61498/08, Judgment of 2 March 2010, §149; Case ***Mamatkulov and Askarov, v. Turkey***, Nos. 46827/99 & 46951/99, Judgment [GC] of 4 February 2005, §§69, 90.
[1139] ECtHR, Case ***Harkins v. the United Kingdom***, No. 71537/14, Decision [GC] of 15 June 2017, §§64-66.
[1140] In contrast to the deportation case of ***Othman (Abu Qatada)***, § 285, and the rendition cases of ***Al Nashiri v. Poland***, No. 28761/11, Judgment of 24 July 2014, § 568, and ***Husayn (Abu Zubaydah) v. Poland***, No. 7511/13, Judgement of 24 July 2014, §560 (see below).
[1141] ECtHR, Case ***Harkins v. the United Kingdom***, No. 71537/14, Decision [GC] of 15 June 2017, §63; Case ***Al-Moayad v. Germany***, N.º 35865/03, Decision of 20 February 2007, §101.

- deliberate and systematic refusal of access to a lawyer to defend oneself, especially when the person concerned is detained in a foreign country[1142];
- substantial grounds for believing that, following extradition, the person would be held *incommunicado* without having access to a lawyer and without having access to, and being tried in, the ordinary criminal courts[1143];
- conviction *in absentia* with no possibility subsequently to obtain a fresh determination of the merits of the charge[1144] - see above sub-chapter;
- trial which is summary in nature and conducted with a total disregard for the rights of the defence[1145];
- use of evidence obtained by torture or other forms of ill-treatment[1146];
- trial by a court which lacks independence and impartiality;[1147]
- trial before a military commission, thus receiving a different standard of justice than nationals of that State[1148] (see below);
- placement of a suspect in indefinite detention, without ever being charged of a criminal offence, and without periodic review of the legality of detention[1149];
- seizure of assets in a Contracting State for nearly eight years pursuing to MLA request presented by non-Contracting State, against the widow of a political opponent of the regime of the requesting State, not in accordance with the law *ab initio* since, according to the Criminal Code of the requesting State, the applicant never had the status of charged or accused person, but only that of a suspect. In nearly eight years no authority or domestic court had thoroughly examined the matter in legal terms or ascertained the applicant's situation in the light of the available information[1150].

Although it could be arguable that, if both States are Parties to the **ECHR**, the territorial principle should always be applicable, the ECtHR has considered that this would undermine the primary responsibility of the requesting State and its courts to protect individual rights, and therefore the ECtHR has held that the "flagrant denial of justice standard" also applies to extradition between Parties to the **ECHR**[1151].

In the **deportation** case **Othman (Abu Qatada) v. UK** (2012), the Court did find a risk of "flagrant denial of justice", due to the admission of ***evidence obtained through torture***, which would render the judgement "immoral, illegal and entirely unreliable in its outcome". The case arose because the applicant, previously convicted *in absentia*, faced a re-trial in the requesting country based on the incriminating statements of two different witnesses, both of whom had been exposed to beating in the soles of their feet (commonly known as *falaka)*, the purpose of which could have only been to obtain information; the Court had previously examined this form of ill-treatment and had no hesitation in characterising it as torture. Furthermore, the use of torture evidence in the

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[1142] ECtHR, Case ***Harkins v. the United Kingdom***, No. 71537/14, Decision [GC] of 15 June 2017, §63; Case ***Al-Moayad v. Germany***, N.º 35865/03, Decision of 20 February 2007, §101.
[1143] ECtHR, Case ***Al-Moayad v. Germany***, N.º 35865/03, Decision of 20 February 2007, §101.
[1144] ECtHR, Case ***Sejdovic v. Italy***, Judgement [GC] of 1 March 2006, §84; Case ***Stoichkov v. Bulgaria***, Judgement of 24 June 2005, §56; Case ***Einhorn v. France****, No. 71555/01,* Decision of 16 October 2001, §33.
[1145] ECtHR, Case ***Harkins v. the United Kingdom***, No. 71537/14, Decision [GC] of 15 June 2017, §63; Case ***Bader and Kanbor v. Sweden***, Judgement of 8 November 2005, §47.
[1146] ECtHR, Case ***Harkins v. the United Kingdom***, No. 71537/14, Decision [GC] of 15 June 2017, §63; Case ***El Haski v. Belgium***, No. 649/08, Judgement of 25 September 2012, §85; Case ***Othman (Abu Qatada) v. United Kingdom***, No. 8139/09, Judgment of 17 January 2012, §267; Case ***Babar Ahmad and others v. United Kingdom (Decision)***, Nos. 24027/07, 11949/08 & 36742/08, Decision (Partial) of 6 July 2010, §§158-160.
[1147] ECtHR, Case ***Harkins v. the United Kingdom***, No. 71537/14, Decision [GC] of 15 June 2017, §66.
[1148] ECtHR, Case ***Al Nashiri v. Poland***, No. 28761/11, Judgment of 24 July 2014, §§565-569; Case ***Husayn (Abu Zubaydah) v. Poland***, No. 7511/13, Judgement of 24 July 2014, §§555-561;
[1149] ECtHR, Case ***Husayn (Abu Zubaydah) v. Poland***, No. 7511/13, Judgement of 24 July 2014, §559.
[1150] ECtHR, Case ***Shorazova v. Malta***, No. 51853/19, Judgment of 3 March 2022, §112.
[1151] See **PC-OC (2018)05**, "Introductory speech (…)", Mr Vincent Glerum, p. 19; and ECtHR, Case ***Stapleton v. Ireland***, No. 56588/07, decision on admissibility of 4 May 2010, §29.

requesting country (Jordan) was, according to the Court, widespread and the legal guarantees contained under Jordanian law seemed to have little practical value. While the applicant had the possibility to challenge the admissibility of the statements against him obtained through torture, he would encounter substantial difficulties in trying to do so many years after the events and before the same court which routinely rejected such claims. Having provided concrete and compelling evidence that his co-defendants had been tortured into providing the case against him, and that such evidence would most likely be used in his retrial, the ECtHR considered that the applicant had met the high burden of proof required to demonstrate a ***real risk*** of a ***flagrant denial of justice*** if he were deported to Jordan[1152]. As a result of this case, a mutual legal assistance agreement was formally signed between the UK and Jordan containing a number of fair trial guarantees for deportees and a stringent ban on the use of torture-obtained evidence. In accordance with this agreement, it falls on the prosecution the onus to prove beyond any doubt that the statement has been obtained out of free will and choice and has not been extrapolated by torture or ill-treatment. Following the formal approval of the Treaty by Jordan's King Abdullah, on 7 July 2013, Abu Qatada *agreed to return to Jordan* and did so, a few days later[1153].

In cases **Al Nashiri v. Poland** (2014) and **Husayn (Abu Zubaydah) v. Poland** (2014), the Court found the risk of "flagrant denial of justice" in the case of **rendition of terrorist suspects** to US authorities for trial by military commissions which "did not offer guarantees of impartiality and independence of the executive as required of a *tribunal* under the Court's case-law". Such commissions were set up specifically to try "certain non-citizens in the war against terrorism", outside the US federal judicial system, and composed exclusively of commissioned US officers, with the appeal procedure conducted by a review panel likewise composed of military officers. They did not have legitimacy under US and international law resulting in, as the Supreme Court found, its lacking the "power to proceed" and, consequently, were not "established by law" for the purposes of Article 6 (1). There was also a sufficiently high probability of admission of evidence obtained under torture in trials against terrorist suspects[1154]. In the latter case, the fact that the applicant had not been listed for trial before the military commission and for over twelve years had remained in indefinite detention without ever being charged with a criminal offence, with the last review of the legality of his detention taking place more than seven years before, amounted in itself, in the Court's view, to a flagrant denial of justice[1155].

As stated before, these are exceptional cases. In the extraterritorial context, the ECtHR has held that as the Convention does not require a Contracting State to verify whether the proceedings that resulted in the conviction are compatible with all the requirements of Article 6, as to require such a review of the manner in which a court not bound by the Convention has applied the principles enshrined in that Article would also thwart the current trend towards strengthening international co-operation in the administration of justice; a trend that is in principle in the interests of the persons concerned. Therefore, in the majority of times that a risk of flagrant denial of justice has been alleged before the ECtHR, the latter has concluded that the stringent test of unfairness it requires in such cases has not been met. Here are some examples:

- Re-trial based on a specially passed law with retrospective effect, enacted by the legislature with the sole aim of influencing the judicial outcome of the extradition proceedings instituted against the applicant and of dubious constitutionality; and trial under "pressure of legal and media attention" which a jury would be not have been able to avoid. The Court found that the serious doubts as to the constitutionality of a statute

[1152] ECtHR, Case ***Othman (Abu Qatada) v. United Kingdom***, No. 8139/09, Judgment of 17 January 2012, §§270-271, 277, 279, 285.
[1153] Silvis, Johannes, **"Extradition and Human Rights: Diplomatic Assurances and human rights in the extradition context"**, lecture presented on 20 May 2014 at the special session on extradition held during the 66th meeting of PC-OC, p 12, quoting in this regard Mariagiulia Giuffré, 'An Appraisal of Diplomatic Assurances One Year after Othman (Abu Qatada) v United Kingdom (2012)', in: International Human Rights Law Review 2 (2013) 266–293 (see footnote 13).
[1154] ECtHR, Case ***Al Nashiri v. Poland***, No. 28761/11, Judgment of 24 July 2014, §§ 566-568, and Case ***Husayn (Abu Zubaydah) v. Poland***, No. 7511/13, Judgement of 24 July 2014, §§556-558, 560.
[1155] ECtHR, Case ***Husayn (Abu Zubaydah) v. Poland***, No. 7511/13, Judgement of 24 July 2014, §559.

could not, in any event, be dispelled without a finding by a competent national court, and that the applicant had not adduced any evidence to prove the "flagrant" nature of the denial of justice he feared, as he was required to do[1156];

- Allegations that the persons to be extradited would receive an unfair trial due to the extensive publicity that the events of 11 September 2001 and the US Government's subsequent counter-terrorism efforts had received, their possible negative influence on a jury and a trial in New York, a city more clearly affected by the attack on the Twin Towers. The ECtHR took into account that the applicants were not indicted with offences directly related to those events and that there were clear safeguards in place to ensure that jurors in US federal criminal procedures were able to try cases impartially[1157];
- Allegations of unfair trial resulting from alleged prejudice arising from public designation of an applicant as a terrorist in a press release on the freezing of assets, as well as from plea bargaining and delays in seeking extradition[1158];
- Allegations of a British national that, if extradited to Australia for the purposes of prosecution, he would suffer a flagrant denial of justice on account of being unable to obtain legal aid in Australia and to secure the attendance of witnesses for his defence, which would infringe the right to equality of arms, the right to legal assistance and the right to obtain the attendance and examination of witnesses. The Court concluded that the applicant had failed to substantiate his allegations, because he had not demonstrated that the Australian authorities would not give due consideration to any application for legal aid he might choose to make, and also since Article 6 (3) (d) of the Convention does not guarantee the accused an unlimited right to secure the appearance of witnesses in court, and it falls upon domestic courts to decide whether it is appropriate to call a witness[1159];
- Use of "irrebuttable presumptions: the Court has found that, although they do restrict one's defence rights, it cannot be said that they lead to a breach of Article 6 of the Convention so fundamental as to amount to nullification, or destruction of the very essence, of one's right to a fair trial, thereby amounting to a "flagrant denial of justice". In this regard, the Court observed that presumptions of fact or of law operate in every legal system and that the Convention does not prohibit such presumptions in principle[1160];
- Allegations of risk of unfair trial in the event of extradition from the UK to the USA due to the likelihood of the use of evidence obtained from alleged co-conspirators who had been unlawfully "rendered" to the USA from Kenya. The Court found that no evidence had been adduced of any unlawful behaviour on the part of the US authorities. In addition, the District Judge was not satisfied on the evidence before him that one, or potentially more than one, of the applicant's co-conspirators might wish to and/or proceed to give evidence against him. Even if they did, there was, in the Court's view, no reason to doubt that the applicant would have the benefit of legal counsel and that it would be open to him to challenge the admissibility of any evidence relied upon by the Prosecution. That being the case, it was considered that the applicant had not satisfied the burden of proof required to demonstrate a real risk of a flagrant denial of justice in case of extradition to the USA[1161].

In the 2019 case **Kislov v. Russia**, the ECtHR was called upon to examine an extensive array of complaints of unfair trial in Belarus (eg. fabrication of charges, deprivation of the possibility to examine key prosecution witnesses and to hear defence witnesses, denial of presentation of expert reports, violation of the principle of equality of arms, lack of independence of judges), in a

[1156] ECtHR, Case ***Einhorn v. France***, *No. 71555/01, Decision of 16 October 2001*, §31, 33-§34 and **PC-OC (2011) 21 Rev17**, pp. 55-56.
[1157] ECtHR, Case ***Babar Ahmad and others v. United Kingdom (Decision)***, Nos. 24027/07, 11949/08 & 36742/08, Decision (Partial) of 6 July 2010, §§162-163.
[1158] ECtHR, Case ***Babar Ahmad and others v. United Kingdom (Decision)***, Nos. 24027/07, 11949/08 & 36742/08, Decision (Partial) of 6 July 2010, §§164-171.
[1159] ECtHR, Case ***King v. United Kingdom***, No. 9742/07, Decision of 26 January 2010, §§23-24.
[1160] ECtHR, Case ***Willcox and Hurford v. United Kingdom***, Nos. 43759/10 & 43771/12, Decision of 18 January 2013, §98.
[1161] ECtHR, Case ***Muhammed Asif Hafeez v. the United Kingdom***, No. 14198/20, Decision of 28 March 2023, §72.

case where the applicant had been convicted after a trial held partly in his presence and partly *in absentia*. Despite the seriousness of many of the allegations, the ECtHR concluded that, during one part of the trial, the applicant exercised his right under Belarusian law to be present at his trial and to defend himself; the continuation of the trial and subsequent conviction *in absentia* was not deemed to amount to a "flagrant denial of justice" since nothing suggested he had fled on account of any treatment incompatible with Article 3 or risk thereof, he had not substantiated that the Convention would require proceedings in Belarus to be taken up again in the present case, nor justified why his private counsel had stopped representing him and, therefore, exercising other procedural rights on the applicant's behalf and in his interests, despite his absence; or why the applicant did not seek restoration of the time limit for a review in the cassation appeal proceedings, since he could have made such an application by post. The examination and hearing of the said witnesses were not considered duly substantiated to the point of constituting a "flagrant denial of justice", nor did the unavailability of a retrial, the fact that judges were not elected, their dismissal by the President of Belarus and the alleged lack of impartiality of the trial judge. The Court noted that, in the determination of whether the proceedings were fair, it does not act as a court of fourth instance deciding on whether the evidence had been obtained unlawfully in terms of domestic law, its admissibility or on the guilt of an applicant. It did not consider appropriate to rule on whether the available evidence was sufficient for an applicant's conviction and thus to substitute its own assessment of the facts and the evidence for that of the domestic courts. Underlining that its only concern is to examine whether the proceedings have been conducted fairly, the Court stressed that the above considerations apply, *a fortiori*, in the extradition context. The ECtHE is consistent in its approach that, even though some proceedings may not be "without reproach" or may pose some doubts and present risks of possible shortcomings, very few would actually pass the stringent test of constituting a "flagrant denial of justice" and thus justify a denial of extradition on these grounds. [1162]

The **ECtHR** has developed a ***three-step test*** to determine whether irregularities in a judicial appointment process violate the essence of ***the right to a tribunal established by law***, a right it considers independent from, although closely connected to, the independence and impartiality of the judiciary. The Court examines, firstly, whether there has been a ***manifest breach*** of domestic law; secondly, whether such breach compromises a ***fundamental rule of the appointment procedure***, namely to ensure the ability of the judiciary to perform its duties free of undue interference and thereby to preserve the rule of law and the separation of powers; and thirdly, whether allegations were effectively ***reviewed and redressed by domestic courts*** in a Convention-compliant manner. [1163] Importantly, the ECtHR has found that a judicial appointment on the recommendation of a body that is not independent (the Polish National Council of the Judiciary) results in the appointed court or tribunal lacking the requirement of being established by law."[1164]

Assurances

In the context of the extradition of Russian nationals of Chechen ethnic origin from Slovakia to Russia for prosecution on suspicions of terrorism, the ECtHR has accepted "specific and renewed assurances" by the Office of the Prosecutor General of the Russian Federation, namely in light of the fact that it is him who, within the Russian system, supervises the activities of all prosecutors in the Russian Federation, including the argumentation of the case for the prosecution before the courts. [1165]

[1162] ECtHE, Case ***Kislov v. Russia***, No. 3598/10, Judgment of 9 July 2019, §§ 118-119, 123-124 and 126-129; Case ***Oleacha Cahuas v. Spain***, No. 24668/03, Judgment of 10 August 2006, §58, 61; Case ***Salem v. Portugal***, No. 26844/04, Decision of 9 May 2006, p. 8.
[1163] ECtHR, Case ***Guðmundur Andri Ástráðsson v. Iceland***, No. 26374/18, Judgment [GC] of 1 December 2020, §§244-253.
[1164] Mancano, Leandro, *Everything must remain the same for everything can change*, 02 August 2022, in Verfassungsblog on matters constitutional, online at https://verfassungsblog.de/everything-must-remain-the-same-for-everything-can-change/, consulted on 14 September 2023.
[1165] ECtHR, Case ***Ibragimov v. Slovakia***, No. 65916/10, Decision of 30 June 2015, §84.

It should be noted that, although Article 6 (1) is not applicable to extradition proceedings, it can be applicable, under its criminal head, to the proceedings concerning the transfer of sentenced persons in so far as they relate to the assurance given by the public prosecution during the criminal proceedings.[1166]

European Arrest Warrant

In the context of an EAW between EU member States, the ECtHR has held that in cases in which the State did not have any margin of manoeuvre in applying the EU law, the **principle of "equivalent protection"**, as developed in the Court's case-law[1167], applied. This is the case where the mutual recognition mechanisms require the court to ***presume*** that the observance of fundamental rights by another Member State has been sufficient. As envisaged by the EAW framework, the domestic court is thus deprived of discretion in the matter, leading to automatic application of the presumption of equivalence. However, any such ***presumption can be rebutted in the circumstances of a particular case***. Even taking into account, in the spirit of complementarity, the manner in which mutual recognition mechanisms operate and in particular the aim of effectiveness which they pursue, the Court must verify that the principle of mutual recognition is not applied automatically and mechanically to the detriment of fundamental rights[1168].

In this spirit, where the courts of a State which is both a Contracting Party to the ECHR and a member State of the EU are called upon to apply a mutual recognition mechanism established by EU law, such as the EAW, they must give full effect to that mechanism where the protection of Convention rights cannot be considered ***manifestly deficient***. However, if a serious and substantiated complaint is raised before them to the effect that the protection of a Convention right has been manifestly deficient and this situation cannot be remedied by EU law, they cannot refrain from examining that complaint on the sole ground that they are applying EU law. In such instances, they must apply the EU law in conformity with the Convention requirements[1169].[1170]

The CJEU has also underscored the importance of ensuring the effectiveness of mutual recognition in the context of intra-EU surrender, but equally stressed that the simplification of surrender should not nullify the rights of suspects and accused in criminal proceedings[1171]. Therefore, the majority of EU directives on procedural rights for suspects and accused persons as set out in the roadmap of 2009 (**EU Roadmap Directives**) include express provisions on the application of specific safeguards to persons subjected to EAW proceedings.

Furthermore, the CJEU has been asked to rule on whether, in cases when the European Commission finds that there is a clear risk of a serious breach, by one Member State, of the rule of law, one of the values on which the Union is based and which are common to the Member States (Article 2 of the TEU), and presents a reasoned proposal in this regard to the European Council, under Article 7 (1) of the TEU, the EC findings in themselves justify the refusal to execute an EAW for the purpose of prosecution or whether an assessment of the requested person's risk of a flagrant denial of justice was still necessary[1172]. In 2018, this question was posed by Irish authorities in view of changes introduced in the Polish legal system.

[1166] ECtHR, Case ***Smith v. Germany***, No. 27801/05, Judgment of 1 April 2010, §43.
[1167] ECtHR, Case ***Bosphorus Hava Yollari Turizm ve Ticaret Anonim Şirketi v. Ireland***, No. 45036/98, Judgment [GC] of 30 of June 2005, §§149-158; Case ***Avotiņš v. Latvia***, No. 17502/07, Judgement [GC] of 23 May 2016, §§115-116.
[1168] ECtHR, Case ***Pirozzi v. Belgium***, No. 21055/11, Judgment of 17 April 2018, §62.
[1169] ECtHR, Case ***Pirozzi v. Belgium***, No. 21055/11, Judgment of 17 April 2018, §§63-64.
[1170] ECtHR, **Guide on Article 6 of the European Convention on Human Rights - Right to a fair trial (criminal limb)**, CoE, Updated on 28 February 2023, pp. 108-110.
[1171] CJEU, **Joined Cases C-404/15 and C-659/15 PPU, *Aranyosi and Căldăraru***, Judgment of 5 April 2016.
[1172] See **PC-OC (2018)05**, "Introductory speech (…)", Mr Vincent Glerum, p. 24.

The CJEU concluded that this does not preclude the need of a case-by-case assessment in light of all the circumstances of each case, and introduced a **two-step test** that should be applied by the executing judicial authority, consisting of:

1. An assessment of whether there is a ***real risk*** of breach of the fundamental rights in the light of the ***general situation*** of the issuing Member State;
2. A ***specific and precise determination*** of whether there is a real risk that the requested person's fundamental right will be undermined, having regard to the circumstances of the case.

This Court ruled as follows (emphasis added):

> "where the executing judicial authority […] has material […] indicating that there is a real risk of breach of the fundamental right to a fair trial […] on account of ***systemic or generalised deficiencies*** so far as concerns the independence of the issuing Member State's judiciary, that authority ***must determine***, ***specifically and precisely***, whether, having regard to his ***personal situation***, as well as to the ***nature*** of the offence for which he is being prosecuted and the factual context that form the basis of the European arrest warrant, and in the light of the information provided by the issuing Member State […] there are ***substantial grounds for believing*** that that person will run such a risk if he is surrendered to that State."[1173]

Therefore, a judicial authority called upon to execute a EAW must refrain from giving effect to it if it considers that there is a real risk that the individual concerned would suffer a breach of his fundamental right to an independent tribunal and, therefore, of the essence of his fundamental right to a fair trial on account of deficiencies liable to affect the independence of the judiciary in the issuing Member State.

This case law was confirmed in 2020, with the CJEU emphasizing that, even when the executing judicial authority has evidence of systemic or generalised deficiencies concerning the independence of the judiciary in the issuing Member State, it ***cannot deny the status of 'issuing judicial authority' to the court which issued that arrest warrant*** and ***cannot presume*** that there are substantial grounds for believing that that person will, if he or she is surrendered to that Member State, run a real risk of breach of his or her fundamental right to a fair trial, guaranteed by the second paragraph of Article 47 of the **CFREU**, Such deficiencies, however serious, are not sufficient on their own to enable an executing judicial authority to consider that all the courts of that Member State fail to fall within the concept of an *issuing judicial authority*[1174]. The above mentioned two-step test must therefore be performed in all cases[1175].

The case law of the CJEU in this regard has been greatly detailed in 2023, with the Court establishing in clear terms that the executing judicial authority **may not refuse execution** of an EAW on grounds a) that the person would be at risk, upon surrender, of being ***tried in a court which lacks jurisdiction*** for that purpose unless:

- firstly, that judicial authority has objective, reliable, specific and properly updated information showing that there are ***systemic or generalised deficiencies*** in the operation of the judicial system of the issuing Member State or deficiencies affecting the ***judicial protection of an objectively identifiable group of persons to which the person concerned belongs***, in the light of the requirement for a tribunal established by law, which mean that the individuals concerned are generally ***deprived***, in that Member State, of an ***effective legal***

[1173] CJEU, Case ***Minister for Justice and Equality v LM (Deficiencies this in the system of justice)***, C-216/18 PPU, Judgement [GC] of 25 July 2018.
[1174] CJEU, **Joined Cases *C-354/20 PPU and C-412/20 PPU, Openbaar Ministerie (Indépendance de l'autorité judiciaire d'émission)***, Judgment of 17 December 2020.
[1175] CJEU, ***Joined Cases C-354/20 PPU (L), and C-412/20 PPU (P)***, Judgement [GC] of 17 December 2020, ruling.

remedy enabling a review of the jurisdiction of the criminal court called upon to try them;

- secondly, that it finds, in the particular circumstances of the case in question, there are ***substantial grounds*** for believing that the court which is likely to be called upon to hear the proceedings to which that person will be subject in the issuing Member State manifestly lacks jurisdiction for that purpose. The fact that the person concerned was able, before the courts of the issuing Member State, to rely on his or her fundamental rights in order to challenge the jurisdiction of the issuing judicial authority and the European arrest warrant issued for him or her is of no decisive importance in that regard; **and**
- that thirdly, it has first requested the issuing judicial authority to provide ***supplementary information***.

The fact that the person concerned was able, before the courts of the issuing Member State, to rely on his or her fundamental rights in order to **challenge the jurisdiction** of the issuing judicial authority and the EAW issued for him or her is of no decisive importance in that regard, neither is the existence of a report by the **Working Group on Arbitrary Detention** which does not directly relate to that person's situation – although the latter may, be taken into account in order to assess whether there are systemic or generalised deficiencies in the operation of the judicial system of that Member State or deficiencies affecting the judicial protection of an objectively identifiable group of persons to which that person belongs.[1176]

In two joined cases ruled upon in 2022, the CJEU stated in clear terms that the right to be judged by a tribunal ***established by law*** encompasses, by its very nature, the judicial appointment procedure. Thus, as a first step in the examination seeking to assess whether there is a real risk of breach of the fundamental right to a fair trial, connected in particular with a failure to comply with the requirement of a tribunal previously established by law, the executing judicial authority must carry out an overall assessment, on the basis of any factor that is objective, reliable, specific and properly updated concerning the operation of the judicial system in the issuing Member State and, in particular, the general context of judicial appointment in that Member State. The information contained in a reasoned proposal addressed by the European Commission to the Council on the basis of Article 7(1) TEU and the relevant case-law of this Court and of the ECtHR would constitute such factors. However, the fact that a body, such as the KRS (in Poland), which is involved in the judicial appointment procedure, is made up, for the most part, of members representing or chosen by the legislature or the executive, was not deemed sufficient to justify a refusal to surrender[1177].

As a second step in that examination, it is for the ***person*** in respect of whom an EAW has been issued to adduce ***specific evidence*** to suggest that systemic or generalised deficiencies in the judicial system had a tangible influence on the handling of his or her criminal case or are liable, in the event of surrender, to have such an influence. Such evidence can be supplemented, as appropriate, by information provided by the issuing judicial authority[1178].

Also, in relation to an EAW issued for the purposes of ***executing a custodial sentence or detention order***, the executing judicial authority must take account of the information relating to the composition of the panel of judges who heard the criminal case or any other circumstance relevant to the assessment of the independence and impartiality of that panel. It is not sufficient, in order to refuse surrender, that one or more judges who participated in those proceedings were appointed on application of a body such as the KRS. The person concerned must, in addition, provide information relating to, inter alia, the procedure for the appointment of the judges concerned and their possible secondment, which would lead to a finding that the composition of that panel of judges was such as to affect that person's fundamental right to a fair trial.

[1176] CJEU, Case **C-158/21, *Puig Gordi and Others***, Judgement [GC] of 31 January 2023.
[1177] CJEU, ***Joined Cases C-562/21 PPU (X) and C-563/21 PPU (Y)***, Judgement [GC] of 22 February 2022 and **Press Release n.º 32/22**, Luxembourg, 22 February 2022.
[1178] CJEU, ***Joined Cases C-562/21 PPU (X) and C-563/21 PPU (Y)***, Judgement [GC] of 22 February 2022 and **Press Release n.º 32/22**, Luxembourg, 22 February 2022.

Furthermore, account must be taken of the fact that it may be possible, for the person concerned, to request the recusal of the members of the panel of judges for breach of his or her fundamental right to a fair trial, the fact that such person may exercise that option as well as the outcome of the request for recusal.[1179] In order to refuse execution of the EAW, the executing judicial authority must be satisfied that there has been a breach of that person's fundamental right to a fair trial before an independent and impartial tribunal previously established by law,[1180]

Where an EAW has been issued for the purposes of ***conducting a criminal prosecution***, the executing judicial authority must take account of the information relating to the personal situation of the person concerned, the nature of the offence for which that person is prosecuted, the factual context surrounding that EAW or any other circumstance relevant to the assessment of the independence and impartiality of the panel of judges likely to be called upon to hear the proceedings in respect of that person. Such information may also relate to statements made by public authorities which could have an influence on the specific case. By contrast, the fact that the identity of the judges who will eventually be called upon to hear the case of the person concerned is not known at the time of the decision on surrender or, when their identity is known, that those judges were appointed on application of a body such as the KRS, was not deemed sufficient to refuse surrender.[1181] In order to refuse executing the EAW, the executing judicial authority must be convinced that, if surrendered, the sought person runs a real risk of breach of the right to a fair trial before an independent and impartial tribunal previously established by law,[1182]

There has been criticism concerning the maintenance of this presumption of mutual trust and ensuing necessity to carry out the two-step test ("systemic and individual deficiencies") in situations considered as serious as that of Poland. To this, the CJEU has responded with the following arguments: that allowing refusal of execution on grounds of systemic deficiencies would amount to a *de facto* suspension of the EAW, while the preamble of the **EAW FD** empowers other EU institutions to do so; that accepting that judges or courts of a Member State can no longer be considered independent in general would deprive those courts and judges of the possibility to make use of the preliminary ruling mechanism; and that it would create a high risk of impunity and undermine victims' rights[1183].

Despite the apparent ***disparities in the jurisprudence of the CJEU and the ECtHR*** – which, as stated above, has found that a judicial appointment on the recommendation of a body that is not independent (the Polish National Council of the Judiciary) results in the appointed court or tribunal lacking the requirement of being established by law – it should be borne in mind, inter alia, that the ECtHR, in its rulings, examined the specific facts of each case, while the CJEU was establishing a broader principle applicable to the constitutional systems of all Member States, and that nothing prevents executing authorities from reaching the same conclusion, should the circumstances warrant it. Also, although the CJEU further requires that the executing court performs the second step, with the person concerned bearing the burden of proof, it clarified the standard of proof and widened the range of information that can be relied upon by the person or the executing authority. Moreover, it stated that lack of sincere cooperation by the issuing authority can be considered as a relevant factor for assessing the real risk – for example, if the issuing authority does not provide the information requested by the executing State, which has happened in other cases. In doing so, the CJEU has explicitly and definitely dispelled doubts surrounding the previous wording of the test: to refuse execution, there is no need to show that the trial court holds a bias against the specific case or the person concerned. In relation to

[1179] CJEU, ***Joined Cases C-562/21 PPU (X) and C-563/21 PPU (Y)***, Judgement [GC] of 22 February 2022 and **Press Release n.º 32/22**, Luxembourg, 22 February 2022.
[1180] CJEU, Case **C-480/21, *WO JL (Minister for Justice and Equality)***. Order of 12 July 2022.
[1181] CJEU, ***Joined Cases C-562/21 PPU (X) and C-563/21 PPU (Y)***, Judgement [GC] of 22 February 2022 and **Press Release n.º 32/22**, Luxembourg, 22 February 2022.
[1182] CJEU, Case **C-480/21, *WO JL (Minister for Justice and Equality)***. Order of 12 July 2022.
[1183] Mancano, Leandro, *Everything must remain the same for everything can change*, 02 August 2022, in Verfassungsblog on matters constitutional, online at https://verfassungsblog.de/everything-must-remain-the-same-for-everything-can-change/, consulted on 14 September 2023.

remedies, the CJEU found that any evidence available to the executing judicial authority enabling it to conclude that the recusal procedure or the legal remedies are ineffective, will be relevant. It has been argued that challenges to execution should extend to possible violations of Article 47(1) of the **CFREU**, which enshrines the right to an effective remedy before a tribunal. This, jointly with the broadened set of evidence that can be relied on and the clearer standard of proof, should considerably strengthen the position of defendants and assist executing authorities in deciding not to surrender while acting in compliance with EU law.[1184]

The executing authority cannot refuse to execute the EAW on the ground that the requested person ***was not heard*** in the issuing Member State before the arrest warrant was issued[1185].

3.7 Flagrant denial of the right to liberty

In its 2003 decision on the admissibility on case **Tomic v. the United Kingdom**, the Court expressed doubts as to whether an issue could be raised by the prospect of arbitrary detention contrary to Article 5 in an expulsion case[1186]. However, in case **Babar Ahmad and Others v. the United Kingdom** (2012), the applicants complained that if they were extradited to the USA and either designated as enemy combatants or subjected to rendition, there would be a real of risk of violations of Articles 3, 5 and 6 of the Convention. The USA Government had given assurances that the applicants would not be so designated and would be tried before federal courts. Before both the domestic courts and the ECtHR, the applicants' complaints were examined on the premise that they met the criteria for designation as enemy combatants and that, if such a designation were made, there would be a real risk of a violation of Articles 3, 5 and 6 of the Convention[1187].

Also, when examining a complaint under Article 6 in case **Al-Moayad v. Germany** (2007), it found that: *[a] flagrant denial of a fair trial, and thereby a denial of justice, undoubtedly occurs where a person is detained because of suspicions that he has been planning or has committed a criminal offence without having any access to an independent and impartial tribunal to have the legality of his or her detention reviewed and, if the suspicions do not prove to be well-founded, to obtain release.*[1188]

Given that this observation was made in the context of the applicant's complaint that he would be detained without trial at Guantánamo Bay, the Court considered that these observations must apply with even greater force to Article 5 of the Convention. It also considered that it would be illogical if an applicant who faced imprisonment in a receiving State after a flagrantly unfair trial could rely on Article 6 to prevent his expulsion to that State but an applicant who faced imprisonment without any trial whatsoever could not rely on Article 5 to prevent his expulsion. The Court equally recalled that there may be a situation where an applicant has already been convicted in the receiving State after a flagrantly unfair trial and is to be extradited to that State to serve a sentence of imprisonment. If there were no possibility of those criminal proceedings being reopened on his return, he could not rely on Article 6 because he would not be at risk of a further flagrant denial of justice. It would thus be unreasonable if that applicant could not then rely on Article 5 to prevent his extradition.

Therefore, in case **Othman (Abu Qatada) v. United Kingdom** (2012) – in which the applicant alleged that, if deported, he would be at real risk of a flagrant denial of his right to liberty as guaranteed by Article 5 of the Convention due to the possibility under Jordanian law of

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[1184] Mancano, Leandro, *Everything must remain the same (…).*and CJEU, ***Case C-480/21 (W O and J L)***, Order of the Court of 12 July 2022.
[1185] CJEU, ***Case C-396/11, Ciprian Vasile Radu***, Judgement [GC] of 29 January 2013.

[1186] ECtHR, Case ***Tomic v. the United Kingdom***, No. 17837/03, Decision of 14 October 2003.
[1187] ECtHR, Case ***Babar Ahmad and Others, v. United Kingdom (Judgment)***, Nos. 24027/07, 11949/08, 36742/08, 66911/09 & 67354/09, Judgment of 10 April 2012, §§100-116.
[1188] ECtHR, Case ***Al-Moayad v. Germany***, No. 35865/03, Decision of 20 February 2007, §101.

incommunicado detention for up to 50 days and would be denied legal assistance during any such detention; and that, if convicted at his re-trial, any sentence of imprisonment would be a flagrant breach of Article 5 of the Convention as it would have been imposed as a result of a flagrant breach of Article 6 – the ECtHR considered that ***it is possible for Article 5 of the Convention to apply in an expulsion case***.

Hence, a Contracting State would be in violation of Article 5 of the Convention if it removed an applicant to a State where he or she was at real risk of a flagrant breach of that Article. However, as with Article 6 of the Convention, a high threshold must apply. A flagrant breach of Article 5 of the Convention would occur only if, for example, the receiving State arbitrarily detained an applicant for many years without any intention of bringing him or her to trial or if an applicant would be at risk of being imprisoned for a substantial period in the receiving State, having previously been convicted after a flagrantly unfair trial.

In case of Abu Qatada, the Court found that there would be no real risk of a flagrant breach of Article 5 of the Convention in respect of the applicant's pre-trial detention in Jordan, as Jordan clearly intended to bring the applicant to trial and had to do so within fifty days' of his detention. Fifty days' detention falls far short of the length of detention required for a flagrant breach of Article 5 of the Convention and, consequently, there would be no violation of this Article if the applicant were deported to Jordan.[1189]

3.8 Right to respect for private and family life

Alleged violations of the right to respect for private and family life in the context of extraditions are examined by the ECtHR in light of the provisions of Article 8 of the **ECHR**, which reads:

> *1. Everyone has the right to respect for his private and family life, his home and his correspondence.*
>
> *2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.*

Mindful of the importance of extradition arrangements between States in the fight against crime, the Court considers that it will only be in ***exceptional circumstances*** that an applicant´s private or family life in a Contracting State will outweigh the legitimate aim pursued by his or her extradition, especially in the case of serious offences committed in the requesting State[1190] or in the case of crimes with an international or cross-border dimension[1191].

The Court's case law has established five criteria, in order to examine the compatibility of State action with the requirements of Article 8:

1. ***Existence of family life***: the applicant must establish that he or she in fact has family life in the State concerned. According to the Court, the family link between the parent and his or her child always exists[1192], irrespective of the age of the children and of whether they live together or not[1193]. However, the Court held that there will be no

[1189] ECtHR, Case ***Othman (Abu Qatada) v. United Kingdom***, No. 8139/09, Judgment of 17 January 2012, §232-233, 235.
[1190] EComHR, Case ***Launder v. The United Kingdom***, No. 27279/95, Decision of 8 December 1997.
[1191] ECtHR, Case ***King v. United Kingdom***, No. 9742/07, Decision of 26 January 2010, §29.
[1192] ECtHR, Case ***Berrehab v. the Netherlands***, No. 10730/84, Judgement of 21 June 1988, §21; Case ***Keegan v. Ireland***, No. 16969/90, Judgement of 26 May 1994, §50.
[1193] ECtHR, Case ***Moustaquim v. Belgium***, Judgement of 18 February 1991, §36; and Case ***El Boujaidi v. France***, No. 25613/94, Judgement of 26 March 1992, §§ 33-42.

family life between parents and adult children or between adult siblings unless they can demonstrate additional elements of dependence.[1194]

2. ***Interference with the right to private and family life***; expulsion measures have been considered by the Court as interference with the right.[1195] The same would apply to extradition or any kind of deportation that would cause family ties to rupture[1196].
3. ***Compliance with the rule of law***: is the interference in accordance with the law? In any case, national law has to be sufficiently accessible and precise in order to avoid arbitrariness.[1197]
4. ***Pursuance of one of the aims listed in Article 8 (2):*** national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.
5. Measure ***necessary in a democratic society.*** To assess the "necessity" (which is not the same as mere "convenience") the Court applies a ***proportionality test*** based on the examination of the following **criteria**:
    - nature and seriousness of the offence committed by the applicant;
    - length of the applicant's stay in the country from which he or she is to be expelled;
    - time elapsed since the offence was committed and
    - applicant's conduct during that period;
    - nationalities of the various persons concerned;
    - applicant's family situation, such as the length of marriage and other factors expressing the effectiveness of a couple's family life;
    - knowledge of the offence by the spouse at the time when he or she entered into the family relationship;
    - existence of children of the marriage, and if so, their age;
    - seriousness of the difficulties which the spouse is likely to encounter in the country to which the applicant is to be expelled;
    - best interests and well-being of the children, in particular the seriousness of the difficulties which any children of the applicant are likely to encounter in the country to which the applicant is to be expelled; and
    - solidity of social, cultural and family ties with the host country and with the country of destination[1198].

It has been stated that the "proportionality test of Art. 8(2) **ECHR** leaves enough room for balancing the interests of society in preventing the risk of impunity and the individual's right to family life" and that "only 'in exceptional circumstances' will the private or family life of the requested person outweigh the legitimate aim pursued by his extradition"[1199].

Furthermore, the Committee of Ministers recommended to States Parties to the **ECE**, when deciding on extradition requests, to bear in mind the hardship that might be caused by the extradition procedure to the person concerned and his or her family, in cases where the procedure is manifestly disproportionate to the seriousness of the offence and when the penalty likely to be passed will not significantly exceed the minimum period of one-year detention or will not involve

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[1194] ECtHR, ***Said Abdul Salam Mubarak v. Denmark***, No. 74411/16, Decision of 22 January 2019, §75; Case ***Balogun v. United Kingdom***, No. 60286/09, Judgment of 10 April 2012, §43.
[1195] ECtHR, Case ***Alleleh and Others v. Norway***, No. 569/20, Judgment of 23 June 2022, §89; Case ***Said Abdul Salam Mubarak v. Denmark***, No. 74411/16, Decision of 22 January 2019, §73.
[1196] ECtHR, Case ***Vlas and Others v. Romania***, No. 30541/12, Decision of 6 January 2015, §§49; Case ***Ketchum v. Romania***, No. 15594/11, Decision of 11 June 2013, §33.
[1197] ECtHR, Case ***Amuur v. France***, No. 19776/92, Judgement of 25 June 1996, §50; Case ***Dougoz v. Greece***, Decision of 6 March 2001, No. 40907/98, §55.
[1198] ECtHR, Case ***A. H. Khan v. United Kingdom***, No. 6222/10, Judgment of 20 December 2011, §33; Case ***Üner v. The Netherlands***, No. 46410/99, Judgment [GC] of 18 October 2006, §57-58.
[1199] See, for instance, **PC-OC (2018)05**, "Introductory speech (…)", Mr Vincent Glerum, p. 19.

deprivation of liberty. It seems that this recommendation was influenced by the right to respect for family life.[1200]

There is a relatively small number of cases in which a possible violation of Article 8 was alleged ***in the context of extradition***.

For instance, in case **Aronica v. Germany** (2002), relating to an extradition from Germany to Italy for the purposes of enforcement of a sentence, in which the applicant alleged that such extradition would lead to separation his family with which he had lived in Germany for seven years, the Court, despite recognizing that his removal would involve considerable hardship, considered, taking into account the margin of appreciation left to the Contracting States in such circumstances, that the decision to extradite the applicant was not disproportionate to the legitimate aims pursued. The Court underlined that such interference in the applicant's family life complied with the requirements of the second paragraph of Article 8, namely because it was a measure taken "in accordance with the law", pursued the aims of the prevention of disorder and crime, and was "necessary in a democratic society" to achieve those aims. The complaint was thus declared inadmissible on these grounds[1201].

Also in case **Peñafiel Salgado v. Spain** (2002), relating to an extradition from Spain to Ecuador (in which the applicant had asked for asylum when extradition was requested, subsequently fled and was arrested in Lebanon and sent back to Spain while in transit in France under the Dublin Convention), the Court noted that the applicant had arrived in Spain in August 1998 at the age of thirty-eight. Since 1997 he had lived in Ecuador with his companion, a Spanish national whom he married on 18 January 2001, while Lebanon had already granted the applicant's extradition to Ecuador. The extradition was later interrupted in Spain, where he was domiciled shortly before the extradition decision. In the light of the foregoing, the Court considered that only the applicant's situation of temporary imprisonment would make it more difficult, in practice, the development of family life in Ecuador, the country of which he was a national, with his wife, who was domiciled there, and whose language both of them spoke.[1202]

In case **King v. United Kingdom** (2010), the Court dealt with the extradition of a British national from the UK to Australia for the purposes of prosecution. The applicant had a wife, two young children and a mother in the UK, whose ill-health would not allow her to travel to Australia. This, in the Court's view, were not exceptional circumstances which would militate in favour of the applicant's non-extradition. Although the long distance between the UK and Australia would mean the family would enjoy only limited contact if the applicant were extradited, convicted and sentenced to a term of imprisonment there, the Court stated it could not overlook the very serious charges brought upon him (alleged membership of an international gang engaged in drug trafficking offences). Given these charges, and the interest of the UK in honouring its obligations towards Australia, the Court considered that such extradition was not disproportionate to the legitimate aim it served[1203].

In case **Shakurov v. Russia** (2012), the Court examined an extradition from Russia to Uzbekistan for the purposes of prosecution for a military offence. The applicant alleged, inter alia, that execution of the extradition order would entail "significant and irreparable" consequences to his relationship with his wife and children, especially his 16-year old daughter who required health care in Russia. The Court considered that it had not been substantiated that the applicant would have any significant difficulty in maintaining his family life after extradition. The reviewing courts took into consideration the medical care provided to the applicant's daughter (who had reached majority once the ECtHR issued its judgement), and concluded that such treatment could well be pursued without him. So, in the Court's view, it could not be said that, in this case, the best interests and well-being of the children should have weighed heavily against the extradition. The

[1200] Paragraph I, **Recommendation No. R (80) 7** concerning the practical application of the European Convention on Extradition, p. 1.
[1201] ECtHR, Case ***Aronica v. Germany***, No. 72032/01, Decision of 18 April 2002, §2.
[1202] ECtHR, Case ***Peñafiel Salgado v. Spain***, No. 65964/01, Decision of 16 April 2002, §3.
[1203] ECtHR, Case ***King v. United Kingdom***, No. 9742/07, Decision of 26 January 2010, §29.

case was not deemed to disclose any "exceptional circumstances" or that extradition would entail exceptionally grave consequences for the applicant's family life, and the extradition decision was considered proportionate to the legitimate aim pursued.[1204]

Case **Ketchum v. Romania** (2013) related to the extradition of an American citizen, who had been granted a residence permit in Romania valid for five years, married a Romanian citizen and started a business in Romania, from Romania to the USA. Without contesting the consequences of the applicant's removal from the Romanian territory where he had established a private and family life for a number of years, the Court considered that the Romanian authorities had not exceeded the margin of appreciation provided by Article 8 of the Convention and the Court's own case law. Moreover, the Court did not find in this case any exceptional circumstances which would require the applicant's right to respect for his private and family life to prevail over the legitimate aim pursued by his extradition.[1205]

In case **Vlas and Others v. Romania** (2015), the Court examined a possible violation of Article 8 of the Convention, in the context of the extradition of a pregnant Moldovan citizen, holder of a special residence permit by reason of her marriage to a Romanian citizen with whom she had a son, from Romania to Moldova for the purposes of prosecution for participation in organizing a pyramid scheme. The applicant complained, inter alia, that her extradition amounted to disproportionate interference with her own, her husband's and their older child's right to respect for family life, and that they did not have an effective remedy in order to assert this right. The Court considered that, despite the obvious consequences of the decision to the applicant's family life, the Romanian authorities did not exceed the margin of appreciation provided for by Article 8 and the Court's own case law. The national courts had examined these arguments and the Court found no reason to challenge their findings. As regards the applicant's pregnancy, it also found no exceptional circumstances in which the applicants' right to respect for family life would prevail over the legitimate aim pursued by her extradition. The Court considered that it resulted clearly from the information before it that the first applicant gave birth to a second child in Moldova without encountering any difficulties and nothing in the file supported the conclusion that the second and third applicants could not have continued their family life in Moldova. Furthermore, the interference with their family life was short-lived, since the first applicant returned to Romania. Accordingly, and taking into account the best interests of the third applicant, who was three years old at the time of the first applicant's extradition, that measure did not appear to the Court disproportionate to the legitimate aim pursued. Furthermore, as the first applicant raised this complaint during the extradition proceedings against her, she was able to present to the Court of Appeal and the High Court all its arguments based on her family situation and her second pregnancy. The national courts replied to its arguments in a reasoned and convincing manner. In particular, the Court notes that the High Court found, on the basis of the medical documents provided by the applicant, that her extradition could not have serious consequences on her health or pregnancy and that her family situation in Romania was established only after the arrest warrant was issued against her. Therefore, the applicants have had an effective remedy in order to assert their right to respect for their family life[1206].

More often, the Court has been called upon to examine alleged violations of Article 8 of the Convention in cases involving the ***expulsion or deportation orders against aliens,*** frequently as it concerns individuals who had come to the expelling State in their childhood and engaged in various criminal activities. The restrictive view of the Court on the application of Article 8 in these situations has often led it to conclude against the existence of any violation in such contexts. For their relevance to extradition-related cases, are some examples and respective reasoning:

Case **Cruz Varas v. Sweden** (1991): in this case, the Court was not convinced that the first applicant had substantiated the risk of torture or ill-treatment in the case of expulsion from Sweden

[1204] ECtHR, Case ***Shakurov v. Russia***, No. 55822/10, Judgment of 5 June 2012, §§196, 200-202.
[1205] ECtHR, Case ***Ketchum v. Romania***, No. 15594/11, Decision of 11 June 2013, §34.
[1206] ECtHR, Case ***Vlas and Others v. Romania***, No. 30541/12, Decision of 6 January 2015, §§46-50, 55-56.

to Chile, nor that there were obstacles to establishing family life by all the applicants in their home country, and therefore found no violation of Article 8[1207].

Case **Aoulmi v. France** (2006): it concerned an expulsion from France to Algeria following a conviction for criminal offences in France, in which the applicant alleged that his whole family (daughter, parents, siblings, aunts and uncles) lives in France, and that he had no family ties to Algeria where he never returned in 39 years since he left the country, aged four. The Court considered that, despite the intensity of the applicant's personal ties with France, the ban from French territory, in light of his conduct and the seriousness of the charges, was ultimately necessary for the defence of order and the prevention of crime.[1208]

The same year, in case **Üner v. the Netherlands**, the Court equally found that a fair balance had been struck in this case and that the applicant's expulsion from the Netherlands to Turkey was proportionate to the aims pursued and therefore necessary in a democratic society. To reach this conclusion, the Court recognized that the applicant had strong ties with the Netherlands, a country where he had moved at age 12, together his mother and brothers, to join his father, having lived there for a considerable length of time and holding a permanent residence status. Moreover, he subsequently went on to found a family there. However, regard was taken of the fact that he had lived with his partner and first-born son for a relatively short period only, and had never lived together with his second son; that it could not be said that he had no social or cultural (including linguistic) ties with Turkish society; that the offences committed (manslaughter and assault) were of a very serious nature; that he had previous convictions and could be said to have displayed criminal propensities; that his children were still very young – six and one and a half years old respectively – and thus of an adaptable age, had Dutch nationality and – if they followed their father to Turkey – would be able to return to the Netherlands regularly to visit other family members; that the exclusion order was limited to ten years; and that the authorities had addressed all relevant considerations militating for or against the denial of residence and use of an exclusion order[1209].

Case ***Plepi v. Albania and Greece*** (2010) concerned a denial of transfer of three Albanian nationals (a man, his wife and the wife's sister) from Greece to Albania on the ground that the sentences commuted by the Albanian court were inferior to those imposed by the Greek court and thus incompatible with the gravity of their offence and with the short time they had spent in Greek prisons. The couple's minor children and family lived in Albania. The Court recalled that the **Convention on the Transfer of Sentenced Persons** does not grant prisoners the right to choose the place of detention and that separation and distance from family are an inevitable consequence of detention following the exercise by the Greek State of its prerogatives in the area of criminal sanctions. Thus, it considered the complaint, on these grounds, incompatible *ratione materiae* with Article 35 (3) of the Convention.[1210]

A similar conclusion was reached in case **Zhernin v. Poland** (2018), relating to the denial of transfer of an Ukrainian national from Poland to Ukraine. Regarding Article 8 of the Convention, the ECtHR recalled that placing a person who has been convicted in a particular prison may potentially raise an issue under Article 8 of the Convention only if the effect on the applicant's private and family life goes beyond the "normal" hardships and restrictions inherent to the very concept of imprisonment. Underlining that the right to respect for family life imposes upon States a positive obligation to assist prisoners in maintaining effective contact with their close family members, the Court noted that the applicant did not claim that the Polish authorities had been limiting his right to family visits and there was no evidence of a single refusal. The Court recognized that travel between Poland and Ukraine clearly entailed costs and effort on the part of the applicant's family, but there was no evidence that these had been excessive or prohibitive, and there was no claim that the necessary Schengen area visa had ever been refused to his

[1207] ECtHR, Case ***Cruz Varas and others v. Sweden***, No. 15576/89, Judgment of 20 March 1991, §88.
[1208] ECtHR, Case ***Aoulmi v. France***, No. 50278/99, Judgment of 17 January 2006, §90.
[1209] ECtHR, Case **Üner v. the Netherlands**, No. 46410/99, Judgment [GC] of 18 October 2006, §§62-67.
[1210] ECtHR, Case ***Plepi v. Albania and Greece***, Nos. 11546/05, 33285/05 & 33288/05, Decision of 4 May 2010, pp.8-9; for a similar case, see ***Serce v. Romania***, No. 35049/08, Judgment of 30 June 2015.

family. Therefore, the ECtHR concluded that the decision to deny transfer was within the large margin of appreciation granted to the authorities in such matters, and in the light of the reasons provided by them for the refusals to transfer the applicant to Ukraine, did not consider it incompatible with Article 8 of the Convention.[1211]

Case **A. H. Khan v. United Kingdom** (2011): it concerned the expulsion of a Pakistani national from the UK to Pakistan following his conviction in the UK and refusal of asylum. The applicant's mother (who he alleged suffered from poor health) and siblings were naturalised British citizens, and he claimed to have a relationship with a British citizen, children in the UK and no ties to Pakistan. The Court considered that the applicant had a long history of offences, that the offence which led to his deportation was of a very considerable seriousness, and that he had relapsed into driving offences very soon after his release from prison, which showed that his imprisonment did not have the desired rehabilitative effect; domestic authorities were therefore entitled to conclude that he continued to present a risk to the public. Furthermore, the Court considered that the applicant had a limited relationship with his children and their mothers, having last seen the former ten years before his deportation; there were also doubts as to whether the applicant fulfilled a positive role in his children's lives. Ties to the rest of the family had also been constrained due to his convictions and terms of imprisonment. On the other hand, the applicant had returned to Pakistan for visits since his arrival in the UK and married there. Whilst he had been mainly educated in the UK and had worked, he did not appear to have established a lengthy or consistent employment history, nor achieved a significant level of integration into British society. His deportation was therefore considered proportionate to the legitimate aim of preventing crime.[1212]

The stringent view of the Court on these cases is manifest in its judgement **Samsonnikov v. Estonia** (2012), relating to an expulsion from Estonia to Russia of a HIV-positive person, previously deported from Sweden to Estonia, who had been born and raised in Estonia and had no ties in Russia. Although the applicant argued that he had close family ties with his father, who lived in Estonia, and that they were dependent upon one another owing to his illness and his father's advanced age, the Court declared it was not convinced that these relations extended beyond usual ties between grownup family members.[1213]

Case **Bajsultanov v. Austria** (2012): this case concerned the expulsion from Austria to Russia of a Chechen who had been granted asylum status in Austria, a status that had been subsequently lifted. The Court considered that the applicant's wife and children, recognised refugees in Austria, with asylum status awarded to them in separate decisions, had at the relevant time been considered at risk of persecution in Chechnya due their association with the first applicant, and had never claimed a risk of ill-treatment because of their own conduct or role in any of the armed conflicts. Since the first applicant was not considered, at the time of the Court's examination of this case, to be at a real risk of ill-treatment if returned to Chechnya, the Court did not find that his wife and children faced any real risk either if they accompanied him back, and therefore found no violation of Article 8[1214].

Case **Balogun v. United Kingdom** (2012): in this case, relating to the expulsion from the UK to Nigeria of a person who lived in the UK since the age of 3, following his conviction for a drug-related offence in the UK, the Court elaborated on the distinction between "private life" and "family life", considering that the applicant's relationships with his girlfriend of seven years, his half-brother with whom he was living, and an aunt of whom he was presumably estranged since the age of 15, did not constitute "family life". However, the Court also recalled that, as Article 8 protects the right to establish and develop relationships with other human beings and the outside world and can sometimes embrace aspects of an individual's social identity, it must be accepted that the totality of social ties between settled migrants such as the applicant and the community in which they are living constitutes part of the concept of "private life" within the meaning of Article

[1211] ECtHR, Case ***Zhernin v. Poland***, No. 2669/13, Decision of 25 September 2018, §§29-32.
[1212] ECtHR, Case ***A. H. Khan v. United Kingdom***, No. 6222/10, Judgment of 20 December 2011, §§33, 36, 38, 40- 41.
[1213] ECtHR, Case ***Samsonnikov v. Estonia***, No. 52178/10, Judgment of 3 July 2012, §87.
[1214] ECtHR, Case ***Bajsultanov v. Austria***, No. 54131/10, Judgment of 12 June 2012, §89.

8. Consequently, it will be a rare case where a settled migrant will be unable to demonstrate that his or her deportation would interfere with his or her private life as guaranteed by Article 8. It will depend on the circumstances of the particular case whether it is appropriate for the Court to focus on the "family life" rather than the "private life" aspect. After considering several of the criteria previously set to assess the proportionality of the measure of deportation (see above), the ECtHR concluded that, although very strong reasons are required to justify the deportation of settled migrants and that, in this particular case, it was not in doubt that the deportation to Nigeria would have a very serious impact on the applicant's private life, given his length of residence in the UK and his limited ties to his country of origin, the Court paid specific regard to the applicant's history of repeated, drugs-related offending and the fact that the majority of his offending was committed when he was an adult, and also to the careful and appropriate consideration that has been given to the applicant's case by the domestic authorities. Therefore, it concluded that the interference with the applicant's private life caused by his deportation would not be disproportionate in all the circumstances of the case, and therefore found no violation of Article 8 of the Convention[1215].

Case **Antwi and others v. Norway** (2012): no violation was either found in this case, concerning the expulsion, with 5-year re-entry ban, of a Ghanaian national, with a naturalized Norwegian wife and daughter. The Court considered that the first applicant's residence in Norway had never been lawful and that he could have no legitimate expectation of remaining in the country, that he had committed grave violations of the Immigration Act (use of a false identity and making false statements about his nationality), that he had grown up in Ghana, where his family lived, and arrived in Norway at an adult age. It was considered that there were no particular obstacles preventing his wife from accompanying him to Ghana and that, while their daughter had limited ties to this country, since this was the country of origin of both parents, who had visited the country three times with their daughter, there were no insurmountable obstacles in the way of the applicants settling together in Ghana or, at the least, to maintaining regular contacts. Therefore, the family factors in question could not, in the Court's view, outweigh the public interest in sanctioning the first applicant's aggravated offences against the immigration rules, and make the expulsion disproportionate.[1216]

The decision on case **K2 v. United Kingdom** (2017) concerned the exclusion of a naturalized British citizen with dual British and Sudanese citizenship from the territory of the United Kingdom and stripping him of his British citizenship, which the applicant alleged breached his right to respect for his family and private life and amounted to an attack on his reputation in breach of Article 8 of the Convention and made it impossible for him to personally participate in the appeal proceedings against these decisions. The Court found no violation of the Convention in this case, since the applicant was not rendered stateless by the decision to deprive him of his British citizenship, and in fact had since obtained, a Sudanese passport, while his wife and child were no longer living in the UK and could freely visit Sudan and even live there if they wished, and the applicant's natal family could – and did – visit him "reasonably often. Furthermore, the Court it did not accept that an out-of-country appeal necessarily renders a decision to revoke citizenship "arbitrary" and the applicant was able to instruct his lawyers and have decision to exclude him from the UK judicially reviewed in a comprehensive and thorough manner[1217].

Case **Said Abdul Salam Mubarak v. Denmark** (2019) concerned the expulsion of a Moroccan national from Denmark to Morocco following his conviction in Denmark for terrorism-related criminal offences and the withdrawal of his Danish citizenship, which he had acquired in 1988, after entering this country in 1984, when he was 24 years old. The applicant's wife (a Danish national of Moroccan descent) and daughter born in 2015, as well as his four adult children from previous relationships, lived in Denmark. The applicant alleged that the order to withdraw his Danish citizenship and to expel him from Denmark was in violation of Article 8 of the Convention. The Court took into account the following factors to conclude there had been no violation of this

[1215] ECtHR, Case ***Balogun v. United Kingdom***, No. 60286/09, Judgment of 10 April 2012, §§43-53.
[1216] ECtHR, Case ***Antwi and others v. Norway***, No. 26940/10, Judgment, 14 February 2012, §§89, 90, 92-94, 98.
[1217] ECtHR, Case ***K2 v. the United Kingdom***, N.º 42387/13, Decision of 7 February 2017, §§ 52, 57- 58, 60, 62-63.

Article: the gravity of the charges brought against the applicant; that he had had the possibility to contest the prosecuting authorities' request to strip him of his Danish citizenship before the domestic courts at three levels of jurisdiction, and he had not alleged any procedural shortcomings in this respect; that the authorities acted diligently and swiftly, with the decision on deprivation of citizenship becoming final in 8 June 2016 in accordance with Supreme Court ruling, after terrorism charges brought against him in February 2014; that the situation complained of came about as a result of the applicant's continued criminal behaviour, in that he had been convicted for similar crimes in 2007 – thus, any consequences complained of were considered, to a large extent, a result of the applicant's own choices and actions; that the applicant was not rendered stateless as a result of such decision; that the domestic courts had carefully assessed the consequences for the applicant of a revocation of his Danish citizenship, taking into account that he had been born and raised in Morocco, and went to Denmark when he was 24; that he had lived in Denmark for 32 years; that he spoke Arabic and some Danish; that he had not achieved a permanent attachment to the Danish labour market and had received social benefits since 1994; that he had four adult children; that, in 2013, under Islamic law, he had married a Danish citizen of Moroccan descent, while remaining married under Danish law to another woman, whom he divorced only in 2015; that he and the mother of this child had never lived together and that their daughter was conceived while the applicant was detained, and she was born in October 2015, after the City Court's judgment of 4 December 2014, and the High Court's judgment of 1 July 2015. The Court underlined that, therefore, both the applicant and his new wife knew that their family life in Denmark would from the outset be precarious, and they could not legitimately expect the applicant's deportation order to be revoked on the basis of a *fait accompli* due to their having a child together. In any event, the Court noted that the applicant's wife was of Moroccan origin, and that she had not before the Danish authorities submitted any reason why she and the daughter could not follow the applicant to Morocco.[1218]

Case **Alleleh and Others v. Norway** (2022): in this case, relating to the expulsion of a Djiboutian national from Norway to Djibouti with a two-year re-entry ban, following the denial of asylum and removal of Norwegian nationality due to the provision of false information. The applicant had married a Norwegian national and had four children (all Norwegian nationals) with him. The Court took into account that the facts with regard to what impact an expulsion would have on the children had been established by way of a thorough process where an expert had been engaged and the children's views obtained in so far as possible based on their age and maturity. The two-year ban on re-entry had been imposed for such a short period out of consideration for the children, and would allow resuming family life in Norway thereafter.[1219]

Despite the restrictive view of the Court in such cases, below are some examples of **violations** of the right to private and family life in the context the removal of aliens from the territory of a Contracting Party:

In case **Nasri v. France** (1995) we find one of the earlier examples of such cases. It concerned the expulsion from France to Algeria of a deaf and dumb Algerian national, who lived in France since age 5 and who, between 1981 and 1993, had committed a number of criminal offences in this country. His expulsion was ordered on the ground that his presence in France represented a threat to public order. The applicant alleged that, in this case, expulsion could not be regarded as necessary in a democratic society, in view of the fact that the applicant was deaf and dumb, illiterate and with no command of deaf and dumb sign language. Therefore, he would have enormous difficulties in communicating if removed from his family circle, the only persons capable of understanding the signs he used to express himself. His parents, his brothers and sisters had not left France since 1965; six of his brothers and sisters had acquired French nationality. He himself had never severed links with his family; indeed, apart from certain periods spent with his sister and his brother-in-law, he had always lived at his parents' home. In addition, the applicant had no knowledge of Arabic, had received little schooling solely in France and his contacts with

[1218] ECtHR, Case ***Said Abdul Salam Mubarak v. Denmark***, No. 74411/16, Decision of 22 January 2019, §§65-67, 69-70, 75-76.
[1219] ECtHR, Case ***Alleleh and Others v. Norway***, No. 569/20, Judgment of 23 June 2022, §§101, 103-104.

the North African community were confined to the second generation, the very large majority of whom did not speak Arabic. In view of this "accumulation of special circumstances", notably the applicant's situation as a deaf and dumb person, capable of achieving a minimum psychological and social equilibrium only within his family, the majority of whose members are French nationals with no close ties with Algeria, the Court considered that the decision to expel the applicant, if executed, would not be proportionate to the legitimate aim pursued.[1220]

Case **Boultif v. Switzerland** (2001) is one of the rare cases in which the Court did find a violation of Article 8 in the context of an expulsion. It concerned a man expelled from Switzerland to Algeria following enforcement of a sentence of imprisonment imposed in Switzerland. The Court took into account, among other criteria, the seriousness of the difficulties which the spouse would be likely to encounter in the applicant's country of origin, underlining however that the mere fact that a person might face certain difficulties in accompanying her or his spouse cannot in itself preclude expulsion. In this case, as the applicant's wife had never lived in Algeria, had no other ties with that country, and did not speak Arabic, the Court considered that she could not, in these circumstances, be expected to follow her husband, who at the time presented only a comparatively limited danger to public order in Switzerland, to Algeria. Consequently, the Court considered that there had been a violation of Article 8 of the Convention in this case[1221].

In case **Maslov v. Austria** (2008), relating to an expulsion from Austria to Bulgaria and 10-year exclusion order, the Court, taking into account the non-violent nature of the offences committed by the applicant when a minor and the State's duty to facilitate his reintegration into society, the length of the applicant's lawful residence in Austria, his family, social and linguistic ties with Austria and the lack of proven ties with his country of origin, found that the imposition of an exclusion order, even of a limited duration, was disproportionate to the legitimate aim pursued ("prevention of disorder or crime") and therefore not "necessary in a democratic society". Consequently, there had been a violation of Article 8 of the Convention.[1222]

A similar conclusion was reached in case **Kaplan and Others v. Norway** (2014), in which the Court dealt with the expulsion of an unsuccessful asylum seeker from Norway to Turkey, while his family members (wife and children, one of whom suffered from psychiatric problems within the spectrum of autism illnesses) were allowed to stay in Norway. Having regard to the youngest child's long-lasting and close bonds to her father, her special care needs and the long period of inactivity before the immigration authorities issued a warning to the first applicant and took their decision to order his expulsion with a re-entry ban, the Court was not convinced in the concrete and exceptional circumstances of the case that sufficient weight was attached to the best interests of the child for the purposes of Article 8 of the Convention.[1223]

Also in case **Paposhvili v. Belgium** (2016), relating to the expulsion of a leukaemia sufferer from Belgium to Georgia, while his family members (wife, children) were allowed to stay in Belgium, the ECtHR found a violation of Article 8. The applicant alleged that his expulsion would put him at a real risk of ill-treatment and premature death, in violation of Articles 3 and 2 of the Convention, and also that his removal to Georgia, ordered together with a ten-year ban on re-entering Belgium, would have resulted in his separation from his family, who constituted his sole source of moral support. The Court considered that, If the Belgian authorities had ultimately concluded that Article 3 of the Convention, as interpreted, did not act as a bar to the applicant's removal to Georgia, they would have been required, in order to comply with Article 8, to examine in addition whether, in the light of the applicant's specific situation at the time of removal, the family could reasonably have been expected to follow him to Georgia or, if not, whether observance of the applicant's right to respect for his family life required that he be granted leave to remain in Belgium for the time he had left to live.[1224]

[1220] ECtHR, Case ***Nasri v. France***, No. 19465/92, Judgment of 13 July 1995, §46.
[1221] ECtHR, Case ***Boultif v. Switzerland***, No. 54273/00, Judgment of 2 August 2001, §§48, 53 and 55.
[1222] ECtHR, Case ***Maslov v. Austria***, No. 1638/03, Judgment [GC] of 23 June 2008, §§100-101.
[1223] ECtHR, Case ***Kaplan and Others v. Norway***, No. 32504/11, Judgment of 24 July 2014, §98.
[1224] ECtHR, Case ***Paposhvili v. Belgium***, No. 41738/10, Judgment [GC] of 13 December 2016, §225.

European Union

An interesting case concerning the articulation of EU law with the Convention system as it regards the right to private and family law is **Povse v. Austria** (2013). It concerned the return of a child from an EU member State to another. Pursuant to the **Brussels IIa Regulation**, a court in one EU member State can request a court in another member State to enforce the return of a child to the former State in the wake of family law proceedings. The applicants were an Austrian national and her minor daughter, who had Austrian and Italian citizenship. The mother had moved to Austria with her daughter without the father's consent. They complained of the Austrian courts' ordering the enforcement of a judgment by an Italian court, which had awarded sole custody of the child to her Italian father and had ordered her return to him. Relying on Article 8 of the ECHR, the applicants contended that the Austrian courts had limited themselves to ordering the enforcement of the Italian court's judgment without examining the argument that the child's return to Italy would be against her interest. The Court declared the application inadmissible for manifestly ill-founded. It held in particular that the Austrian courts had done no more than implement their obligation under EU Law. Under the **Brussels IIa Regulation** they had been obliged to respect the terms of the judgment issued by the Italian court ordering the return of the child. The Austrian courts could be presumed to have acted in compliance with its Convention obligations, having regard to the fact that the ***legal order of the EU secured protection of fundamental rights in a manner equivalent to that provided by the Convention system***. The Italian court had heard the parties and had assessed whether the child's return would entail a grave risk for her. Moreover, the Austrian courts had sought a preliminary ruling from the CJEU, which had reviewed the scope of the Regulation and had found that any alleged change in the circumstances of the applicants' situation since the issuing of the return order had to be addressed to the Italian courts, which were competent to rule on a possible request for a stay of enforcement of the order. The Court also observed that should any action filed by the applicants before the Italian courts fail, it would be open to them to lodge an application with the Court against Italy.[1225]

3.9 Children

It is worth recalling here that, in accordance with the **CRC**, the concept of "children" encompasses all persons below 18 years of age and that, in all actions concerning children, all intervening bodies and institutions, including courts of law, administrative authorities, shall take the best interests of the child as a primary consideration (Articles 1 and article 3, (1)).

Specifically in relation to extradition **Resolution (75) 12 of the Committee of Ministers on the practical application of the European Convention on Extradition** recommends to Contracting Parties:

> *That, 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;*

European Arrest Warrant

In a jurisprudence that must be interpreted also in light of the provisions of the CRC, to which all EU Member States are Parties, the CJEU has stated that: […] the judicial authority of the executing Member State must refuse to surrender only those ***minors*** who are the subject of a European arrest warrant and who, ***under the law of the executing Member State, have not yet reached the age at which they are regarded as criminally responsible*** for the acts on which the warrant issued against them is based.

[1225] ECtHR, Case ***Povse v. Austria***, No. 3890/11, decision of 18 June 2013, §§77-82, 89.

Furthermore, "in order to decide whether a minor who is the subject of a European arrest warrant is to be surrendered, the judicial authority of the executing Member State must simply verify whether the person concerned has reached the minimum age required to be regarded as criminally responsible in the executing Member State for the acts on which such a warrant is based, ***without having to consider any additional conditions, relating to an assessment based on the circumstances of the individual,*** to which the prosecution and conviction of a minor for such acts are specifically subject under the law of that Member State."[1226]

3.10 The role of assurances

Defined as "formal commitment by the requesting State to the requested State"[1227], assurances are generally used to ensure that the sought person will be treated upon surrender in accordance with conditions set out by the requested State, namely international human rights and other standards.

Such assurances are usually provided via diplomatic channels and thus generally referred to as "diplomatic assurances". They may take many forms – eg. *note verbale*; memorandum of understanding; *aide-memoire* (informal summary of a diplomatic interview or conversation that serves merely as an aid to memory); *pro memoria*; *note diplomatique*; *note collective*; and circular diplomatic note[1228]. It is common that such diplomatic instruments are accompanied by a statement of a national authority with competence to express the necessary commitment on behalf of the State and to ensure the respect of such guarantees upon surrender.

Diplomatic assurances engage the requesting State itself, rather than the central or other authority involved in the extradition case or in the prosecution or execution of the sentence. They are deemed necessary when the level of trust necessary to undertake an extradition is somehow weakened, and can relate to a number of areas, such as sub-standard prison conditions, the treatment of suspects or sentenced persons in prisons, outside of prisons or in court, the standards and practices of criminal procedures, and the independence of the judiciary[1229].

However, assurances aimed at preventing inherently illicit practices such as extrajudicial killings, torture and ill-treatment, are particularly sensitive and require extra caution (see below). For this reason, the present sub-chapter is devoted to them, in particular. For assurances used in the context of, for example, death penalty or fair trial guarantees, see the respective chapters. It should also be noted that, for instance in case of political offences, the prohibition of extradition established in Article 3 **ECE** is mandatory and cannot be rebutted through the provision of diplomatic or other assurances[1230].

Assurances are seen as a way to harmonize the cooperative and protective functions of extradition, most importantly in situations where the person's life or freedom from torture are at stake, by combining the need to favour cooperation (*favoriser l'entraide*) with the need to respect the State's extraterritorial international obligations, namely of a human rights nature.

Already in 2006, during the early discussions on the need to modernize CoE Conventions in the criminal field, several experts suggested that the matter of diplomatic assurances be added among the matters to be considered. Reference was made to the works of the DH-S-TER, a

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[1226] CJEU, **Case C-367/16 *Piotrowski***, Judgement [GC] of 23 January 2018.

[1227] See Jenni, Erwin, "The need for diplomatic assurances and consequences on the length of extradition proceedings", in PC-OC, *Special session to celebrate the 60th anniversary of the European Convention on Extradition – Presentations and summaries of the panel discussions*, 20 June 2018, doc. **PC-OC (2018) 05**, [hereinafter, "Jenni, Erwin, in **PC-OC (2018) 05** (…])", p. 42.

[1228] Silvis, Johannes, **"Extradition and Human Rights: Diplomatic Assurances and human rights in the extradition context"**, lecture presented on 20 May 2014 at the special session on extradition held during the 66th meeting of PC-OC, p. 16.

[1229] See Verbert, Erik, "Opening of the Special session, Mr Erik Verbert (Belgium), Chairman of the PC-OC", in **PC-OC (2018) 05**, [hereinafter, "Vertbert, Erik, in **PC-OC (2018) 05** (…)]", pp. 7-8.

[1230] See, for instance, **PC-OC (2018)05**, "Introductory speech (…)", Mr Vincent Glerum, p. 16.

Group of Specialists subordinated to the Steering Committee on Human Rights, which dealt with the use of diplomatic assurances primarily in cases of expulsion or deportation of suspected terrorists but also considered, as it seemed, their application in extradition, and to which the CDPC appointed a representative. The main questions identified were related to whom would monitor the respect of the assurances given and the consequences of non-respect (whether it could it be considered as a dispute to be settled)[1231].

Meanwhile, assurances have taken such a prominent role in the context of extradition that the PC-OC has discussed them again on a number of occasions, and devoted its second Special Session on Extradition, held in June 2018 to celebrate the 60th anniversary of the Convention, to the influence of human rights on extradition and, more specifically, on "the need for assurances regarding human rights matters in extradition cases"[1232]. Diplomatic assurances have equally been included in the agenda of PC-OC at its 79th plenary meeting[1233].

In his 2014 lecture before PC-OC, Johannes Silvis, Judge of the ECtHR, states that it "appears that diplomatic assurances, governmental assurances, assurances of prosecutors or other actors in the criminal justice system play an important role in the case-law of our Court in extradition cases"[1234]. He relied on the following definition of "diplomatic assurances":

> The term "diplomatic assurances", as used in the context of the transfer of a person from one State to another, refers to an undertaking by the receiving State to the effect that the person concerned will be treated in accordance with conditions set by the sending State or, more generally, in keeping with its human rights obligations under international law[1235].

In its **Guidelines to the model request on extradition**, adopted in May 2021, PC-OC clearly states that, since issues surrounding fundamental rights may arise even in straightforward extradition requests, assurances in this respect may have to be included in field 7 of its Model Request on Extradition ("Other"). Furthermore, the requesting State should take into account earlier experiences with the requested State in terms of assurances that were requested in the past. Future requests, especially when these regard similar offences or circumstances, will need to include the same or similar assurances than those provided after the transmission of an earlier extradition request.

Some assurances are expressly required by treaties and the extradition may not be carried out in their absence. It is the case of those relating the death penalty (which must guarantee that this penalty shall not be carried out, cf. Article 11 **ECE**); and to judgements *in absentia* (which must ensure the right to a retrial which safeguards the rights of defence, cf. Article 3 of **AP2**. Other assurances may regard articles 2 or 3 of the **ECHR**, for example in order to prevent extrajudicial killings or the subjection of the person to cruel, inhuman or degrading treatment or punishment. These are the most sensitive cases and those that require more caution, as they deal with inherently illegal practices undertaken by non-State actors and/or often unrecognized by State authorities.

Assurances often relate to the conditions of the prison where the person sought may be held after his or her surrender. When the person sought is considered dangerous or has a serious medical condition, it is useful to provide the requested State with a risk assessment, including indications

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[1231] **PC-OC (2006) 12:** report of the 51st meeting, §§36-39.
[1232] See Vertbert, Erik, in **PC-OC (2018) 05** (…), p. 4.
[1233] **PC-OC (2020) 12**, *List of decisions taken at the 78th meeting of the PC-OC*, Strasbourg, 9 October 2020, p. 6.
[1234] Silvis, Johannes, **"Extradition and Human Rights: Diplomatic Assurances and human rights in the extradition context"**, lecture presented on 20 May 2014 at the special session on extradition held during the 66th meeting of PC-OC, p. 16.
[1235] Silvis, Johannes, **"Extradition and Human Rights: Diplomatic Assurances and human rights in the extradition context"**, lecture presented on 20 May 2014 at the special session on extradition held during the 66th meeting of PC-OC, footnote 4.

on the risk of escape, violent behaviour, medical history and criminal records. The transfer of medical records is subject to the consent of the person concerned.[1236].

Among the issues discussed by PC-OC experts at the second Special Session on Extradition, held in 2018, in relation to assurances, are the following:

- Who must give assurances (eg. difference between assurances and information) → participants concluded that, due to the nature of the extradition procedure, there should be an intervention of the executive;
- Who controls the execution of the assurances and how: with the representative of the ECtHR considering that judicial control is a preferable solution compared to an administrative one, and that this actually seemed to be a trend across Europe;
- Definition of "real risk": the representative of the ECtHR stated that the risk must be imminent, individual and preventable through assurances;
- Prison situation: the representative of the ECtHR clarified that there are human rights standards across Europe, which are however dynamic and may change;
- The importance of forward planning assurances;
- Responsibility for the violation of assurances: the representative of the ECtHR stated that, when an appropriate assessment of the assurances is done, later violations of human rights are the requested State's responsibility[1237].

Given the delays that the request and granting of assurances might originate, it has been recommended that their need is assessed at the earliest possible moment and that the proceedings concerning the question of valid and sufficient guarantees be "combined" with the extradition proceeding itself, especially in cases where the fugitive will have to be detained pending extradition. Monitoring of guarantees upon surrender is also time and resource consuming[1238].

Also during the discussions held in 2018, a reference in this regard was made to the questions on conditions of detention posed by Belgian authorities to Spain in the context of the surrender of Catalan ex-minsters, in order to accelerate the proceedings and avoid future litigation, based on recommendations of the EU Fundamental Rights Agency:

- In what prison would the persons sought be detained?
- Are the detention conditions in that prison in compliance with the Convention, the jurisprudence of the **ECHR** and the provisions of eg. the European Prison Rules or other standards set out by international bodies like the CPT?
- What is the surface area of the cell?
- Is the person sought detained alone in that cell or with others? If so, what is the individual living space?
- How about access to showers, toilets, hygiene … and access to medical care?
- How about the food (quantity, quality)?
- Are there enough meaningful and recreational activities?
- Are there any restrictions on family visits, undisturbed (private) visit of the spouse/partner or consultation with a lawyer?
- Is there any violence in that prison and if so what remedies exist to prevent the person sought coming into contact with those acts of violence or their consequences?
- Is there any overpopulation in that prison and if so what measures will be taken to prevent the person sought suffering from negative conditions arising from a situation of overpopulation?[1239]

[1236] **PC-OC (2021)04rev**, §§40-44.
[1237] See Ferreira, Joana, "Panel discussion on the drafting and the monitoring of assurances", **PC-OC (2018) 05**, [hereinafter, "Ferreira, Joana, **PC-OC (2018) 05** (…)"], pp. 52-53.
[1238] See Jenni, Erwin, in **PC-OC (2018) 05**, p. 47.
[1239] See Gaevar, Jan Van, "The drafting and monitoring of assurances", **PC-OC (2018) 05** [hereinafter, "Gaevar, Jan Van, **PC-OC (2018) 05** (…)"], p. 50.

In order to grant extradition relying on assurances given by the requesting State, the requested State must take a **three-step approach**:

1. Preliminary question: does the general human rights situation in the receiving State ***exclude*** accepting any assurances whatsoever?[1240]

   If that is not the case, national authorities, taking into account the particular characteristics of each situation, concrete State practice and the personal characteristics and situation of the sought person:

2. First step: assess the ***quality*** of assurances;

3. Second step: in light of the receiving State's practices, can the assurances provided be ***relied upon***?[1241]

The quality and reliability of assurances shall be assessed taking into account, inter alia, the following factors (see below): transparency; specificity; authority of provider; legally binding nature; effective control; legal status of treatment; quality of interstate relations; verifiability in practice; acceptance of international monitoring; history of ill-treatment of the requested person; and reliability of domestic judicial appraisal.

In a case examined in 2021 by the ECtHR, regarding the extradition of a British national from Spain to Thailand for the purposes of prosecution for murder, in which the applicant alleged that such extradition would expose him to the risk of treatment incompatible with Articles 2 and 3 of the Convention, as he could be sentenced to death or life imprisonment, and kept in inhumane conditions of detention, the Court took into account that extradition proceedings under Spanish law comprise three stages: firstly, a decision by the Council of Ministers (wielding its executive power) to initiate the extradition in question; secondly, a domestic court (exercising judicial power) analyses and delivers a decision regarding whether the extradition should be allowed on legal grounds; and thirdly, another decision issued by the Council of Ministers (again wielding executive power), which can either give final approval for the extradition to take place if the judicial decision has authorised it, or definitively block it regardless of the previous judicial approval. In the case at hand, it was the court (*Audiencia Nacional*), not the Government, which had considered that assurances received from the Thai authorities were sufficient for the applicant to be extradited without violating his right to life or his right not to be subjected to inhuman or degrading treatment. The Council of Ministers' decision was limited to stating that there were no reasons of national sovereignty, security, public order or other essential national interests not to grant the extradition. The applicant lodged an *amparo* appeal with the Constitutional Court, but after expiry of the 30-day deadline to do so provided under domestic law, and therefore the court's decision had already become final and could not be taken up by the Constitutional Court. In light of this, the ECtHR concluded that the applicant had failed to exhaust the available domestic remedies and declared the complaint inadmissible under Article 35 of the Convention[1242].

It is worth remembering that, as noted by a previous Chairman of the PC-OC, "the ECtHR, and possibly similar Courts or instances outside of Europe, apply an *ex nunc* evaluation of the alleged violation of the fundamental rights of the person sought. This means that the ***Court looks at the matter 'now'***, at the time the Court decides. The situation 'then', usually some years earlier at the time the decision to extradite was made (*ex tunc*) is not relevant. This approach may have considerable effects on the outcome of the Court's decision or judgment. Any case law in other matters that saw the light between the extradition decision and the Court's decision or judgment may well change the outcome. More "stringent" case law on Article 3 for example may have as

[1240] ECtHR, Case ***Gaforov v. Russia***, No. 25404/09, Judgment of 21 October 2010, §138.
[1241] See below the factors to be taken into account in this regard, as detailed by the Court in Case ***Othman (Abu Qatada) v. United Kingdom***, No. 8139/09, Judgment of 17 January 2012, §§186-189.
[1242] ECtHR, Case ***Looker v. Spain***, No. 51568/19, Decision of 11 May 2021, §§60, 64-65, 67.

an effect that the extradition order that was in line with earlier case law on the same subject, is no longer compatible with the current case law."[1243]

European Arrest Warrant

At the EU level, concerning the execution of an **EAW**, if the issuing judicial authority gives or endorses an assurance "that the requested person will not suffer inhuman or degrading treatment", the executing authority shall ***rely on this assurance***, unless there are ***specific indications*** that the detention conditions in a particular detention centre are in breach of Article 4 of the **CFREU**. Therefore, it is only in ***exceptional circumstances***, and on the basis of precise information, that the executing judicial authority can find that, notwithstanding such an assurance, there is a real risk of the person concerned being subjected to inhuman or degrading treatment[1244].

In case **ML (2018)**, the CJEU summarized the key points of its case law concerning assurances, as follows:

- The fact that the person concerned can ***challenge the conditions of his/her detention*** in the issuing Member State is ***not sufficient*** to rule out a real risk of inhuman treatment;
- Executing judicial authorities are ***solely required to assess the conditions of detention in the prisons in which***, according to the information available to them, it is ***specifically intended that the person concerned will be detained***, including on a temporary or transitional basis;
- When the ***issuing judicial authority gives an assurance*** that the person concerned will not be subjected to inhuman or degrading treatment:
  - The executing judicial authority ***may request information*** concerning the actual and precise conditions in which the person concerned will be detained in the issuing Member State;
  - The assurance provided by the competent authorities of the issuing Member State is a ***factor*** that the executing judicial authority ***cannot disregard***;
  - Where the assurance has been given, or at least endorsed, by the issuing judicial authority, the executing judicial authority ***must rely on that assurance***, at least in the ***absence of any specific indications*** that the detention conditions in a particular detention centre are in breach of the prohibition of inhuman or degrading treatment;
  - When the assurance was ***neither provided nor endorsed*** by the issuing judicial authority, the safeguard that it represents must be evaluated by carrying out an ***overall assessment*** of all the information available to the executing judicial authority[1245].

The weaknesses of diplomatic assurances

The weaknesses and limitations of diplomatic assurances as a means to ensure compliance with the human rights of the sought person upon surrender have been widely recognized, particularly when used in the context of inherently illegal, clandestine and unrecognized practices such as extrajudicial killings, torture, ill-treatment and enforced disappearances.

In fact, UN bodies and mechanisms with specific mandates against torture and ill-treatment clearly recommend that, in the context of the transfer of a person from one State to another, diplomatic assurances are not relied upon to undermine the principle of *non-refoulement* in cases where there are substantial grounds to believe that the person could be subjected to torture in the receiving State. sS stated before, this is mostly due to the inherently illegal and unrecognized nature of such practices (contrary, for example, to official punishments such as the death penalty).

[1243] Vertbert, Erik, in **PC-OC (2018) 05** (…), p. 8 (emphasis added).
[1244] CJEU, Case **C-128/18 *Dorobantu***, Judgement [GC] of 15 October 2019, §§68-69.
[1245] CJEU, ***Case ML***, Judgement of 25 July 2018, C-220/18 PPU, ruling.

CAT adopted in 2017 its **General Comment No. 4** on the implementation of **article 3 of the UNCAT** in the context of article 22 (individual complaints procedure). Article 3 of **UNCAT** expressly applies to extradition procedures and reads as follows (emphasis added):

> *1. No State Party shall expel, return ("refouler") **or extradite** a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.*
>
> *2. For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights.*

Recalling that the prohibition torture, as defined in Article 1 of UNCAT, is absolute and that, according to Article 2 (2), *no exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture*, as well as that other acts of ill-treatment are equally prohibited in a non-derogable manner, the Committee states the following regarding "diplomatic assurances":

> *(…) The term "diplomatic assurances" as used in the context of the transfer of a person from one State to another, refers to a formal commitment by the receiving State to the effect that the person concerned will be treated in accordance with conditions set by the sending State and in accordance with international human rights standards.*
>
> *(…) The Committee considers that diplomatic assurances from a State party to the Convention to which a person is to be deported should not be used as a loophole to undermine the principle of non-refoulement as set out in article 3 of the Convention, where there are substantial grounds for believing that the person would be in danger of being subjected to torture in that State.*[1246]

Recommendations in this regard have been addressed to such States as Sweden, Kazakhstan and Switzerland in the context of the examination of individual communications; and to the USA, Morocco, Germany and Albania upon the examination of State reports on the implementation of UNCAT[1247].

The UN Special Rapporteur against Torture partly devoted his 2006 report to the Commission on Human Rights to the issue of diplomatic assurances. In it, he recalls a presentation made on a discussion held on 7 December 2005, under the auspices of the CoE, regarding the development of guidelines for diplomatic assurances with the Group of Specialists on Human Rights and the Fight against Terrorism of the Steering Committee for Human Rights, outlining the main concerns exposed therein:

> "(a) The principle of *non-refoulement* (CAT, art. 3; ECHR, art. 3; International Covenant on Civil and Political Rights (ICCPR), art. 7) is an absolute obligation deriving from the absolute and non-derogable nature of the prohibition of torture;
>
> (b) Diplomatic assurances are sought from countries with a proven record of systematic torture, i.e. the very fact that such diplomatic assurances are sought is an acknowledgement that the requested State, in the opinion of the requesting State, is practising torture. In most cases, those individuals in relation to whom diplomatic assurances are being sought belong to a high-risk group ("Islamic fundamentalists");
>
> (c) It is often the case that the requesting and the requested States are parties to CAT, ICCPR and other treaties absolutely prohibiting torture. Rather than using all their diplomatic and legal powers as States parties to hold other States parties accountable for their violations, requesting States, by means of diplomatic assurances, seek only an

[1246] CAT, *General Comment No. 4 (2017) on the implementation of article 3 of the Convention in the context of article 22*, doc. **CAT/C/GC/4**, §§19-20.
[1247] **CAT/C/GC/4**, footnote 26.

> exception from the practice of torture for a few individuals, which leads to double standards vis-à-vis other detainees in those countries;
>
> (d) Diplomatic assurances are not legally binding. It is therefore unclear why States that violate binding obligations under treaty and customary international law should comply with non-binding assurances. Another important question in this regard is whether the authority providing such diplomatic assurances has the power to enforce them vis-à-vis its own security forces;
>
> (e) Post-return monitoring mechanisms are no guarantee against torture - even the best monitoring mechanisms (e.g. ICRC and CPT) are not "watertight" safeguards against torture;
>
> (f) The individual concerned has no recourse if assurances are violated;
>
> (g) In most cases, diplomatic assurances do not contain any sanctions in case they are violated, i.e. there is no accountability of the requested or requesting State, and therefore the perpetrators of torture are not brought to justice;
>
> (h) Both States have a common interest in denying that returned persons were subjected to torture. Therefore, where States have identified independent organizations to undertake monitoring functions under the agreement, these interests may translate into undue political pressure upon these monitoring bodies, particularly where one is funded by the sending and/or receiving State."[1248]

The Special Rapporteur concluded, in no uncertain terms, that" diplomatic assurances with regard to torture are nothing but attempts to circumvent the absolute prohibition of torture and refoulement, and that rather than elaborating a legal instrument on minimum standards for the use of diplomatic assurances, the Council of Europe should call on its member States to refrain from seeking and adopting such assurances with States with a proven record of torture."[1249]

Furthermore, the ECtHR recalled in his judgement on case **Othman (Abu Qatada) v. the United Kingdom (2012)**:

> "142. In its 2006 concluding observations on the United States of America, the UN Committee against Torture recommended that diplomatic assurances should only be relied upon in regard to States which do not systematically violate UNCAT's provisions, and after a thorough examination of the merits of each individual case. It recommended clear procedures for obtaining assurances, with adequate judicial mechanisms for review, and effective post-return monitoring arrangements."

In the same judgement, the Court recalls the concerns expressed by other bodies:

"143. In a February 2006 address to the Council of Europe Group of Specialists on Human Rights and the Fight against Terrorism (DH-S-TER), Louise Arbour, then United Nations Commissioner for Human Rights stated:

> *Based on the long experience of international monitoring bodies and experts, it is unlikely that a post-return monitoring mechanism set up explicitly to prevent torture and ill-treatment in a specific case would have the desired effect. These practices often occur in secret, with the perpetrators skilled at keeping such abuses from detection. The victims, fearing reprisal, often are reluctant to speak about their suffering, or are not believed if they do.*

144. In his "viewpoint" of 27 June 2006, the Council of Europe Commissioner for Human Rights, Thomas Hammarberg, stated that diplomatic assurances were pledges which were not credible

[1248] Commission on Human Rights, *Report of the Special Rapporteur on the question of torture*, Manfred Nowak, doc. **E/CN.4/2006/6**, §31.
[1249] **E/CN.4/2006/6**, §32.

and had turned out to be ineffective in well-documented cases. His view was that the principle of non-*refoulement* should not be undermined by convenient, non-binding promises.

145. Concerns as to the United Kingdom's Government's policy of seeking assurances have also been expressed by the United Kingdom Parliament's Joint Committee on Human Rights (in its report of 18 May 2006) and the House of Commons Select Committee on Foreign Affairs (in its report of 20 July 2008).

146. Human Rights Watch has strongly criticised the use of assurances. In an essay in its 2008 World Report entitled "Mind the Gap Diplomatic Assurances and the Erosion of the Global Ban on Torture", it argued that the problem with assurances lay in the nature of torture itself, which was practised in secret using techniques that often defied detection.(…)".

Also Johannes Silvis, Judge at the ECtHR, in a presentation made before the PC-OC in 2014, on "Diplomatic assurances and Human Rights in the Extradition Context" recognized that "there are worrying accounts of the weakness of diplomatic assurances", perhaps because, when they are necessary, there is an acknowledged risk of torture and ill-treatment. He gave concrete examples in this regard, namely of a Syrian born Canadian man (**Maher Arar)**, suspected member of Al Qaeda, who was apprehended by US authorities and sent to Syria despite claims that he would be tortured therein and on the basis on assurances provided by the Syrian government; after his release following 10 months in detention without charge, he confirmed he was subjected to torture and explained why he did not reveal so during visits from Canadian officials:

> *I could not say anything about the torture. I thought if I did, I would not get any more visits, or I might be beaten again … The consular visits were my lifeline, but I also found them very frustrating. There were seven consular visits, and one visit from members of Parliament. After the visits I would bang my head and my fist on the wall in frustration. I needed the visits, but I could not say anything there.*

The other case concerned two Egyptian asylum seekers (**Ahmed Agiza and Mohammed Alzery)** forcibly returned to Cairo in December 2001 after being captured on Swedish soil. US officials have been accused of conducting the transfer, making it one of the first major cases of extraordinary rendition. Despite promises of the Egyptian government's that the detainees would not be tortured nor sentenced to death, and provision of access to Swedish officials to monitor their situation, such visits always took place in the presence of Egyptian officials. The NGO Human Rights Watch, UK authorities and the UN Human Rights Committee all considered there were strong suspicions that such persons were tortured and that the procured diplomatic assurances were not sufficient to prevent it.[1250]

Practitioners in the field of international cooperation in criminal matters are also aware of the difficulties of relying in assurances, for example because diplomats are often not prepared to detect cases of hidden torture and sometimes are not independent, although some have noted that they can compensate for their own difficulties by calling for the intervention of experts or lawyers[1251].

Still, although placing increased demands with regard to the wording of the assurances and quality of the monitoring mechanism, the ECtHR has not declared assurances unusable, despite substantial pressure from NGO to do so. The Court requires respondent States to prove that assurances are not taken as a mere formality, neither by the requesting State nor by the requested State, and therefore it has been considered counterproductive to try to draft any "universal" wording thereof: assurances should be "tailor-made" for each specific case. Also, follow-up seems to be an essential part of any assurances provided, including as a means to collect statistical data that could be presented to the Court in other cases to prove that the monitoring mechanisms do work. It is important that practitioners are ready and in touch with diplomatic staff, aware of their capabilities, their training and qualifications, and of their limitations.

[1250] Silvis, Johannes, **"Extradition and Human Rights: Diplomatic Assurances and human rights in the extradition context"**, lecture presented on 20 May 2014 at the special session on extradition held during the 66th meeting of PC-OC, p. 17.
[1251] See remarks by Barbara Goeth-Flemmich and Erwin Jenni, **PC-OC (2018) 05**, p. 53.

For example, small States with small embassies may face additional practical difficulties, lacking staff and often having non-resident embassies[1252].

The Court's approach to assurances in cases of extrajudicial killings, torture and ill-treatment

As stated before, extradition relying on assurances in cases of real risk of torture and ill-treatment is particularly problematic. Contrary to what happens, for example, in relation to such issues as the death penalty, life imprisonment or even fair trial guarantees, which are official penalties or based on clear legal provisions, easier to check and to monitor by the requested State, and to guarantee by the requesting State, torture is, by definition, prohibited worldwide, almost always criminalized, unrecognized, practiced in clandestine settings and close environments and sometimes difficult to prevent even if there is a political will to do so. For this reason, as stated above, many international bodies have warned against the use of assurances, most particularly in cases of extrajudicial killings, torture or ill-treatment.

Contrary to other international human rights bodies, the ECtHR, however, accepts the provision of assurances even in these cases, provided that very strict conditions are fulfilled. In all cases, the Court focuses on whether the risk of torture or ill-treatment is/was a real one, and whether it was alleviated by diplomatic and prosecutorial assurances given by the requesting State[1253]. In cases where such assurances have not been given or have been found to be inadequate, the Court has not had recourse to the extradition context to determine whether there would be a violation of Article 3 if the surrender were to take place[1254]. The weight to be given to assurances from the receiving State depends, in each case, on the circumstances prevailing at the material time.[1255]

However, it should also be noted that there might be cases in which the Court admits that assurances are unnecessary, mainly when, upon close examination of the case, the risk of ill-treatment is considered unfounded[1256] or when there is a high unlikelihood of imposition of a sentence incompatible with Article 3 of the Convention.[1257]

Here are some examples of circumstances found relevant by the Court to consider **reliable** the assurances relied on to extradite:

- ***Diplomatic note***, binding under public international law and carrying a presumption of good faith[1258], containing ***specific*** and ***unequivocal*** assurances[1259], particularly if the requesting State has a ***long history of respect for democracy, human rights and the rule of law***, and when there are ***longstanding extradition arrangements*** between both States, and most especially if ***no breach*** in an assurance given by such State can be pointed out – this, however, does not absolve a Contracting State from its obligation to consider the practical application of assurances, in light of all the material before it; [1260]

[1252] See Glerum, Vincent, "Introductory speech on the 60th anniversary of the European Convention on Extradition", in **PC-OC (2018)05**, p. 29 [hereinafter, "Glerum, Vincent, **PC-OC (2018)05**"].
[1253] ECtHR, Case ***Oleacha Cahuas v. Spa***in, No. 24668/03, Judgment of 10 August 2006, §§43-44; Case ***Salem v. Portugal***, No. 26844/04, Decision of 9 May 2006, p. 7; Case ***Nivette v. France***, No. 44190/98, Decision of 3 July 2001, pp. 6-.7.
[1254] Eg. ECtHR, Case ***Soldatenko v. Ukraine***, No. 2440/07, Judgment of 23 October 2008, §§69, 73.
[1255] ECtHR, Case ***Mamazhonov v. Russia***, No. 17239/13, Judgment of 23 October 2014, §134; Case ***Othman (Abu Qatada) v. United Kingdom***, No. 8139/09, Judgment of 17 January 2012, §187; Case ***Saadi v. Italy***, No. 37201/06, Judgment [GC] of 28 February 2008, §148.
[1256] ECtHR, Case ***Kislov v. Russia***, No. 3598/10, Judgment of 9 July 2019, §100.
[1257] ECtHR, Case ***King v. United Kingdom***, No. 9742/07, Decision of 26 January 2010, §19.
[1258] ECtHR, Case ***Rrapo v. Albania***, No. 58555/10, Judgment of 25 September 2012, §§72-73.
[1259] ECtHR, Case ***Zarmayev v. Belgium***, No. 35/10, Judgment of 27 February 2014, §§109,111.
[1260] ECtHR, Case ***Babar Ahmad and others v. United Kingdom (Decision)***, Nos. 24027/07, 11949/08 & 36742/08, Decision (Partial) of 6 July 2010, §§105-108; Case ***Al-Moayad v. Germany***, No. 35865/03, Decision of 20 February 2007, §§66-71;

- Government guarantees that applicable ***national legislation*** does not provide for penalties incompatible with Article 3[1261], establish their automatic commutation when the person is extradited from a State which does admit them[1262], or which reduce or withdraw some charges in order to guarantee that such penalties will not be imposed[1263]; in a given case, national courts found convincing additional assurances provided by the Deputy Prime Minister, who was also in charge of internal affairs, engaging the executive power, that the person would not be subjected to either the death penalty or to imprisonment for more than 25 years since, even if the courts of the requesting State, as independent courts, sentenced the applicant to a heavier penalty, the executive should in such a case make use of its power of pardon and commute the sentence to less than the 25 years.[1264]
- Assurances based on ***sentencing guidelines*** compatible with the requirements of Article 3, in conjunction with elements that demonstrate that a breach of such guidelines is unlikely (eg. sentencing of co-defendants, same judge, legal provisions recognizing the need to avoid disparities in sentencing for the same conduct) and that that, if it occurs, there is a remedy against it[1265];
- Government declarations may be complemented with ***commitments by competent national authorities*** (eg. prosecutorial), whose view may be decisive, that the person would not be subject to a penalty incompatible with Article 3 of the Convention; [1266]
- Guarantees issued by the Procurator-General who, in the requesting State, supervises the activities of all prosecutors (who, in turn, argue the prosecution case before the courts) and fulfil a supervisory role in respect of the rights of prisoners, namely having the right to visit and supervise places of custody without hindrance.[1267]
- Assurances provided by authorities of a ***member State of the Council of Europe*** and a Contracting Party to the ECtHR, and that a possible failure to respect such assurances would seriously undermine that State's credibility and could be addressed in a complaint against it; [1268]
- Assurances concerning that the person will serve his or her sentence in a prison and in conditions compatible with Article 3 of the Convention, namely in what concerns the specific health needs of the extradited person[1269], coupled with a ***monitoring mechanism***, namely private visits by authorities of the requested State or a national human rights institution[1270];

[1261] ECtHR, Case ***Oleacha Cahuas v. Spa***in, No. 24668/03, Judgment of 10 August 2006, §§43-44.
[1262] ECtHR, Case ***Salem v. Portugal***, No. 26844/04, Decision of 9 May 2006, p. 7.
[1263] ECtHR, Case ***Beverly McCallum v. Italy***, No. 20863/21, Decision [GC] of 21 September 2022, §§53-55.
[1264] ECtHR, Case ***Salem v. Portugal***, No. 26844/04, Decision of 9 May 2006, p. 7.
[1265] ECtHR, Case ***López Elorza v. Spain***, No. 30614/15, Judgment of 12 December 2017, §§112-113, 116.
[1266] ECtHR, Case ***Oleacha Cahuas v. Spa***in, No. 24668/03, Judgment of 10 August 2006, §§43-44; Case ***Nivette v. France***, No. 44190/98, Decision of 3 July 2001, pp. 6-.7
[1267] ECtHR, Case ***Shamayev and others v. Georgia and Russia***, No. 36378/02, Judgment of 14 April 2005, §§338, 344.
[1268] ECtHR, Case ***M.I. v. Bosnia and Herzegovina***, No. 47679/17, Decision of 29 January 2019, §§51-53; Case ***Azimov v. Russia***, No. 67474/11, Judgment of 18 April 2013, §§133-134; Case ***Chentiev and Ibragimov v. Slovakia***, Nos.: 21022/08 & 51946/08, Decision of 14 September 2010, pp. 14-15.
[1269] ECtHR, Case ***Muhammed Asif Hafeez v. the United Kingdom***, No. 14198/20, Decision of 28 March 2023, §§65-66.
[1270] ECtHR, Case ***M.I. v. Bosnia and Herzegovina***, No. 47679/17, Decision of 29 January 2019, §§51-53; Case ***Said Abdul Salam Mubarak v. Denmark***, No. 74411/16, Decision of 22 January 2019, §53; Case ***Ibragimov v. Slovakia***, No. 65916/10, Decision of 30 June 2015, §§69-73; Case ***Chentiev and Ibragimov v. Slovakia***, Nos.: 21022/08 & 51946/08, Decision of 14 September 2010, pp. 14-15; Case ***Gasayev v. Spain***, No. 48514/06, Decision of 17 February 2009, pp. 6-7.

- Other ***post-extradition monitoring and complaint mechanisms***: eg. presence of a representative of the requested State to observe the proceedings in the requesting State [1271]; judicial appeals[1272], control by the Inter-American Court of Human Rights;[1273]

Next, we shall give some examples of circumstances found relevant by the Court to conclude that the assurances provided were **unreliable**:

- Reliance on diplomatic assurances against torture provided by a State where torture is ***endemic*** or ***persistent,*** or where there are reported ***practices resorted to or tolerated*** by the authorities, against a group the person belongs to, which are manifestly contrary to the principles of the Convention according to reliable sources;[1274]
- Reliance on diplomatic assurances without any detailed ***assessment of the risk*** against the standards elaborated by the ECtHR[1275], and without establishing that the absence of a risk of ill-treatment is firmly established, in practical terms[1276];
- Assurances couched in vague[1277] or general ***stereotyped terms***, based purely on accession to international treaties and in the existence of domestic mechanisms to protect human rights, uncorroborated by any evidence or contradicted by reliable sources, and without any ***monitoring mechanism***;[1278]

[1271] ECtHR, Case ***Al-Moayad v. Germany***, No. 35865/03, Decision of 20 February 2007, §§66-71.

[1272] ECtHR, Case ***Beverly McCallum v. Italy***, No. 20863/21, Decision [GC] of 21 September 2022, §§53-55.

[1273] ECtHR, Case ***Oleacha Cahuas v. Spain***, No. 24668/03, Judgment of 10 August 2006, §§43-44.

[1274] ECtHR, Case ***Liu v. Poland***, No. 37610/18, Judgment of 6 October 2022, §§78, 81-82; Case ***Bivolaru and Moldovan v. France***, Nos. 40324/16 & 12623/17, Judgment of 25 May 2021, §§125-126; Case **G.S. v. Bulgaria**, No. 36538/17, Judgment of 4 April 2019, §93; Case ***Turgunov v. Russia***, No. 15590/14, Judgment of 22 October 2015, §58; Case ***Mukhitdinov v. Russia***, No. 20999/14, Judgment of 21 May 2015, §49; Case ***Gayratbek Saliyev v. Russia***, N.º 39093/13, Judgment of 17 April 2014, §§61-62; Case ***Nizomkhon Dzhurayev v. Russia***, No. 31890/11, Judgment of 3 October 2013, §130; Case ***Kasymakhunov v. Russia***, No. 29604/12, Judgment of 14 November 2013, §126; Case ***Sidikovy v. Russia***, No. 73455/11, Judgment of 20 June 2013, §§145, 149-150; Case ***Kozhayev v. Russia***, No. 60045/10, Judgment of 5 June 2012, §84; Case ***Gaforov v. Russia***, No. 25404/09, Judgment of 21 October 2010, §138; Case ***Klein v. Russia***, No. 24268/08, Judgment of 1 April 2010, §55; Case ***Baysakov and others v. Ukraine***, No. 54131/08, Judgment of 8 February 2010, §51; Case ***Abdulazhon Isakov v. Russia***, No. 14049/08, Judgment of 8 July 2010, §111; Case ***Soldatenko v. Ukraine***, No. 2440/07, Judgment of 23 October 2008, §§69, 73; Case ***Chahal v. United Kingdom***, No. 22414/93, Judgment [GC] of 15 November 1996, §§105-106.

[1275] ECtHR, Case ***Abdulkhakov v. Russia***, No. 14743/11, Judgment of 2 October 2012, §150; Case ***Umirov v. Russia***, No. 17455/11, Judgment of 18 September 2012, §121; Case ***Kozhayev v. Russia***, No. 60045/10, Judgment of 5 June 2012, §84; Case ***Saadi v. Italy***, No. 37201/06, Judgment [GC] of 28 February 2008, §148; Case ***Chahal v. the United Kingdom***, N.º 22414/93, Judgment [GC] of 15 November 1996, §§105.

[1276] ECtHR, Case ***Bivolaru and Moldovan v. France***, Nos. 40324/16 & 12623/17, Judgment of 25 May 2021, §§125-126; Case ***Tadzhibayev v. Russia***, No. 17724/14, Judgment of 1 December 2015, §§45-47; Case ***Nabid Abdullayev v. Russia***, No. 8474/14, Judgment of 15 October 2015, §66; Case ***Turgunov v. Russia***, No. 15590/14, Judgment of 22 October 2015, §§55-57; Case ***Mukhitdinov v. Russia***, No. 20999/14, Judgment of 21 May 2015, §§49-50; Case ***Khamrakulov v. Russia***, No. 68894/13, Judgment of 16 April 2015, §§68-69; Case ***Mamazhonov v. Russia***, No. 17239/13, Judgment of 23 October 2014, §134; Case ***Mamadaliyev v. Russia***, No. 5614/13, Judgment of 24 July 2014, §69; Case ***Kadirzhanov and Mamashev v. Russia***, Nos. 42351/13 & 47823/13, Judgment of 17 July 2014, §96; Case ***Gayratbek Saliyev v. Russia***, No. 39093/13, Judgment of 17 April 2014, §§65-67; ECtHR, Case ***Kasymakhunov v. Russia***, No. 29604/12, Judgment of 14 November 2013, §127; Case ***Ermakov v. Russia***, No. 43165/10, Judgment of 7 November 2013, §205; Case ***Rustamov v. Russia***, No. 11209/10, Judgment of 3 July 2012, §120; Case ***Toumi v. Italy***, No. 25716/09, Judgment of 5 April 2011, §55; Case ***Trabelsi v. Italy***, No. 50163/08, Judgment of 13 April 2010, §§47-49; Case ***Sellem v. Italy***, No. 12584/08, Judgment of 5 May 2009, §43; Case ***O. v. Italy***, No. 37257/06, Judgment of 24 March 2009, §44; Case ***Ben Khemais v. Italy***, No. 246/07, Judgment of 24 February 2009, §§61, 64.

[1277] EctHR, Case ***Yefimova v.Russia***, No. 39786/09, Judgment of 19 February 2013, §203; Case ***Labsi v. Slovakia***, No. 33809/08, Judgment, 15 May 2012, §122.

[1278] ECtHR, Case **G.S. v. Bulgaria**, No. 36538/17, Judgment of 4 April 2019, §90; ECtHR, Case ***Kholmurodov v. Russia***, No. 58923/14, Judgment of 1 March 2016, §66; Case ***Mukhitdinov v. Russia***, No. 20999/14, Judgment of 21 May 2015, §49; Case ***M. G. v. Bulgaria***, No. 59297/12, Judgment of 25 March 2014, §94; Case ***Latipov v. Russia***, No. 77658/11, Judgment of 12 December 2013, §96; Case

- Assurances provided by a State whose authorities ***publicly admit*** the use of punishment (eg. corporal punishment) contrary to Article 3[1279];
- Monitoring mechanism does not guarantee, in practical terms, ***effective protection*** against proscribed ill-treatment[1280], namely due to lack of expertise of staff undertaking the visits, of ability to speak with the detainee without witnesses or of unfettered access to detention facilities, and inexistence of a mechanism to lodge complaints[1281];
- Lack of willingness of the requesting State's authorities to ***cooperate*** with international monitoring mechanisms, including human rights NGOs, and at the bilateral level, or to carry out investigations into past abuses;[1282]
- Previous ***breach*** of diplomatic assurances by the requesting State; [1283]
- Lack of ***competence*** of the institution providing the assurances to commit the State, combined with a lack of an effective system of torture prevention[1284];
- Assurances previously considered ***unsatisfactory*** by the Court[1285];
- Assurances provided without authorities being in possession of ***all relevant information*** (eg. concerning the person's state of health, conditions of detention, effectiveness of monitoring mechanism) and too narrow in scope to ensure effective protection against ill-treatment[1286];
- Assurances provided by ***entity unable*** to ensure effective protection against ill-treatment[1287] or based purely on ***informal statements***[1288];
- Absence of any ***diplomatic procedure*** with a view to obtaining guarantees or assurances that the person would not be subjected to treatment incompatible with Article

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Kasymakhunov v. Russia, No. 29604/12, Judgment of 14 November 2013, §§126-127; Case ***Ermakov v. Russia***, No. 43165/10, Judgment of 7 November 2013, §205; Case ***K. v. Russia***, No. 69235/11, Judgment of 23 May 2013, §65; Case ***Zokhidov v. Russia***, No. 67286/10, Judgment of 5 February 2013, §141; Case ***Abdulkhakov v. Russia***, No. 14743/11, Judgment of 2 October 2012, §150; Case ***Kozhayev v. Russia***, No. 60045/10, Judgment of 5 June 2012, §84; Case ***Khodzhayev v. Russia***, No. 52466/08, Judgment of 12 May 2010, §103; Case ***Klein v. Russia***, No. 24268/08, Judgment of 1 April 2010, §55; Case ***Saadi v. Italy***, No. 37201/06, Judgment [GC] of 28 February 2008, §§147-148.

[1279] ECtHR, Case **G.S. v. Bulgaria**, No. 36538/17, Judgment of 4 April 2019, §§90-93.

[1280] ECtHR, Case ***Yefimova v.Russia***, No. 39786/09, Judgment of 19 February 2013, §203.

[1281] ECtHR, ECtHR, Case ***Liu v. Poland***, No. 37610/18, Judgment of 6 October 2022, §78; Case ***Tadzhibayev v. Russia***, No. 17724/14, Judgment of 1 December 2015, §§45-47; Case ***Nabid Abdullayev v. Russia***, No. 8474/14, Judgment of 15 October 2015, §68; Case ***Turgunov v. Russia***, No. 15590/14, Judgment of 22 October 2015, §§55-57; Case ***Khamrakulov v. Russia***, No. 68894/13, Judgment of 16 April 2015, §§68-69; Case ***Mamadaliyev v. Russia***, No. 5614/13, Judgment of 24 July 2014, §69; Case ***Kadirzhanov and Mamashev v. Russia***, Nos. 42351/13 & 47823/13, Judgment of 17 July 2014, §96; Case ***Gayratbek Saliyev v. Russia***, No. 39093/13, Judgment of 17 April 2014, §§65-67; Case ***Nizomkhon Dzhurayev v. Russia***, No. 31890/11, Judgment of 3 October 2013, §133.

[1282] ECtHR, Case ***Liu v. Poland***, No. 37610/18, Judgment of 6 October 2022, §81; Case ***Allanazarova v. Russia*** No. 46721/15, Judgment of 14 February 2017, §§81-82; Case ***Gayratbek Saliyev v. Russia***, N.º 39093/13, Judgment of 17 April 2014, §68; Case ***M. G. v. Bulgaria***, No. 59297/12, Judgment of 25 March 2014, §94; Case ***Nizomkhon Dzhurayev v. Russia***, No. 31890/11, Judgment of 3 October 2013, §132; Case ***Baysakov and others v. Ukraine***, No. 54131/08, Judgment of 8 February 2010, §51; Case ***Soldatenko v. Ukraine***, No. 2440/07, Judgment of 23 October 2008, §§69, 73; Case ***Ryabikin v. Russia***, No. 8320/04, Judgment of 19 June 2008, §119.

[1283] ECtHR, Case ***Azimov v. Russia***, No. 67474/11, Judgment of 18 April 2013, §§133-134.

[1284] ECtHR, Case ***Baysakov and others v. Ukraine***, No. 54131/08, Judgment of 8 February 2010, §51; Case ***O. v. Italy***, No. 37257/06, Judgment of 24 March 2009, §42; Case ***Soldatenko v. Ukraine***, No. 2440/07, Judgment of 23 October 2008, §§69, 73.

[1285] ECtHR, Case ***B.U. and Others v. Russia***, Nos. 59609/17, 74677/17 & 76379/17, Judgment of 22 January 2019, §22; Case ***U. N. v. Russia***, No. 14348/15, Judgment of 26 July 2016, §39.

[1286] ECtHR, Case **Liu v. Poland**, No. 37610/18, Judgment of 6 October 2022, §§78, 81; Case ***Khachaturov v. Armenia***, No. 59687/17, Judgment of 24 June 2021, §§95, 103.

[1287] ECtHR, Case ***M. G. v. Bulgaria***, No. 59297/12, Judgment of 25 March 2014, §94; Case ***Makhmudzhan Ergashev v. Russia***, No. 49747/11, Judgment of 16 October 2012, §75.

[1288] ECtHR, Case **Liu v. Poland**, No. 37610/18, Judgment of 6 October 2022, §82; Case ***Kozhayev v. Russia***, No. 60045/10, Judgment of 5 June 2012, §84.

> 3, in view of the demonstration, by the person, that he or she would be exposed to such risk, both in abstract and in concrete terms[1289];

A landmark case in this regard was **Chahal v. United Kingdom** (1996), in which the Court examined the expulsion of a Sikh activist from the United Kingdom to India following a failed application for asylum on grounds of national security, the Court considered that the assurance provided by the Government of India (that the applicant, if expelled to India, "would enjoy the same legal protection as any other Indian citizen, and that he would have no reason to expect to suffer mistreatment of any kind at the hands of the Indian authorities") was insufficient since, despite the efforts of that Government to bring about reform, the violation of human rights by certain members of the security forces in Punjab and elsewhere in India is a recalcitrant and enduring problem. It was also of the view that the applicant's high profile would be more likely to increase the risk to him of harm[1290].

Thus, the Court concluded that, despite the assurances provided, the applicant faced a real risk of ill-treatment if he were to be deported to India and that a violation of Article 3 **ECHR** would occur if the deportation order to India were to be enforced.

> "105. Although the Court does not doubt the good faith of the Indian Government in providing the assurances mentioned above (paragraph 92), it would appear that, despite the efforts of that Government, the NHRC and the Indian courts to bring about reform, the violation of human rights by certain members of the security forces in Punjab and elsewhere in India is a recalcitrant and enduring problem (see paragraph 104 above). Against this background, the Court is not persuaded that the above assurances would provide Mr Chahal with an adequate guarantee of safety."[1291]

Therefore, ***Article 3 does not protect only against State ordered torture; it protects also in cases where the State has limited control over the day-to-day practices of its security forces***. The principle in **Chahal** has been extended to cover situations where the person to be removed fears ill-treatment at the hands of ***non-State actors***. Although the ECtHR will not easily assume that a State is not capable of protecting persons within its jurisdiction against private violence, the Court has not ruled out that circumstances might be so serious that an individual might warrant protection against return[1292].

In case **Saadi v. Italy** (2008), dealing with an expulsion from Italy to Tunisia of a person convicted of terrorism-related charges in both Italy and, *in absentia*, in Tunisia, the Court reiterated the need to examine whether such assurances provided, in their practical application, would constitute a sufficient guarantee that the applicant would be protected against the risk of treatment prohibited by the Convention. Applying, as, always, rigorous criteria and exercising close scrutiny when assessing the existence of a real risk of ill-treatment, it takes into account, not only evidence adduced by both parties, but also reports issued by international NGO such as Amnesty International and Human Rights Watch, and even governmental sources such as the US State Department. Against this background, the Court considered that, in this case, not even visits by the International Committee of the Red Cross could exclude the risk of subjection to treatment contrary to Article 3.[1293]

[1289] ECtHR, Case ***Ouabour v. Belgium***, No. 26417/10, Judgment of 2 June 2015, §§76-78.
[1290] ECtHR, Case ***Chahal v. the United Kingdom***, N.º 22414/93, Judgment [GC] of 15 November 1996, §§105-106.
[1291] ECtHR, Case ***Chahal v. the United Kingdom***, N.º 22414/93, Judgment [GC] of 15 November 1996, §§96-97 and 105.
[1292] See Silvis, Johannes, **"Extradition and Human Rights: Diplomatic Assurances and human rights in the extradition context"**, lecture presented on 20 May 2014 at the special session on extradition held during the 66th meeting of PC-OC, p 5.
[1293] ECtHR, Case ***Saadi v. Italy***, No. 37201/06, Judgement (Grand Chamber) of 28 February 2008, §§ 146-148.

In January 2012, a case of paramount importance - **Othman (Abu Qatada) v. UK** – led the ECtHR to set the ***parameters*** to which diplomatic assurances must obey in order to be considered acceptable by this Court.

The case concerned a Jordanian national, arrived in the UK in 1993 and granted asylum. He was detained from 2002 until 2005 under the Anti-terrorism, Crime and Security Act 2001. Following his release, the Secretary of State served the applicant with a notice of intention to deport. Meanwhile, in 1999 and 2000 the applicant was convicted *in absentia* in Jordan of offences of conspiracy to carry out bombings and explosions. The crucial evidence against the applicant in each of the trials that led to those convictions were the incriminating statements of two co-defendants, who subsequently complained of torture. In 2005 the UK and Jordanian Governments signed a Memorandum of Understanding (MoU) which set out a series of assurances of compliance with international human rights standards to be adhered to when an individual was returned to one State from the other. It also provided for any person returned to have prompt and regular visits from a representative of an independent body nominated jointly by the two Governments. The Adaleh Centre for Human Rights Studies later signed a monitoring agreement with the UK Government to that effect. In the applicant's case additional questions as to any possible retrial were put to, and answered by, the Jordanian Government. The applicant appealed against the decision to deport him but his claims, after careful examination by the domestic courts, were ultimately dismissed[1294].

In his judgement, the ECtHR took note of the concerns expressed by several international human rights bodies regarding the use of diplomatic assurances in cases of torture and ill-treatment, including an essay contained in the 2008 World Report of the NGO Human Rights Watch, which considered the arrangements between in the UK Jordan, characterised Adaleh as a small NGO and questioned whether, with little experience, questionable independence and virtually no power to hold the Government accountable, it was able to ensure the safety of a person returned under the MOU."[1295] The Court accepted that:

> "as the materials provided by the applicant and the third party interveners show, there is ***widespread concern within the international community*** as to the practice of seeking assurances to allow for the deportation of those considered to be a threat to national security (…). However, it not for this Court to rule upon the propriety of seeking assurances, or to assess the long term consequences of doing so; its only task is to examine whether the assurances obtained in a particular case are sufficient to remove any real risk of ill-treatment. Before turning to the facts of the applicant's case, it is therefore convenient to set out the approach the Court has taken to assurances in Article 3 expulsion cases.
>
> 187. In any examination of whether an applicant faces a real risk of ill-treatment in the country to which he is to be removed, the Court will consider both the ***general human rights situation*** in that country and the ***particular characteristics*** of the applicant. In a case where assurances have been provided by the receiving State, those assurances constitute a further relevant factor which the Court will consider. However, ***assurances are not in themselves sufficient*** to ensure adequate protection against the risk of ill-treatment. There is an ***obligation to examine*** whether assurances provide, in their ***practical*** application, a sufficient guarantee that the applicant will be protected against the risk of ill-treatment. The weight to be given to assurances from the receiving State depends, in each case, on the circumstances prevailing at the material time (…).
>
> 188. In assessing the practical application of assurances and determining what weight is to be given to them, the preliminary question is whether the general human rights situation

[1294] Silvis, Johannes, **"Extradition and Human Rights: Diplomatic Assurances and human rights in the extradition context"**, lecture presented on 20 May 2014 at the special session on extradition held during the 66th meeting of PC-OC, p 7.
[1295] ECtHR, Case ***Othman (Abu Qatada) v. United Kingdom*****,** No. 8139/09, Judgment of 17 January 2012, §146.

in the receiving State ***excludes accepting*** any assurances whatsoever. However, it will only be in ***rare cases*** that the general situation in a country will mean that no weight at all can be given to assurances (…).

189. More usually, the Court will assess first, the ***quality*** of assurances given and, second, whether, in light of the receiving State's practices they can be ***relied upon***. In doing so, the Court will have regard, inter alia, to the following factors:

(i) whether the terms of the assurances have been ***disclosed*** to the Court (…);

(ii) whether the assurances are ***specific*** or are ***general and vague*** (…);

(iii) ***who*** has given the assurances and whether that person can ***bind*** the receiving State (…;

(iv) if the assurances have been issued by the central government of the receiving State, whether ***local authorities can be expected to abide*** by them (…);

(v) whether the assurances concerns ***treatment*** which is ***legal*** or ***illegal*** in the receiving State (…))

(vi) whether they have been given by a ***Contracting State*** (…);

(vii) the length and strength of ***bilateral relations*** between the sending and receiving States, including the receiving State's ***record*** in abiding by similar assurances (…);

(viii) whether compliance with the assurances can be ***objectively verified*** through diplomatic or other monitoring mechanisms, including providing unfettered access to the applicant's lawyers (…);

(ix) whether there is an ***effective system of protection against torture*** in the receiving State, including whether it is willing to cooperate with international monitoring mechanisms (including international human rights NGOs), and whether it is willing to investigate allegations of torture and to punish those responsible (…);

(x) whether the applicant has ***previously been ill-treated*** in the receiving State (…); and

(xi) whether the reliability of the assurances has been examined by the ***domestic courts*** of the sending/Contracting State (…)."[1296]

The ECtHR considered that in "the applicant's case, the UK and Jordanian Governments had made genuine efforts to obtain and provide transparent and detailed assurances to ensure that he would not be ill-treated upon his return to Jordan. The MoU reached as a result of those efforts was superior in both its detail and formality to any assurances previously examined by the Court. Furthermore, the assurances had been given in good faith and approved by the highest levels of Jordanian Government, whose bilateral relations with the UK had historically been very strong. The MoU clearly contemplated that the applicant would be deported to Jordan, where he would be detained and retried for the offences for which he had been convicted *in absentia*. The applicant's high profile would likely make the Jordanian authorities careful to ensure his proper treatment, since any ill-treatment would not only have serious consequences on that country's bilateral relationship with the UK, but would also cause international outrage. Finally, in accordance with the MoU, the applicant would be regularly visited by the Adaleh Centre, which would be capable of verifying that the assurances were respected. Consequently, the applicant's

[1296] ECtHR, Case ***Othman (Abu Qatada) v. United Kingdom*** No. 8139/09, Judgment of 17 January 2012, §§186-188, emphasis added.

return to Jordan would not expose him to a real risk of ill-treatment. The court unanimously found no breach of Article 3."[1297]

It should be borne in mind, however, that, as emphasised by the then Chairman of PC-OC at the second Special Session on Extradition:

> "The Court uses the wording *inter alia* and *factors* and not *criteria*, this means that the Court did not – and so far does not – prescribe a fixed or limitative set of 11 criteria that should be applied in (any) case where (diplomatic) assurances are deemed necessary and such assurances where requested and obtained."[1298]

In fact, it has been argued that this rather long list of requirements to assurances has not been used in quite the same detail by the ECtHR ever again[1299].

State practice on requesting and granting assurances also varies. For example, concerning assurances related to prison conditions, Germany informed, at the 67th meeting of PC-OC, that the German courts and the Federal Office of Justice used different wordings depending on whether the requesting State is a Party to the **ECHR** or not. If it is, the wording of such assurances will refer this Convention and the European standards on the treatment of prisoners. If the requesting State is not a Party to the **ECHR**, such wording refers to the UN Standard Minimum Rules for the Treatment of Prisoners, despite the fact that the ECtHR applies the European standards and the **ECHR** in order to review surrender procedures to non-member States[1300]. Discussing the matter at its 68th meeting, in May 2015, PC-OC considered that this was an important question, that it should not be limited to non-European States and that it should take into account the case law of the ECtHR, CPT standards, European Prison Rules and the UN Minimum Standards for the Treatment of Prisoners. PC-OC Mod was instructed to give further consideration to this question and to report back to the plenary.[1301] At its next session, PC-OC supported the view of PC-OC Mod that, when deciding on the extradition of a person to a place where the prison conditions are potentially problematic, the ***only binding obligation to consider is Article 3 of the ECHR concerning the prohibition of torture and inhuman or degrading treatment or punishment and the related case law of the ECtHR***. Given the absolute nature of Article 3, CoE member States should, in principle, provide the same level of protection to all persons within their jurisdiction, regardless of whether the State requesting extradition is, or is not, a member State of the CoE. PC-OC recalled that decisions on extradition and the potential violation of Article 3 were to be taken on a ***case by case basis***, while considering all elements of relevance to the specific case, including the concrete risks[1302]. In the discussion paper used as a basis for these discussions[1303], some inconsistencies have been pointed out in the standards used as a reference in the Court's case law, as well as that an analysis strictly limited to CoE standards involves a "significant lowering of the consistently applied criteria for the evaluation of the alleged violation of the invoked fundamental right. The requirement of a (concrete) *serious* risk, becomes the mere indication of a (simple) *risk* to a violation of, for instance article 3." A "very cautious" approach was recommended[1304], strictly reliant on CoE/ECtHR standards, as expressed by the Court in its judgement on case **Babar Ahmad and Others v. United Kingdom** (2012)[1305].

[1297] Silvis, Johannes, **"Extradition and Human Rights: Diplomatic Assurances and human rights in the extradition context"**, lecture presented on 20 May 2014 at the special session on extradition held during the 66th meeting of PC-OC, pp 10-11.
[1298] See Vertbert, Erik, in **PC-OC (2018) 05** (…),pp. 9-10.
[1299] See **PC-OC (2018)05**, "Introductory speech (…)", Mr Vincent Glerum, p. 28.
[1300] **PC-OC Mod (2014) 06**, *Prison standards in extradition matters*, Question raised by Ms Kristina Speicher (Germany), Strasbourg, 29 September 2014.
[1301] **PC-OC (2015) 14**, *List of decisions taken at the 68th meeting of the PC-OC*, Strasbourg, 29 May 2015, p. 3.
[1302] **PC-OC (2015) 19**, List of decisions taken at the 69th meeting, Strasbourg, 5 November 2015, pp. 3-4.
[1303] **PC-OC Mod (2015) 07**, p. 4.
[1304] **PC-OC-Mod (2015) 07**, pp.3-4.
[1305] ECtHR, Case ***Babar Ahmad and Others v. United Kingdom (Judgment)***, Nos. 24027/07, 11949/08, 36742/08, 66911/09 & 67354/09, Judgment of 10 April 2012, §179.

Chapter 4: Extradition *versus* other transnational procedures

4.1 Extradition and surrender under an EAW

Extradition is the official procedure whereby one State (the requesting State) officially requests from another State (the requested State) the surrender of a person who is sought for criminal prosecution, or to serve a sentence following conviction for a criminal offence. It is the oldest form of international cooperation and is regulated between States through international treaties which are either bilateral or multilateral in character.

Multilateral treaties are often adopted under the *aegis* of international organisations such as the UN or the CoE. The **ECE** has been adopted within the CoE. The UN has included provisions on extradition, for example, in its **Convention against Transnational Organised Crime** (UNTOC or Palermo Convention), **Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment** (CAT) or the **International Convention for the Protection of All Persons from Enforced Disappearance** (CPED).

UNTOC, for instance, has been considered a ***model for international cooperation on extradition*** and its Article 16 allows States Parties which make extradition conditional on the existence of a treaty to consider the Convention as a legal basis for extradition in their relations with other States Parties. It also allows for flexibility in approach in that all offences under the Convention are deemed to be included in existing extradition treaties, thus allowing States Parties ease of implementation with respect to those crimes. Some other international instruments such as the anti-terrorism conventions and the international drug conventions are also relevant to extradition and may apply to a specific type or group of offences.

Furthermore, the UN Office on Drugs and Crime (UNODC) has developed technical assistance tools on extradition, such as a **Model Treaty on Extradition** and a **Model Law on Extradition** (2004). These tools are intended to be used by States in the negotiation of bilateral and regional agreements to promote more effective cooperation in criminal cases with transnational implications, and in the enactment of relevant national laws.

Extradition laws specify the crimes that are extraditable, clarify extradition procedures and safeguards, and stipulate the relationship between the act and international treaties. The extradition procedures to which the fugitive will be subjected are dependent on the law and practice of the requested State and national laws differ regarding the relationship between extradition laws and treaties.

The procedure based on a **European Arrest Warrant** (EAW) has replaced the formal extradition procedures between the EU Member States. The EAW is a simplified cross-border judicial surrender procedure – for the purpose of prosecuting or executing a custodial sentence or detention order. It operates via direct contacts between judicial authorities, allowing for faster and simpler surrender procedures.

The EAW was introduced by the **EU Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States** (2002/584/JHA).

The major **difference** the extradition and EAW procedures is of a ***procedural*** nature: the EAW is issued by a judicial authority in a first Member State (issuing Member State) to a judicial authority in a second requested Member State (executing Member State). **Unlike the extradition procedure, the executive cannot interfere in the decision of the judicial authority.**

The EAW was introduced in January 2004 and is based on the principle of ***mutual recognition*** and founded on ***trust*** and ***direct contact*** among the judicial authorities of the Member States. Thus, it requires each national judicial authority (the executing judicial authority) to recognize, *ipso facto*, and with a minimum of formalities, requests for the surrender of a person made by the judicial authority of another Member State (the issuing judicial authority).

Defined as a "judicial decision issued by a Member State with a view to the arrest and surrender by another Member State of a requested person, for the purposes of conducting a criminal prosecution or executing a custodial sentence or detention order", the EAW operates when a final sentence of imprisonment or a detention order has been imposed for a minimum period of four months; and for acts punishable by the law of the issuing Member State by a custodial sentence or a detention order for a maximum period of at least 12 months (Articles 1 (1) and 2 (1) of **Council Framework Decision 2002/584/JHA of 13 June 2002**).

The EAW is essentially a **structured form** that must be used by the judicial authorities of the EU Member States. It constitutes an annex to the **Council Framework Decision** and can be found at the **EJN website** (together with many other useful resources), in all official languages of the EU. This standard form, which must be filled by the authorities of the issuing State, contains information on the identity of the person concerned, the issuing judicial authority, the final judgement, the nature of the offence and the penalty. As a rule, it is transmitted directly to the executing judicial authority. If this authority is unknown, resources are available to determine this: the Schengen Information System (SIS); Interpol; and the EJN.

The executing judicial authority then proceeds to ***arrest*** the sought person, who must then be made aware of the content of the arrest warrant and is entitled to the services of a lawyer and an interpreter. In all cases, the executing authority may decide to keep the individual in custody or to release him or her, subject to certain conditions. Pending a decision, the executing authority (in accordance with its national law) hears the person concerned. The executing judicial authority must take a ***final decision*** on execution of the EAW no later than **60 days after the arrest**. It then immediately notifies the issuing authority of the decision taken. Any period of ***detention*** arising from the execution of the EAW must be **deducted** from the total period of deprivation of liberty imposed.

However, Member States remain at liberty to apply and conclude bilateral or multilateral agreements insofar as such agreements help to ***further simplify or facilitate*** the surrender procedures. The application of such agreements should in no case affect relations with Member States that are not Parties to them.

These are the main differences between traditional extradition and surrender under an EAW:

a) ***Strict time limits***: the country where the person is arrested has to take the final decision on the execution of the EAW within 60 days after the arrest of the person. If the person consents to the surrender, the surrender decision must be taken within 10 days. The person requested must be surrendered as soon as possible on a date agreed between the authorities concerned, and no later than 10 days after the final decision on the execution of the EAW.

b) ***Double criminality check***: no longer required for 32 categories of offences. The only requirement is that it be punishable by a maximum period of at least 3 years of imprisonment in the issuing country. For other offences, surrender may be subject to the condition that the act constitutes an offence in the executing country as well.

c) ***No political involvement***: decisions are taken by judicial authorities only, with no political considerations involved.

d) ***Surrender of nationals***: EU States can no longer refuse to surrender their own nationals, unless they take over the execution of the prison sentence against the sought person.

e) ***Guarantees***: the State which executes the EAW may require guarantees that, after a certain period, the person will have the **right to ask for review**, if the punishment imposed is a **life sentence**; the sought person can serve any resulting **prison time in the executing Member State**, if he or she is a national or habitual resident therein.

Surrender ***prevails*** over extradition between EU Member States and in case the EU country of nationality of a person whose extradition has been requested by a third State, having been

informed of such request by the EU Member State to which such request was addressed, and given the opportunity to issue an EAW for the purpose of prosecution, does so[1306]. It equally prevails when there is an international agreement on extradition between the EU and the third country involved, giving the requested Member State the option of not extraditing its own nationals[1307].

Human right scrutiny by the ECtHR and the CJEU in the context of extradition and surrender under an EAW

In the sphere of extradition, the ***EAW system is not, per se, incompatible with the Convention***. When a State applies for a European or Interpol arrest warrant for the purposes of detaining a person located in another State and the later executes the warrant in accordance with its international obligations, the requesting State is responsible, under the Convention, for that person's detention, even if the latter was effected by another State[1308].

As far back as 1958, the EComHR ruled that "if a State contracts treaty obligations and subsequently concludes another international agreement which disables it from performing its obligations under the first treaty, it will be answerable for any resulting breach of its obligations under the earlier treaty"[1309] This was particularly so in cases where the obligations in question had been assumed in a treaty, the **ECHR**, whose guarantees affected "the public order of Europe"[1310].

In principle, where the domestic authorities are called upon to implement EU law, particularly in the framework of an EAW, without any power of discretion and when the CJEU has already adjudicated on respect for the fundamental rights in question, the ***presumption of equivalent protection will apply***. The principle of equivalent protection was articulated for the first time in case **Bosphorus Airlines v. Ireland** (2005), in which the Court stated that where a State transferred sovereign powers to an international organisation, "absolving Contracting States completely from their Convention responsibility in the areas covered by such a transfer would be incompatible with the purpose and object of the Convention; the guarantees of the Convention could be limited or excluded at will, thereby depriving it of its peremptory character and undermining the practical and effective nature of its safeguards". For the first time, the Court agreed to examine the merits of a complaint concerning measures taken to give effect to Community law where the State had no margin of appreciation. It took the view that Ireland had merely complied with its legal obligations flowing from membership of the European Community. Furthermore, and most importantly, it held that it was not necessary to examine whether the measure had been proportionate to the aims pursued, given that "the protection of fundamental rights by Community law [is] ... "equivalent" ... to that of the Convention system". Accordingly, "the presumption [arose] that Ireland did not depart from the requirements of the Convention when it implemented legal obligations flowing from its membership of the European Community"[1311].

Nevertheless, the ECtHR must always verify that the principle of mutual recognition is not applied automatically and mechanically to the detriment of fundamental rights. If a serious and substantiated complaint is raised before the national authorities to the effect that the protection of a Convention right has been ***manifestly deficient*** and that this situation cannot be remedied by

[1306] CJEU, Case **C-182/15, *Petruhhin***,, Judgement [GC] of 6 September 2016.
[1307] CJEU, Case ***Pisciotti***, C-191/16, Judgement [GC] of 10 April 2018.
[1308] ECtHR, Case ***Vasiliciuc v. The Republic Of Moldova***, No. 15944/11, Judgment of 2 May 2017, §§23-24.
[1309] EComHR, Case ***X v. Germany***, No. 235/56, decision of 10 June 1958.
[1310] EComHR, Case ***Austria v. Italy***, No. 788/60, decision of 11 January 1961.
[1311] ECtHR, Case ***Bosphorus Hava Yollari Turizm Ve Ticaret Anonim Şirketi v. Ireland***, No. 45036/98, Judgment [GC] of 30 June 2005, §§154, 165.

EU law, such authorities ***cannot refrain from examining that complaint on the sole ground that they are applying EU law***.[1312]

The Court did not consider that the protection of fundamental rights had been manifestly deficient such that the presumption of equivalent protection was rebutted in case **Avotiņš v. Latvia** (2016), holding in this case that there had been no violation of Article 6 (1) of the Convention. It notably reiterated that, when applying EU law, the Contracting States remained bound by the obligations they had entered into on acceding to the **ECHR**. Those obligations were to be assessed in light of the ***presumption of equivalent protection*** established by the Court in the judgement on case **"Bosphorus Airways" v. Ireland** (2005) and developed in the judgement on case **Michaud v. France** (2012).

Fundamental rights, as guaranteed by the **ECHR**, constitute general principles of the EU law, although the **ECHR** has not yet been formally incorporated into it. More importantly, under the "conformity clause" of Article 52 (3)[1313] of the **CFREU**, the CJEU is committed to abide by the **ECHR** standards and to follow the jurisprudence of the ECtHR in the interpretation of any corresponding Charter rights. The CJEU has consistently applied the jurisprudence of the ECtHR, including when assessing fundamental rights issues in the context of surrender and extradition.

In each section of this publication, reference is made to the functioning of the EAW mechanism regarding matters equivalent to those covered by **ECE**.

5. 2 Extradition and asylum

Although guaranteed by Article 14 of the **UDHR**, the ***right to asylum*** is not recognized by the **ECHR**, this treaty being the sole major regional human rights treaty that fails to do so[1314] (it is provided for, inter alia, in Article 18 of the **CFREU**, Article 22 (7) of the **American Convention on Human Rights** and Article 12 (3) of the **African Charter on Human and People's Rights**.

In case an individual is granted asylum and, upon moving to another State, his or her extradition is requested by its country of origin from the later State, the Court has considered that it is not its role to decide whether the asylum granted elsewhere would prevent extradition, nor whether a decision to grant refugee status taken by the authorities of a State Party to the **Convention Relating to the Status of Refugees** must be interpreted as conferring on the person concerned the same status in all the other State Parties of said Convention. The Court also stated that it does not have the task of making a formal decision on compliance with the legislative acts of the institutions of the EU with regard to asylum and equivalent protection. Notwithstanding this, the Court did consider that the decision of a third State to grant asylum should be taken as an ***important indication*** and a ***starting point*** for the requested State's analysis of the applicant's situation at the relevant moment. This can, however, lead to another set of practical problems, in

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[1312] ECtHR, Case ***Bosphorus Hava Yollari Turizm Ve Ticaret Anonim Şirketi v. Ireland***, No. 45036/98, Judgment [GC] of 30 June 2005, §156; Case ***Michaud v. France***, No. 12323/11, Judgment of 6 December 2012, §103; Case ***Avotiņš v. Latvia***, No. 17502/07, Judgment [GC] of 23 May 2016.

[1313] **CFREU**, Article 52 (3): *In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the* ***meaning and scope of those rights shall be the same as those laid down by the said Convention****. This provision shall not prevent Union law providing* ***more extensive protection****.* (emphasis added)

[1314] ECtHR, Case ***Vilvarajah and others v. United Kingdom***, Nos 13163/87 & 13164/87 & 13165/87 & 13447/87 & 13448/87, Judgment of 30 October 1991, §§ 102-103.

[1314] Case ***Mamatkulov and Askarov v. Turkey***, Nºs 46827/99 46951/99, Judgment [GC] of 4 February 2005, §66; Case ***Mamatkulov and Abdurasulovic v. Turkey***, N.º 46827/99 46951/99, Judgement of 6 February 2003, §65; and Case ***Shamayev and others v. Georgia and Russia***, N.º 36378/02, Judgment of 14 April 2005, § 334.

case the State of asylum is unwilling to share the information upon which the asylum decision was taken[1315].

In 1964, the European Commission of Human Rights had to decide one of earliest cases concerning the relationship between asylum and extradition. It concerned a Yugoslavian national, sentenced in Yugoslavia to nine years of imprisonment for having stolen a State-owned company, who fled to Austria, where he filed an asylum claim and never received an answer. The Yugoslavian Government called for the claimant's extradition and he was ultimately detained. The applicant claimed before the Commission, inter alia, that his conviction in Yugoslavia had been preceded by "acts of brutality and violence" and repeated attacks on the rights of the defence and that the real offenders in the case were members of the Communist Party, who would have been protected at the expense of an innocent man, and that his extradition would attract "very serious and inhuman retaliation". The Commission concluded that **extradition does not constitute "inhuman or degrading treatment"** within the meaning of **Article 3** of the **Convention**, and that ***only in exceptional circumstances will it prove to be contrary to the Convention***. In this case, the Commission considered there was no context that would cast doubt on its compatibility with the Convention, especially since the Austrian courts had expressly approved it and the Office of the UNHCR had agreed to it as well[1316].

Resolution No. 1 on access to justice for migrants and asylum seekers, adopted at the 28th Conference of the European Ministers of Justice (25-26 October 2007, Lanzarote), in its paragraph 16 c), entrusted the CDPC with the task of examining "the relationship between asylum procedures and extradition procedures". This Committee discussed the issue during its 58th plenary session in 2009 and concluded that the question was "of great importance to the Council of Europe" but had noted "the absence of a specialised intergovernmental committee dealing with issues of asylum seekers"[1317]. Still, the matter was discussed by the PC-OC in follow-up and a draft questionnaire on the topic, prepared by the Swiss and Slovak delegations, was examined by this Committee and sent to all delegations for **replies**[1318].

The Office of the United Nations High Commissioner for Refugees (UNHCR) was also requested to contribute to these discussions and submitted a note, dated April 2008, with **"Guidance on Extradition and International Refugee Protection"**[1319].

In it, UNHCR clarifies, *inter alia*, that:

> "When determining whether or not to grant extradition, the requested State may find itself in a conflict of obligations. On the one hand, a duty to extradite may arise from a bilateral or multilateral extradition agreement to which both the requesting and the requested States are party, or under provisions in international or regional instruments which establish a duty to extradite or prosecute. On the other hand, the requested State is bound by its *non-refoulement* obligations under international refugee and human rights law, which preclude the extradition of a refugee or an asylum-seeker to the requesting State under the conditions examined already. In such situations, bars to the surrender of an individual under international refugee and human rights law ***prevail over any obligation to extradite***.
>
> […] The precedence of human rights obligations does not depend on the existence of specific provisions to this effect in the treaty which establishes a duty to extradite. Rather, ***the primacy of such obligations over those contained in extradition treaties is due to their nature and their place within the hierarchies in the international legal order***. It derives from Article 103, in conjunction with Articles 55(c) and 56, of the Charter of the United Nations. Article 103 of the Charter of the United Nations establishes the

[1315] ECtHR, Case ***M. G. v. Bulgaria***, N.º 59297/12, Judgment of 25 March 2014, §88, and Kubicek, *Recent trends* (…), in **PC-OC (2018) 05**, p. 31.
[1316] EComHR, Case ***X. v. Austria and Yugoslavia***, No. 2143/64, Decision of 30 June 1964, p. 6.
[1317] **PC-OC (2013)14**, *List of decisions taken at the 65th meeting*, Strasbourg, 28 November 2013, p. 3.
[1318] **PC-OC (2008) 16**, *Summary Report of the 54th meeting*, Strasbourg, 20 May 2008, §§32-33.
[1319] UNHCR, **Guidance note on extradition and international refugee protection**, Geneva, April 2008.

> prevalence of Charter obligations over those stemming from other international agreements. In addition, under Articles 55(c) and 56 of the Charter, Member States of the United Nations are bound to work towards the achievement of the purposes of the United Nations, which include universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language or religion."[1320]

UNHCR also "acknowledges the legitimate concern of States to ensure that fugitive criminals be brought to justice" and that "extradition is an important tool in this regard". It warns, though, that "sometimes, […] extradition requests are used with ***persecutory intent***. This is worrying, as extradition may amount to the return, directly or indirectly, of a refugee to the country where he or she would be at risk of persecution or other irreparable harm. From an international protection point of view, the principal concern in extradition cases concerning refugees or asylum-seekers is to ensure that those in need and deserving of international protection have access to and benefit from such protection, while at the same time ***avoiding the abuse*** of the institution of asylum by persons who seek to hide behind it for the purpose of evading being held responsible for serious crimes."

According to UNHCR, "this "requires, on the one hand, a ***rigorous assessment*** of the wanted person's eligibility for refugee protection, based on a careful examination of all relevant facts and with due observance of procedural fairness requirements." It notes that "persons responsible for crimes may not qualify for refugee status, either because they do not meet the inclusion criteria of the refugee definition set out in Article 1A(2) of the 1951 Convention, or because their involvement in certain serious crimes or heinous acts gives rise to an exclusion clause of Article 1F of the 1951 Convention. […] On the other hand, where an extradition request concerns a refugee or an asylum seeker, States must ensure compliance with their protection ***obligations under international refugee and human rights law***. These obligations form ***part of the legal framework governing extradition*** and need to be taken into consideration when determining whether the wanted person may be lawfully surrendered to the requesting State. Most importantly, in considering the extradition of a refugee or an asylum-seeker, States are bound to ensure full respect for the principle of *non-refoulement* under international refugee and human rights law.

In conclusion, UNHCR states that "extradition and asylum processes must be coordinated in such a way as to enable States to rely on extradition as an effective tool in preventing impunity and fighting transnational crime in a manner which is fully consistent with their international protection obligations."[1321]

In its discussions on the topic held at its 56th plenary meeting, the PC-OC recognized that the relationship between asylum and extradition procedures is an important source of concern to some member States, despite the fact that the majority of them did not report serious problems thereon and did not see a need to embark on further work on the matter[1322].

PC-OC also discussed possible consequences of the draft EU Directive on common procedures for granting and withdrawing international protection status (asylum) on extradition procedures, on the basis of a discussion paper prepared by the delegate from the Czech Republic[1323], agreeing that this was a very important issue and deciding to closely follow developments on such issue[1324].

The interaction between extradition and asylum proceedings was again on PC-OC's agenda in 2013, with debates based on a discussion paper prepared by Erik Verbert (Belgium), who

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[1320] UNHCR, **Guidance note on extradition and international refugee protection**, Geneva, April 2008, §§21-22, emphasis added.
[1321] UNHCR, **Guidance note on extradition and international refugee protection**, Geneva, April 2008, §§97-101.
[1322] **PC-OC (2009) 11**, *List of decisions taken at the 56th plenary meeting*, Strasbourg, 14 May 2009, p. 2.
[1323] **PC-OC (2011) 24**, *The European Commission's amended proposal for a New Directive on Common Procedures for granting and withdrawing International Protection Status – relation between Asylum and Extradition in the European Union*; Discussion paper proposed by Mr Jakub Pastuszek (Czech Republic), Strasbourg, 7 November 2011.
[1324] **PC-OC (2011) 27**, *List of decisions taken at the 61st meeting*, Strasbourg, 24 November 2011, p. 3.

underlined tensions in this regard: "On the one hand there is the basic principle of priority of asylum (procedures) *vis-à-vis* extradition (procedures). Closely linked to that and again founded upon the key principle of *non-refoulement*, is the binding nature of asylum procedures." Regarding the hierarchy of obligations, reference is namely made to §§21 and 22 of UNHCR's Guidance Note (see above). "One concrete directive in that respect is that extradition procedures or the (final) decision to extradite should await the final outcome of a pending asylum procedure, including the appeal(s) that the asylum seeker may have lodged. Accordingly, the ***final determination on the asylum claim should be made prior to the decision on the extradition request***."[1325]

But the paper also signals that, since UNHCR indicates that refugees and asylum seekers may be extradited under certain conditions, there is the point of view that it would be prudent to conduct both procedures in parallel. In this regard, it its noted that, since the State requesting extradition is often the State against which protection is sought (and thus both procedures often serve perfectly opposed goals, a parallel or subsequent treatment of the asylum claim and extradition request may raise serious issues regarding the ***confidentiality*** of case files. Furthermore, questions are raised regarding the acquisition of nationality by refugees and its relations with extradition, i.e., whether the cessation of the refugee status by virtue of acquisition of nationality offers protection against extradition if the State in question does extradite its own nationals; and what protection applies if extradition is requested from a third State the former refugee is found in[1326].

Continuing these discussions in 2014, including during its first special session on extradition, PC-OC agreed with its Working Group that problems encountered by Member States regarding the interaction between extradition and asylum procedures could be diminished by ***enhancing the exchange of information and communication*** between the different authorities concerned at ***national*** level but also at ***international level***[1327].

When examining cases concerning the extradition of (or the execution of an EAW against) persons to whom refugee status has been granted by a third State (or more), the ECtHR has reiterated that it is not its task to interpret domestic legislation concerning the granting of refugee status and political asylum, nor is it its role to answer the question of whether a decision to grant refugee status taken by the authorities of a State Party to the Geneva Convention must be interpreted as conferring on the person concerned the same status in all the other State Parties of the said Convention. Nor does it have the task of making a formal decision on compliance with the legislative acts of the institutions of the EU with regard to asylum and equivalent protection. The qualification as a refugee or granting of such status by the ***UNHCR seems particularly relevant*** to the Court[1328].

However, the Court considers that, when examining those cases, such status must be taken into account as an important indication that, at the time when it was granted to the person concerned, there was sufficient evidence to show that such person was at risk of being persecuted in his or her country of origin. But the Court views this as only a ***starting point*** for its analysis of the applicant's situation at the relevant moment. In a case concerning the extradition of a person, previously granted asylum in Poland and Germany, from Bulgaria to Russia for the purposes of prosecution (in Ingushetia) for participation in an armed group, preparation of terrorist acts and trafficking in weapons and toxic substances, the Court considered that the applicant did incur in

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[1325] **PC-OC (2013) 08**, *Discussion paper on the interaction between extradition and asylum*, prepared by Mr Erik Verbert (Belgium), Strasbourg, 28 May 2013, p.3, emphasis added.
[1326] **PC-OC (2013) 08**, *Discussion paper on the interaction between extradition and asylum*, prepared by Mr Erik Verbert (Belgium), Strasbourg, 28 May 2013, p.3, emphasis added, pp. 3-4.
[1327] **PC-OC (2014) 02,** *List of decisions taken at the 66th meeting*, Strasbourg, 21 May 2014, p. 4.
[1328] ECtHR, Case ***Azimov v. Russia***, No. 67474/11, Judgment of 18 April 2013, §141; Case ***Abdulkhakov v. Russia***, No. 14743/11, Judgment of 2 October 2012, §147; Case ***Tehrani v. Turkey***, Nos. 32940/08 & 41626/08 & 43616/08, Judgment of 13 April 2010, §66.
Case **Gaforov v. Russia**, No. 25404/09, Judgment of 21 October 2010, §§135-138; Case ***Khaydarov v. Russia***, No. 21055/09, Judgment of 20 May 2010, §108; Case ***Charahili v. Turkey***, No. 46605/07, Judgment of 13 April 2010, §59.

a real risk of being subjected to ill-treatment if extradited to Russia, not only in view of his situation as a refugee in two EU countries, but also of the coherence of his position in the domestic extradition proceedings and before the ECtHR. Also taken into account was the fact that his allegations were amply corroborated by other documents in the file and in particular by those sent by the Russian to the Bulgarian authorities, by information contained in international reports indicating that persons belonging to the same group as the applicant were often subjected to torture while in detention and by the fact that no effective investigations were undertaken, as well as by the weakness of assurances provided. The ECtHR found that his ***extradition would violate* Article 3 *of the Convention***, which led to the definitive interruption of extradition proceedings. The person was released and left the requested State by his own will[1329]. An expulsion from Slovakia to Algeria, following the denial of both extradition and asylum due to a "real risk" of exposure to treatment contrary to Article 3, and in view of the human rights situation in the country in general, and of the treatment of persons suspected of terrorism in particular, was found to violate the same provision of the **ECHR**.[1330]

It is incompatible with **Article 5** of the **Convention** that, if authorities of a given State decide to rely on the asylum status granted by a third State, the person ***remains in detention once a definitive confirmation of his or her refugee status*** in such State is received.[1331]

In a 2015 case in which the ECtHR had verified that the national authorities had completely examined the applicant's risk of subjection to treatment contrary to Article 3 in the context of asylum proceedings, and ***no new elements*** were brought to its attention in an application concerning extradition, the Court has accepted the assessment made by national courts[1332].

When the asylum application is submitted only ***after detention with the view to extradition*** (or expulsion) and ***well after the applicant's arrival*** in the requested country, the Court considers this an indication of **diminished credibility** of the applicant's allegations[1333], although it also emphasizes that ***failure to apply for refugee status in due time does not, as such, refute the allegations under Article 3 of the Convention nor exempt national authorities from thoroughly assessing the risk of ill-treatment***[1334]. It should also be borne in mind that the protection afforded by **Article 3** of the **Convention** is, in any event, **broader** than that provided for in **Articles 32 and 33** of the **1951 United Nations Convention relating to the Status of Refugees**.[1335]

On the contrary, a ***refusal*** of domestic authorities to consider ill-treatment as a basis for granting refugee status, coupled with the refusal to examine the international reports in extradition proceedings and the rejection of expert opinions and witness statements as irrelevant, as well as a the "summary reasoning adduced by the domestic courts and their refusal to assess materials originating from reliable sources" led the Court to ***doubt that the risk of ill-treatment was subject to rigorous scrutiny***, either in the asylum or in the extradition proceedings[1336]. Competent national authorities have an obligation to assess, of their own motion, all the information brought to their attention before taking a decision on the person's removal, regardless

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[1329] ECtHR, Case ***M. G. v. Bulgaria***, No. 59297/12, Judgment of 25 March 2014, §87-89 and 94.
[1330] ECtHR, Case ***Labsi v. Slovakia***, No. 33809/08, Judgment of 15 May 2012, §§122-125.
[1331] ECtHR, Case ***Turdikhojaev v. Ukraine***, No. 72510/12, Judgment of 18 March 2021, §§50-51.
[1332] ECtHR, Case ***Ibragimov v. Slovakia***, No. 65916/10, Decision of 30 June 2015, §§62-63, 69-74.
[1333] ECtHR, Case ***R.K. v. Russia***, No. 30261/17, Judgment of 8 October 2019, §§52-57; Case ***Shakurov v. Russia***, No. 55822/10, Judgment of 5 June 2012, §§138-141.
[1334] ECtHR, Case **Ermakov v. Russia**, No. 43165/10, Judgment of 7 November 2013, §196.
[1335] ECtHR, Case ***Sidikovy v. Russia***, No. 73455/11, Judgment of 20 June 2013, §149; Case ***Khaydarov v. Russia***, No. 21055/09, Judgment of 20 May 2010, §109; Case ***Khodzhayev v. Russia***, No. 52466/08, Judgment of 12 May 2010, §101; Case ***Saadi v. Italy***, No. 37201/06, Judgment [GC] of 28 February 2008, §138.
[1336] ECtHR, Case ***Kasymakhunov v. Russia***, No. 29604/12, Judgment of 14 November 2013, §125; Case ***Abdulkhakov v. Russia***, No. 14743/11, Judgment of 2 October 2012, §148.

of his or her conduct[1337]. Furthermore, the protection of the fundamental value embodied in **Article 3** of the **ECHR** ***cannot be waived due to failure to comply with "automatic and mechanical" requirements***, as the Court found in a case relating to the expulsion from Turkey to Iran of a woman granted refugee status by the UNHCR whose application for asylum had been denied because it had not be submitted within a ***5-days deadline***, thus denying the person any scrutiny of her fears about return and of the risk that she be prosecuted and sentenced to a form of inhuman punishment prescribed by Iranian law for adultery (stoning to death, flogging and whipping)[1338].

Despite the ***absence of total overlap*** in the assessment of the real risk of ill-treatment in the various extradition, asylum or expulsion/deportation proceedings, the results of each are likely to have a ***profound influence*** in the other: for instance, a conclusion by national authorities that a person's extradition is not permissible on the basis of the Court's case-law and a number of international documents, jointly with the acknowledgement of a real risk of exposure to treatment contrary to Article 3 of the Convention in asylum proceedings and various international documents highlighting a risk of ill-treatment in the receiving country, has lead the ECtHR to conclude that an applicant's expulsion violated, inter alia, **Article 3** of the **Convention**.[1339]

Case **Peñafiel Salgado v. Spain** (2002) related to an Ecuatorian citizen, prosecuted in Ecuador, who left for Spain and whose extradition was then requested by Ecuador, having filed for asylum in Spain and then left for Lebanon while the extradition and asylum procedures were ongoing in Spain. The applicant was arrested in Lebanon and Ecuador again requested his extradition therefrom, which was granted. In the course of his surrender from Lebanon Ecuador, while transiting through France, the applicant reiterated his request for asylum pending in Spain and, on the basis of the **Dublin Convention**, was transferred to Spain for the purposes of continuation of the asylum proceedings. When his asylum request was denied in Spain, Ecuador requested that Spain continued in the extradition proceedings that were interrupted by the applicant's request for asylum (and by his departure to Lebanon). Extradition was granted and the applicant surrendered to Ecuador, having then complained that the Spanish courts did not examine the merits of the extradition procedure and the circumstances in which Ecuador requested the applicant's extradition from Lebanon, due to a document whose translation into Arabic was distorted, and also that his extradition had been granted by the *Audiencia Nacional* immediately after his asylum application had been rejected in administrative proceedings, without awaiting the outcome of his appeal against the rejection, as well as of the irregularity of the proceedings instituted against him in Ecuador, namely the use of means of pressure on judges, incorrect translations and his unlawful detention on remand. The Court recalled that the right not to be extradited is not, as such, included among the rights and freedoms recognized in the Convention and its additional protocols, nor are extradition proceedings covered by Article 6 of the Convention, and that, due to jurisdiction matters, the extradition procedure followed in Lebanon was even more outside the scope of the Convention and its form and reasoning could not be examined by Spanish courts. As regards the applicant's complaints relating to the asylum procedure initiated by the Spanish authorities and domestic courts, the Court reiterated that ***neither the Convention nor its Protocols recognize the right to political asylum***.[1340]

For situations in which extradition and asylum proceedings run concurrently, domestic law provides separate time-limits for the processing of the asylum application and the delivery of a decision by the relevant authorities. Either way, the decision must be taken "without undue delay". In a case where domestic law provided for a maximum of 60 days for examination of the asylum application by an administrative body and 60 days for each of the two levels of jurisdiction, but these time-limits had been greatly exceeded, with the administrative decision issued after eight months and the overall asylum proceedings lasting about seventeen months, instead of six months as provided for by internal law, the Court raised an issue of ***lawfulness***, since ***any***

[1337] ECtHR, Case ***F. G. v. Sweden***, No. 43611/11, Judgment [GC] of 23 March 2016, §127.
[1338] ECtHR, Case ***Jabari v. Turkey***, No. 40035/98, Judgment of 11 July 2000, §40.
[1339] ECtHR, Case ***Labsi v. Slovakia***, No. 33809/08, Judgment of 15 May 2012, §123-125, 131-132.
[1340] ECtHR, Case ***Peñafiel Salgado v. Spain***, No. 65964/01, Decision of 16 April 2002, §1.

detention which exceeds the period permitted by domestic law is unlikely to be considered to be* "in accordance with the law"**. Also, as a result of the delays in the asylum proceedings, the ***length of the detention pending extradition, which lasted eighteen months, was not in accordance with domestic law, since ***both time-limits are inextricably linked***[1341].

The Court consistently holds that the existence of circumstances that under domestic law ***exclude extradition*** of a person render ***any detention for the purpose of extradition unlawful and arbitrary***. However, it should be noted that, in the context ***of concurrent extradition and asylum requests***, detention only becomes arbitray from the moment when the decision on granting the applicant ***refugee status becomes final and binding***. If no decision on granting the applicant refugee status has been taken either prior to or during his detention, the latter cannot be retroactively considered unlawful or arbitrary, even if the alleged risks and objections are found to be well-founded and capable of preventing the person's removal. All that is required under 5 (1) (f) is **that "action is being taken with a view to deportation or extradition"**[1342].

In case the person lodges an ***asylum request*** while detained under an ongoing ***expulsion procedure***, detention would be in conformity with the Convention as long as authorities were considering expulsion and had a realistic perspective to achieve it in case the application for asylum was denied. The situation changes once a competent body finds that the person runs the risk of being exposed to ill-treatment in the event of expulsion to the prospective country. [1343].

The Court has considered that granting of **temporary asylum status** does ***not necessary confers credibility*** to the allegations and/or exempts sought persons in extradition procedures from ***substantiating*** allegations of risk of ill-treatment, as they may, in the Court's view, be no more than attempts from the national authorities of the requested State to provide the person with a ***lawful basis for residence*** while proceedings before the Court are pending.[1344]

In 2021, in a case concerning the ***surrender from France to Romania***, under an EAW, of two Romanian nationals, one of whom had been granted ***asylum in Sweden*** (country which denied requests for his extradition to Romania) for the purposes of enforcement of sentences of imprisonment, the ECtHR considered that such issue "is a real and serious question as to the protection of fundamental rights by the EU law and its articulation with the protection resulting from the **Geneva Convention of 1951** on which the CJEU has never ruled". Since the French *Court of Cassation* did not refer the matter to the CJEU, thus ruling without the relevant international mechanism for monitoring respect for fundamental rights, the ***presumption of equivalent protection was not considered to apply***. The ECtHR noted that the **EAW FD** does not provide for a ground for non-execution relating to the refugee status of the person whose surrender is requested. However, the granting of refugee status to the applicant by the Swedish authorities reveals that, at the time when this status was granted, the said authorities considered that there was sufficient evidence to establish that he was in danger of being persecuted in his country of origin.

The ECtHR found that this must be ***particularly taken into account*** when examining the actual risk that the applicant would suffer treatment contrary to **Article 3** of the **Convention** in the event of surrender. According to the Court, this examination must be carried out in light of the situation of the concerned person prevailing on the date of decision-making by the executing judicial authority and taking into account the general economy of the EAW. In this case, despite the fact that Sweden informed it had no intention of withdrawing the refugee status granted to the applicant ten years earlier and before Romania joined the EU, the ECtHR considered that nothing in the file investigated by the executing judicial authority or information brought by the applicant before the Court indicated that he was still in danger, in the event of surrender, of being persecuted for religious reasons in Romania, and therefore there ***were no sufficiently solid***

[1341] ECtHR, Case ***Komissarov v. the Czech Republic***, No. 20611/17, Judgment of 3 February 2022, §§48-52.
[1342] ECtHR, Case ***Mokallal v. Ukraine***, No. 19246/10, Judgment of 10 November 2011, §§42-43.
[1343] ECtHR, Case ***M. S. v. Belgium***, No. 50012/08, Judgment of 31 January 2012, §§150-155.
[1344] ECtHR, Case ***K. v. Russia***, No. 69235/11, Judgment of 23 May 2013, §69.

factual bases to characterize the existence of a real risk of violation of Article 3 of the Convention and refuse, for this reason, the execution of the EAW[1345].

The ECtHR is also often called upon to assess whether there are serious reasons to believe that the expulsion of an individual, namely in the context of revocation of his or her asylum status, may expose the person to a serious risk of torture and ill-treatment. As stated above, this assessment must be made on a **case-by-case basis** and in light of all the elements before the Court. Given the absolute nature of the prohibition of torture and ill-treatment, expulsion shall constitute a violation of Article 3 of the Convention if such risk is present, regardless of the person's conduct or affiliations[1346]. The Court also does not exclude that the ***publicity*** surrounding the person's asylum claim and appeals abroad might engender resentments or feelings of revenge in his country of origin and therefore put the applicant in increased risk of persecution; this is particularly relevant if the applicant does not appear to have played any active role in making his asylum case known to the public[1347]. The Court also considers that the indirect removal of an alien to an ***intermediary country*** does not affect the responsibility of the expelling Contracting State to ensure that he or she is not, as a result of its decision to expel, exposed to treatment contrary to **Article 3** of the ECHR. However, if the person is expelled to another Contracting State and has the ***possibility to seek protection therein***, the expulsion to such intermediary country does not create, in itself, a real risk of ill-treatment[1348].

Furthermore, it should be emphasized that, in case the risk of persecution in the receiving State has been established, it is not in accordance with the Court's case law to refuse the application of the right to *non-refoulement* to that country on the grounds that the subject presents a ***threat to public security*** in the country where he or she is staying[1349].

There are also relevant case law of the CJEU in this regard. For example, in case **Ruska Federacija**, the CJEU ruled that, when a Member State, to which a national of EFTA has moved, receives an extradition request from a third State pursuant to the **ECE**, and when that national was granted asylum by that EFTA State — before he or she acquired the nationality of that State — precisely on account of the criminal proceedings brought against him or her in the State which issued the request for extradition, it is for the competent authority of the requested Member State to verify that the extradition would not infringe the rights covered by Article 19(2) of the **CFREU**. The grant of asylum is, in this case, a "particularly substantial piece of evidence in the context of that verification". Before considering executing the request for extradition, the requested Member State is obliged, in any event, to inform that same EFTA State and, should that State so request, surrender that national to it, in accordance with the provisions of the surrender agreement, provided that the EFTA State has jurisdiction, pursuant to its national law, to prosecute his or her national for offences committed outside its national territory.[1350].

European Union

At the EU level, the Dublin System[1351] is in place, with the view to determine which EU Member State is responsible for examining an ***asylum application*** lodged in one of the Member States by a third-country national. The **Dublin Regulation** – applied by all EU Member States, as well as Norway, Iceland, Switzerland and Liechtenstein – establishes the principle that only ***one Member State*** is responsible for examining an asylum application. The objective is to avoid

[1345] ECtHR, Case ***Bivolaru and Moldovan v. France***, Nos.: 40324/16 & 12623/17, Judgment of 25 May 2021, §§131, 136-138 and 141.
[1346] See ECtHR, ***Case W v. France***, No. 1348/21, Judgment of 30 August 2022, §§ 68, 70, 73-74, 78-79, for a case concerning a person suspected of belonging to the Chechen radical Islamist movement, having a past as a fighter within a terrorist organization, and a commitment towards the international jihad.
[1347] ECtHR, ***N. v. Finland***, No. 38885/02, Judgment of 26 July 2005, §165.
[1348] ECtHR, Case ***Abdolkhani and Karimnia v. Turkey (No. 1)***, No. 30471/08, Judgment of 22 September 2009, §§74, 82, 88-89; Case ***T. I. v. United Kingdom***, No. 43844/98, Decision of 7 March 2000, pp. 15-16.
[1349] ECtHR, Case ***M.N. and Others v. Turkey***, No. 40462/16, Judgment of 21 June 2022, §43.
[1350] CJEU, Case **C-897/19 PPU, *Ruska Federacija***, Judgment of 2 April 2020.
[1351] See summary of these cases in ECtHR, **Fact sheet: Case law concerning the EU**, pp. 5-7.

asylum seekers from being sent from one country to another, and also to prevent abuse of the system by the submission of several asylum applications by the same person.

In a case concerning an Afghan national who entered the EU via Greece before arriving in Belgium, where he applied for **asylum**, the Belgian Aliens Office asked the Greek authorities to take responsibility for the asylum application. The applicant complained, in particular, about the conditions of his detention and his living conditions in Greece, and alleged that he had no effective remedy in Greek law in respect of these complaints. He further complained that Belgium had exposed him to the risks arising from the above mentioned deficiencies, and lack of an effective remedy under Belgian law in respect of those complaints. Regarding in particular the applicant's transfer from Belgium to Greece, the ECtHR held, considering that reports produced by international organisations and bodies all gave similar accounts of the practical difficulties raised by the application of the Dublin system in Greece, and the UNHCR had warned the Belgian Government about the situation there, that the Belgian authorities must have been aware of the deficiencies in the asylum procedure in Greece when the expulsion order against him had been issued. Belgium had initially ordered the expulsion solely on the basis of a tacit agreement by the Greek authorities, and had proceeded to enforce the measure without the Greek authorities having given any individual guarantee whatsoever, when they could easily have refused the transfer. The Belgian authorities should not simply have assumed that the applicant would be treated in conformity with the Convention standards; they should have verified how the Greek authorities applied their asylum legislation in practice; but they had not done so. Therefore, as far as Belgium was concerned, the Court found a violation of Article 3 (prohibition degrading treatment) of the Convention, as well as of Article 13 (right to an effective remedy) taken together with Article 3 of the Convention because of the lack of an effective remedy against the applicant's expulsion order.

In respect of Greece, the Court found a violation of Article 13 taken in conjunction with Article 3 of the Convention because of the deficiencies in the Greek authorities' examination of the applicant's asylum application and the risk he faced of being removed directly or indirectly back to his country of origin without any serious examination of the merits of his application and without having had access to an effective remedy. Furthermore, the Court found a violation of Article 3 (prohibition of degrading treatment) by Greece both because of the applicant's detention conditions and because of his living conditions there. Lastly, under Article 46 (binding force and execution of judgments) of the Convention, the Court held that it was incumbent on Greece to proceed, without delay, to an examination of the merits of the applicant's asylum request that met the requirements of the **ECHR** and, pending the outcome of that examination, to refrain from deporting the applicant[1352].

A violation of **Article 3** was also found in the case of an Afghan couple with five children, whose asylum application had been rejected by Swiss authorities, who had also ordered their deportation to Italy. The applicants alleged in particular that, if they were returned to Italy "in the absence of individual guarantees concerning their care", they would be subjected to inhuman and degrading treatment linked to the existence of "systemic deficiencies" in the reception arrangements for asylum seekers in this country. They also submitted that the Swiss authorities had not given sufficient consideration to their personal circumstances and had not taken into account their situation as a family. The Court held that there would be a violation of Article 3 of the Convention if the Swiss authorities were to send the applicants back to Italy under the **Dublin Regulation** without having first obtained ***individual guarantees*** from the Italian authorities that the applicants would be taken charge of in a manner adapted to the age of the children and that the family would be kept together. The Court found in particular that, in view of the current situation regarding the reception system in Italy, and in the absence of detailed and reliable information concerning the specific facility of destination, the Swiss authorities did not possess sufficient assurances that, if returned to Italy, the applicants would be taken charge of in a manner adapted to the age of the children. However, the Court also found that an ***effective remedy*** had been available to the applicants in respect of their complaint under Article 3 of the Convention. Accordingly, it rejected

[1352] ECtHR, Case ***M.S.S. v. Belgium and Greece***, No30696/09, Judgment [GC] of 21 October 2011.

their complaint under Article 13 (right to an effective remedy) of the Convention taken in conjunction with Article 3 as manifestly ill-founded[1353].

The Court found ***inadmissible*** a complaint, under Article 3 of the Convention, by a Somali asylum seeker who alleged that his removal to Italy would expose him to poor living conditions and a fear that the Italian authorities would expel him directly to Somalia without an adequate examination of his asylum case. It declared that the applicant had not established that his future prospects, if returned to Italy, whether taken from a material, physical or psychological perspective, disclosed a sufficiently real and imminent risk of hardship severe enough to fall within the scope of Article 3. The Court noted in particular that unlike the applicants in the case of **Tarakhel v. Switzerland** (see above), who were a family with six minor children, the applicant was an able young man with no dependents and that the current situation in Italy for asylum seekers could in no way be compared to the situation in Greece at the time of the **M.S.S. v. Belgium and Greece** judgment (also above). In the Court's view, the structure and overall situation of the reception arrangements in Italy could not, in themselves, act as a bar to all removals of asylum seekers to that country.[1354]

Also inadmissible for manifestly ill-founded under Article 3 was the case concerning the transfer to Italy of an Eritrean asylum seeker and her two minor daughters pursuant to the **Dublin III Regulation**, without individual guarantees from the Italian authorities of adequate reception facilities and access to medical care. Similarly to the previous case, the ECtHR considered that the applicant had not demonstrated that her future prospects, if transferred to Italy with her children, whether looked at from a material, physical or psychological perspective, disclosed a sufficiently real and imminent risk of hardship that was severe enough to fall within the scope of Article 3 (prohibition of inhuman or degrading treatment) of the Convention[1355].

5.3 Disguised extradition and its connection with deportation or expulsion procedures

During the 62nd plenary meeting, the PC-OC had a discussion on the relationship between extradition and deportation/expulsion based on a list of concrete questions prepared by the PC-OC Mod[1356]. This was a follow up to an exchange of views held during the 61st meeting of the PC-OC on the basis of a discussion paper entitled "Disguised extradition, i.e. surrender by other means – Some ideas to start a discussion"[1357] and, in it, **extradition** – the traditional way to surrender a person in view of prosecution or execution of a sentence – is defined as:

> the surrender of a fugitive who is sought by another jurisdiction for criminal justice purposes – it is usually the judicial rendition (although it can also be a mixture of judicial and administrative, or even purely administrative), by one State to another, of fugitives charged with having committed an extraditable offence and sough for trial or already convicted and sought for punishment. It results in a relationship between sovereign States, but are also focused on the rights of the individual (eg. right to life, prohibition of torture and ill-treatment, right to liberty and security, right to private and family life);[1358]

Nowadays legal sources for extradition are often bilateral or multilateral treaties. Nevertheless it is widely accepted that also extradition outside a treaty is possible, provided that the law of the requested State so provides and the law of the requesting State allows prosecution and

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[1353] ECtHR, Case ***Tarakhel v. Switzerland***, No. 29217/12, Judgment [GC] of November 2014.
[1354] ECtHR, Case ***A.M.E. v. the Netherlands***, No. 51428/10, Decision of 13 January 2015.
[1355] ECtHR, Case ***M.T. v. the Netherlands***, No. 46595/19, Decision of 23 March 2021.
[1356] **PC-OC (2012)8rev2**: Note on the relationship between extradition and deportation/expulsion (disguised extradition) – Summary of the discussion held during the 62nd meeting of the PC-OC, p. 2.
[1357] **PC-OC (2011)09rev**, "Disguised extradition, i.e. surrender by other means: some ideas to start a discussion", by Mr Eugenio Selvaggi (Italy) with Comments by Mr Miroslav Kubicek (Czech Republic) and Mr Erik Verbert (Belgium), 16 May 2011.
[1358] **PC-OC (2011)09rev**, p. 2.

punishment in such a case. When extradition outside a treaty is foreseen, then the principle of reciprocity would normally apply.[1359]

Disguised extradition means that one State places a person in such a situation that he/she falls or might fall under the control of the authorities of another State which is interested in submitting him or her to its jurisdiction for the purpose of prosecution or punishment. States would thus bypass the stringent regulations governing extradition, since procedures regulating these "other means", like expulsion, are usually based on a discretionary power and where remedies to the government's decision are provided for by law (which might not always be the case), such remedies are lengthy and sometimes the process will be concluded after the surrender of the concerned person, which is why the human rights of such person come at stake[1360].

States may resort to "disguised extradition" for a multitude of reasons, including failure of an initiated extradition procedure; lack of a treaty basis for extradition; non extraditable offence; lengthy and complex procedures or too cumbersome ones. Disguised extradition may be effected by legal or illegal means.

5.3.1 Legal procedures

These include resort to expulsion and deportation – i.e., possibilities that States provide themselves with in order to secure their interests, in particular as far as ***public order*** is concerned. The right to expel undesirable people is widely accepted and not disputed. The problem arises when such a system is used to circumvent the guarantees of extradition procedures. In some cases, surrender would not be possible at all under extradition law; in other, cases surrender might be possible but the recourse to expulsion in order to avoid the judicial assessment deprives the person of his/her rights.[1361]

> **Expulsion**: termination by a State of an alien's ***legal entry*** to remain, which is often based upon the grounds that the alien is considered ***undesirable*** or a ***threat*** to the State – it is usually effected to the State where the person came from or of his/her nationality (despite the apparent inexistence of stringent rules on this);
>
> **Deportation**: removal from a State of a person who ***illegally entered*** the territory of that State.

So, differently from an extradition procedure, which is based on international cooperation in criminal matters, usually laid down in treaties, expulsion and deportation procedures are mainly based on national legislation related to ***immigration*** and are ***unilateral*** by nature (although there might also be bilateral or multilateral agreements in this respect, such as readmission agreements).[1362]

In the above mentioned discussion paper, it is recognized that there might be some coincidence between expulsion and deportation, according to domestic legislations, usually on immigration; and that generally any decision on expulsion or deportation may be challenged before a competent authority (normally a court). Within the EU the overall situation is considered complex because of the free movement of people[1363].

Discussing the matter in 2012, PC-OC experts underlined that extradition "provides the individual with certain safeguards (rule of speciality, double criminality) which are lacking in case of deportation/expulsion. It was observed however that the procedural rights of the alien (such as the right to a review of the decision) are also protected in cases of deportation/expulsion, as reflected in the extensive case law of the ECtHR in this field. The deportation/expulsion procedure

[1359] **PC-OC (2011)09rev**., p. 2.
[1360] **PC-OC (2011)09rev**, p. 2.
[1361] **PC-OC (2011)09rev**, p. 3.
[1362] **PC-OC (2012)8rev2**, p.2.
[1363] **PC-OC (2011)09rev**, p. 2.

seems to focus more on the sovereign right of the State, which, outside the EU context, may use relatively wide discretion as to its immigration policy." Interpol indicated a tendency, in certain States, to request information from other States with a view to expulsion, which led to a revision of the red notice requests in 2011 so as not to exclude deportation/ expulsion. [1364]

The question was raised whether a State may proceed with a deportation/expulsion procedure when an extradition procedure has been ***initiated***. It was observed that both the legal situation and the practice vary largely in Europe. Experts recalled that no international review had been conducted on this specific subject and that the ECtHR had not yet addressed the issue. In States where the legal order imposes a primacy of extradition over deportation/expulsion, it was felt that it is not always clear at what stage the extradition procedure is considered initiated.[1365]

Some experts felt that the precedence of one procedure over the other is not an issue. Extradition and deportation/expulsion are different procedures that should be used within the boundaries of national legislation and international commitments. It was noted that as deportation/expulsion is a sovereign right of States, it could never be excluded. However, when a national court has decided that the extradition of a person should be refused (for example due to the absence of double criminality or the lapse of time), one wonders whether the expulsion of such a person would still be acceptable as a deportation/expulsion procedure does not recognise the same safeguards as extradition procedures. Considering the different aims of the procedures, some experts felt that deportation/expulsion to a State that has requested extradition can be possible even in those cases where the request for extradition has been refused. ***Where extradition has been refused for human rights reasons, such as risk of torture, the option of deportation/expulsion would clearly not be open***[1366] - a view in line with the case law of the ECtHR (see below).

The question was also raised of whether a State that has requested extradition can provide the requested State with ***information that might lead to deportation/ expulsion*** instead of extradition. Taking into account that the decision to deport or expel is a unilateral decision of the deporting/expelling State, some experts felt that the requesting state is free to give support with information that might lead to expulsion and to provide assistance to facilitate the person's return. One expert stressed that providing such information might cause problems in the national proceedings running in the State which provided the information[1367].

In case **Öcalan v. Turkey** (2005), concerning the expulsion or "atypical extradition" from Kenya to Turkey, the ECtHR made clear that the **ECHR** does not prevent cooperation between States, within the framework of extradition treaties or in matters of deportation, for the purpose of bringing fugitive offenders to justice, provided that it does not interfere with any specific rights recognised in the Convention. Therefore, according to the Court, the fact that a fugitive has been handed over as a result of cooperation between States (in the absence of an extradition treaty) does not in itself make the arrest unlawful and does not give rise to any problem under Article 5 of the Convention, as long as the legal basis for the fugitive's arrest is an arrest warrant issued by the authorities of the fugitive's State of origin[1368], A similar conclusion was reached by the EComHR in the case of an "expulsion" (disguised extradition) from Sudan to France, with the Court adding that "the fact that the arrest warrant was not served on the applicant until he left the aeroplane after having landed in France does not mean that the alleged prior deprivation of his liberty had no legal basis in French law. Even assuming that the circumstances in which the applicant arrived in France could be described as a disguised extradition, this could not, as such, constitute a breach of the Convention"[1369].

[1364] **PC-OC (2012)8rev2**, p.2.
[1365] **PC-OC (2012)8rev2**, pp.2-3.
[1366] **PC-OC (2012)8rev2**, p. 3, emphasis added.
[1367] **PC-OC (2012)8rev2**, p. 3.
[1368] ECtHR, Case ***Öcalan v. Turkey***, No. 46221/99, Judgment [GC] of 12 May 2005, §§85-87, 89.
[1369] EComHR, Case ***Ramirez Sanchez v. France***, No. 28780/95, Decision of 24 June 1996, pp. 161-162.

In the discussion paper, some examples are given of cases considered of interest in this regard. They show that such other procedures do not offer the same guarantees of extradition, although guarantees might be equivalent in substance[1370]. They are often much speedier than ordinary extradition procedures and, above all, they show that decisions are taken on the basis of (sometime high level) political evaluations.

- ***Doherty case*** (early 1980s): the UK sought to extradite Doherty from the USA, where he had illegally entered, for participation in the killing of a British Security Forces captain in Belfast, Northern Ireland. The competent Court denied extradition on the grounds that it was a political offence and finally Doherty was deported to the UK, where he was to serve a life imprisonment sentence. What could not be achieved by extradition was accomplished via deportation.
- ***Soblen case***: the paper reproduces in full a description of this case made by Cherif Bassiouni - *Dr. Soblen was accused of espionage in the United States. Released on bond, he fled to Israel, claiming asylum and citizenship as a Jew under the Israeli Law of Return. Israel…found that Dr. Soblen was not qualified for Israeli citizenship and placed him on a flight to New York. Interestingly, there were no other passengers aboard except US marshals. In flight, close to England, Dr. Soblen attempted suicide. The plane landed in Great Britain and Dr. Soblen was taken to hospital. The US wanted him but the offence was not an extraditable one (political offence) under the bilateral treaty of 1931. But Great Britain found that Dr. Soblen had not been legally admitted into the country and ordered his departure on the first available plane of the day, presumably to be returned to Israel. It so happened that there were no flights for Israel that day and the first flight out was to New York, aboard the same plane that took Soblen from Israel*. Dr. Soblen committed suicide while being transported to the airport.
- ***Pinochet case:*** it differs from the above, since it deals with a regular extradition procedure initiated by Spain, whose authorities requested the UK: the Court found that former President Pinochet was not able to attend the hearings due to health reasons; he was then put on a plane (not a British one) and arrived in Chile.
- ***Badalamenti case***: Vito Badalamenti, an Italian citizen, was arrested in 1984 in Spain on a request of USA in order to stand trial in the famous "Pizza Connection" case (for heroin trafficking). He was acquitted and sought to be released with a writ of *habeas corpus*. Spain did not want him back; Italy wanted him but Badalamenti could face criminal charges there. Paraguay notified its willingness to receive that person, but later on withdrew it; the USA thought that "it would be inappropriate to have him at liberty in the United States". Finally, Badalamenti arrived in Italy because the US applied the exclusion process (exclusion to be admitted in the country; as a matter of fact Badalamenti was in US as a paroled alien solely for the purpose of standing the Pizza Connection trial). At the end, Mr Badalamenti was acquitted in Italy[1371].

In 2018, the ECtHR found **violations of Convention Articles 3 and 5 (1), (4) and (5)** in a case relating to the expulsion, from Turkey to Kazakhstan, of a failed asylum seeker whose extradition to Kazakhstan had also been denied because the charge against him in the requesting State fell within the scope of one of the categories of offence precluding extradition, as listed in Turkish Criminal Code (speech offence, political offence or military offence). The applicant alleged that Turkish authorities had made no assessment of his claim that he ran the risk of being subjected to torture and other ill-treatment if returned to his country, even though such a risk existed at the relevant time. In light of, *inter alia*, the fact that the applicant had consistently claimed before the domestic authorities that he would be exposed to a real risk of death or ill treatment if removed to Kazakhstan, and provided Turkish authorities with information about his personal situation and the reasons for his fear of ill-treatment and death, the Court considered that such authorities were aware or ought to have been aware of facts indicating that the applicant could be exposed to a risk of ill-treatment upon return to Kazakhstan. Therefore, it concluded that his expulsion

[1370] BASSIOUNI, International Extradition, US Law and Practice, Oceana Publications, 1996, on the basis of studies conducted by Langdon and Gardiner published in 1920, quoted in **PC-OC (2011)09rev**, pp.3-4.
[1371] **PC-OC (2011)09rev**, pp.3-4.

constituted a circumvention of the domestic extradition procedure and that, in the absence of an examination by the national authorities of the applicant's claims and of a legal procedure providing safeguards against unlawful deportation, the applicant's deportation to Kazakhstan amounted to a violation of Article 3 of the Convention[1372].

The ECtHR recently found, in a case concerning four Turkish nationals whose extradition had been sought by the Turkish authorities, but ended up being ***expelled*** under the Migration Code despite extradition being refused by the competent court or ***before any extradition proceedings was even initiated*** – and despite having requested asylum for fears of persecution and ill-treatment in Turkey – that their removal from Azerbaijan to Turkey and their deprivation of liberty constituted a disguised extradition in "circumvention of formal extradition proceedings and of the relevant international safeguards which such proceedings entail", and part of an extra-legal transfer of persons which circumvented all guarantees offered to them by domestic and international law. Also problematic was the fact that at no point in the domestic proceedings did the national authorities examine the applicants' fears of ill-treatment if returned to Turkey. The decision to remove them from Azerbaijan based on the cancellation of their passport or residence permits was seen as nothing but a pretext for an extradition in disguise, thus placing them outside the protection of the law. And the haste with which the removal took place deprived the applicants of any possibility to challenge their removal on those grounds before the competent courts; therefore, the Court concluded that the applicants were denied effective guarantees of protection against arbitrary *refoulement,* and the respondent State (Azerbaijan) had failed to discharge its procedural obligation under Article 3 of the Convention to assess the risks of treatment contrary to that provision before returning the applicants to Turkey[1373].

On the contrary, in 2018 the Court examined a case concerning the expulsion from the Netherlands to Morocco of a failed asylum-seeker who was convicted and sentenced in the Netherlands for several preparatory acts of terrorism (with certain evidence obtained from the Moroccan authorities through MLA), having already been convicted for a (different) terrorist criminal offence in Morocco. The applicant alleged before the Court that such expulsion would put him at a real risk of being subjected to treatment contrary to Article 3 of the Convention given that the Moroccan authorities should be aware of his conviction for terrorism-related crimes in the Netherlands, his association with a dismantled Moroccan militant cell loyal to the Islamic State and his asylum application in the Netherlands. The Court underlined that the question before it was not whether upon his return the applicant risked being monitored, arrested and/or questioned, or even convicted of crimes, by the Moroccan authorities since this would not, in itself, be contrary to the Convention, but whether his removal to Morocco would expose him to a real risk of being subjected to treatment prohibited by Article 3 of the Convention. The Court noted that no request for the applicant's extradition to Morocco has been made, that there was no indication that the Moroccan judicial authorities failed to respect the principle *non bis in idem*, and even that they regarded the applicant as a suspect of terrorism. Therefore, no violation of the Convention was found in this case[1374].

It is possible that the order to leave the territory on the basis of which a person is detained refers to the circumstance that authorities are waiting for information regarding the persistence of the risks faced by the individual if expelled to the prospective country. The ECtHR is willing to see that step as a necessary precondition to the applicant's expulsion, but cannot conceive that it may be, in itself, considered as an action taken with a view to expulsion within the meaning of Article 5 (1) (f) of the Convention. The situation is different from the moment the national authorities establish diplomatic contacts to find a third State willing to welcome the applicant until the moment when the applicant refuses to be removed to such third country. In light of the failure of the steps taken with a view to finding a third State, the absence of any further steps in that connection and information confirming the risks faced by the applicant if returned to the prospective country, the

[1372] ECtHR, Case ***Batyrkhairov v. Turkey***, No. 69929/12, Judgment of 5 June 2018, §§47, 51-52. In the same sense, Case ***Khalikov v. Russia***, No. 66373/13, Judgment of 26 February 2015, §§50-55.
[1373] ECtHR, Case ***Shenturk and Others v. Azerbaijan***, No. 41326/17, 8098/18, 8147/18 & 8384/18, Judgment of 10 March 2022, §§105-106 and 114-116.
[1374] ECtHR, Case ***X v. the Netherlands***, No. 14319/17, Judgment of 10 July 2018, §§76, 79-81.

Court fails to see any connection between the person's detention and the possibility of removing him from national territory, and therefore concludes that **Article 5 (1) (f)** of the Convention has been violated[1375].

In a case in which the applicant alleged that his extradition or administrative removal to his country of origin would expose him to ill-treatment, and that the administrative-removal proceedings had been used by the authorities in order to circumvent the guarantees available to the applicant in extradition proceedings, the Court found a violation of Article 3 and noted that requesting an applicant to produce "indisputable" evidence of a risk of ill-treatment in the requesting country would be tantamount to asking him to prove the existence of a future event, which is impossible, and would place a clearly disproportionate burden on him. Any such allegation always concerns an eventuality, something which may or may not occur in the future. Consequently, such allegations cannot be proven in the same way as past events. The applicant must only be required to show, with reference to specific facts relevant to him and to the class of people he belongs to, that there was a high likelihood that he would be ill-treated. Even though detailed submissions to that effect were made by the applicant in the present case, the authorities rejected them for lack of evidence that the charges were politically motivated[1376].

It should be noted that the Court has accepted that **assurances** provided in the context of unsuccessful extradition requests remained valid in asylum and expulsion proceedings.[1377] But assurances not always are interchangeable between proceedings: in a case involving the expulsion of an asylum seeker from Russia to Uzbekistan following denial of his extradition (for lack of dual criminality) for the purposes of prosecution, the Court considered that the existence of domestic laws and international treaties guaranteeing respect for fundamental rights is not in itself sufficient to ensure adequate protection against the risk of ill-treatment where, as in the present case, reliable sources have reported practices resorted to or tolerated by the authorities which are manifestly contrary to the principles of the Convention. Furthermore, the domestic authorities, as well as the Government before the Court, used summary and non-specific reasoning in an attempt to dispel the alleged risk of ill-treatment on account of the above considerations, including the evident pre-existing adverse interest the Uzbek authorities had in the applicant. As to the assurances given by the Uzbek authorities and relied on by the Government, apart from being couched in general terms and uncorroborated by any evidence of being supported by any enforcement or monitoring mechanism, the Court found that they were given for the purposes of extradition proceedings that were ultimately discontinued and as such are of **no direct relevance to expulsion proceedings**[1378].

5.3.2 Illegal means

These are illegal actions, both from an international law or/and a domestic law point of view, through which the handover of persons might be accomplished, like forcible abduction and unlawful seizure of the person. To make a distinction between them, the discussion paper once again quotes Cherif Bassiouni:

> **Abduction**: means that agents of State A apprehend the person in State B, with or without the knowledge or the consent of State B;
>
> **Seizure**: means that agents of State A (where the person is) apprehend that person and surrender him/her to the agents of State B outside formal or legal process[1379].

[1375] ECtHR, Case ***M. S. v. Belgium***, No. 50012/08, Judgment of 31 January 2012, §§175, 177, 179.
[1376] ECtHR, Case ***Ismailov v. Russia***, No. 20110/13, Judgment of 17 April 2014, §81.
[1377] ECtHR, Case ***Said Abdul Salam Mubarak v. Denmark***, No. 74411/16, Decision of 22 January 2019, §§53, 56.
[1378] ECtHR, Case ***Akram Karimov v. Russia***, No. 62892/12, Judgment of 28 May 2014, §§132-133.
[1379] **PC-OC (2011)09rev**, pp.3-4.

There might be a mixture of the two hypothesis (i.e. agents of both States acting in co-operation), as it happened in the landmark case **Nasr and Ghali v. Italy**: it concerned the extrajudicial transfer (or "extraordinary rendition"), through the abduction by CIA agents, with the co-operation of Italian secret service officials, of a suspect of international terrorism, granted political asylum in Italy, and his subsequent transfer to Egypt, where he was held in secret detention for several months. An investigation into the abduction immediately started by the public prosecutor's office in Milan led to the prosecution and trial of a number of Italian secret service officials and American CIA agents, but no extradition for prosecution was ever requested in relation to the 22 American citizens sought by Italian justice (they were later convicted *in absentia* of Mr Nasr's abduction and given prison sentences between six and nine years); the case against the Italian agents had to be discontinued because the Italian Prime Minister considered that the information and documents requested by the public prosecutor's office were covered by State secrecy and that the conditions for lifting that secrecy were not met, a vision backed by a ruling of the Constitutional Court. The Court found that there was a violation of Article 3 of the Convention, also in connection with Articles 8 and 13. As to the last issue, the Court mentioned that Italy did not ensure the respect of the right of the applicants to have an effective inquiry conducted on the abduction in relation to the Italian defendants because of the imposition of State secrecy and in relation to the American CIA and diplomatic officials because of the refusal to request their extradition with the view to prosecution. The refusal to seek the surrender of the American citizens after the sentence became final was also deemed to be contrary to Article 13 and led to the ***impunity*** of the people involved.

This Court decision is to be considered relevant as case-law for several reasons: firstly, Italy was considered responsible for ***not having sought extradition from the USA***; secondly, Italy was considered responsible for ***not having asked for extradition to the USA***; thirdly, Italy was considered responsible because the ***President of the Republic granted pardons to some of the sentenced American citizens***. The interest of the decision lies in particular in the fact that the granting of pardons is traditionally considered to be a sovereign power; according to the Court's judgment, such a decision can be scrutinized by the Court. Likewise, any political decision, such as a decision on granting or refusing extradition, may be under scrutiny as well[1380].

A similar case was that of **Ozdil and Others v. the Republic of Moldova** (2019), in which five Turkish nationals seeking asylum in Moldova for fear of reprisals in their country of origin were, without any warning, arrested in their homes or on their way to work by individuals wearing plain clothes and immediately taken to Turkey in a plane chartered for that purpose, while their whereabouts remained undisclosed to their families for several weeks. It was later found that this had taken place in the context of a joint operation between the secret services of Turkey and Moldova. The Court concluded that the transfer of the applicants without notification of any decision taken in relation to them, either in the asylum or extradition procedures, without any choice as to the jurisdiction they wished to be expelled to, and the long and careful preparation of such operation, indicated that it was conceived and organised in such a manner as to take the applicants by surprise and deprive them of any time or possibility to defend themselves. Therefore, the Court considered that the applicants' ***deprivation of liberty was neither lawful nor necessary within the meaning of* Article 5 (1) (f)** of the Convention, nor devoid of ***arbitrariness***; and that depriving the applicants of their liberty in this way amounted to an extra-legal transfer of persons from the territory of one State to another which circumvented all guarantees offered to them by domestic and international law[1381].

The ***Bozano case*** has been considered as a "clear example of disguised extradition, as described by the **ECHR**. "After the French court of appeals in Limoges denied Italy's request for Bozano's extradition, he was picked up without any formal process in the streets of Grenoble by French police and then handed over to a Swiss police officer and finally extradited to Italy. It might be

[1380] ECtHR, Case ***Nasr and Ghali v. Italy***, No. 44883/09, Judgment of 23 February 2016, as summarised in **PC-OC (2011) 21 Rev17**, pp. 230-231.
[1381] ECtHR, Case ***Ozdil and Others v. the Republic of Moldova***, No. 42305/18, Judgment of 11 June 2019, §§39, 54-55, 57.

interesting to note that extradition to Italy was denied by the French court under the circumstance that Bozano was acquitted at his first instance trial in Italy and then found guilt on appeal, *in absentia*, which is a procedure that does not exist in France (in case of trial *in absentia* a new trial is carried out once the person is arrested); although Italian and French police authorities agreed to have Bozano returned to Italy, there was no way in which that could have been accomplished. The ECtHR found that there had been a violation of Article 5 of the Convention since Bozano's deprivation of liberty in view of delivering him to the Swiss authorities was not lawful and "amounted in fact to a disguised form of extradition designed to circumvent the negative ruling" of the French court[1382].

Back in 1985, thje ECtHR examined a case of a man against whom criminal proceedings had been instituted in Germany, but who had absconded and was located in France. A German police informer arranged to meet with the applicant in Luxembourg and the German authorities asked the Luxembourg police whether the latter could arrest the applicant on the ground that he had committed criminal offences in the Grand Duchy and deport him to the Federal Republic of Germany. The Luxembourg police informed that the applicant could demand to be taken to the French border; without an international arrest warrant, however, no action could be taken against Mr Stocké at all. Subsequently, the German police informer met with the applicant in Strasbourg and prented to arrange a flight to Luxembourg. In fact, however, the German police informer ask the pilots to touch down in Germany where the applicant was immediately arrested and taken into custody. The Court concluded then that, since it had not been established that the co-operation between the German authorities and the police informer extended to unlawful activities abroad, it t did not seem necessary to examine, whether the applicant's arrest in the Federal Republic of Germany would have violated the Convention[1383].

In the discussion paper, it is considered that one of major issues related to abduction and other illegal means, is whether the State where the trial is to be carried out or the punishment executed is legally in a position to proceed. "The principle that has been followed for a significant period of time is the maxim *male captus, bene detentus*, i.e. although unlawfully taken nevertheless legally detained; that would include cases of disguised extradition sub specie of expulsion and/or abduction or equivalent. Whether that State has jurisdiction would depend very much on its domestic law, in particular whether the individual might challenge the competence of that jurisdiction."[1384].

In its 2016 Court Talk on Terrorism, que ECtHR addressed the issue of "extraordinary renditions of terrorism suspects" as a practiced prohibited by international law in no uncertain terms (emphasis added):

> "In recent years, certain States have been involved in what is called the *extraordinary rendition* of suspected terrorists. Also known as *extrajudicial transfer*, it is a measure which involves the transfer of a person from one jurisdiction or State to another, for the purposes of detention and interrogation outside the ordinary legal system. It is ***absolutely incompatible with the rule of law and the values protected by the Convention*** because of its deliberate disregard of the guarantees of due process[1385].
>
> For instance, the Court found a violation of Article 5 in the case of the unlawful detention of a German national of Lebanese origin who had been suspected of having links with terrorists and who had been the subject of an "extraordinary rendition". In particular, he had been handed over to agents of the Central Intelligence Agency of the United States (CIA), who had been operating at the time in "the former Yugoslav Republic of

[1382] EComHR, Case ***Bozano v. Switzerland***, No. 9009/80, Decision (Partial) of 12 July 1984, §60; also **PC-OC (2011)09rev**, p. 5.
[1383] ECtHR, Case ***Stocké v. Germany***, No. 11755/85, Judgment of 19 March 1991, pp. 12-13.
[1384] **PC-OC (2011)09rev**, pp. 4-5.
[1385] ECtHR, Case ***Babar Ahmad and Others v. the United Kingdom***, Nºs 24027/07, 11949/08 and 36742/08, decision of 6 July 2010, § 114.

Macedonia"[1386]. In that case, the Court also found a violation of Article 3 on account of the torture and inhuman and degrading treatment to which he had been subjected while in detention.

Breaches of four Articles of the Convention, Articles 2, 3, 5 and 6, were found in the case of a suspected terrorist, who had been handed over to CIA agents operating in Poland and who had been detained at the United States naval base in Guantánamo Bay in Cuba following an "extraordinary rendition"[1387]. In its judgment, the Court also required Poland to seek assurances from the United States authorities that the applicant would not be sentenced to death following his "extraordinary rendition".[1388]

A reverse case of "disguised extradition" is **Vasiliciuc v. the Republic of Moldova** (2017), in which a Moldovan citizen living in Greece, was stopped at the Chisinau Airport when returning to Greece and a number of pieces of jewellery made of precious metals and stones was found in her possession, which she had failed to declare in her customs declaration. She spent two weeks in Moldova but, despite going to the police station on several occasions, was never detained there, decided to return to Greece because she could no longer be absent from work, informed the authorities about her intention to do so and and obtained, leaving the country with no difficulties through the same airport. After her departure, Moldovan police formally initiated criminal proceedings against the applicant for attempted smuggling of jewellery, issued a detention order againt her and managed to have her arrested in Greece with the purpose to extradition. Extradition proceedings ended when the Athens Court of Appeal found that according to Article 5 of the ECE, persons suspected of offences in connection with taxes, duties and customs could be extradited only if the Contracting Parties have so decided in respect of any such offence or category of offences, which was not the case. The responsibility for this person's arrest in Greece fell upon Moldova, on account of the arrest warrant issued by the Moldovan courts. The ECtHR considered that, despite formally an arrest with the view to extradition, this was in fact a stratagem used by Moldovan authorities to implement the District Court's decision outside Moldova's borders and to bring the applicant before a competent Moldovan legal authority on reasonable suspicion of having committed an offence. Therefore, as regards Moldova, the applicant's detention had to be examined under Article 5 (1) (c) of the Convention, because otherwise the person would be deprived of the protection afforded by Article 5[1389].

[1386] ECtHR, Case ***El-Masri v. the former Yugoslav Republic of Macedonia*****,** N.º 39630/09, Judgement [GC] of 13 December 2012.
[1387] ECtHR, Case ***Al Nashiri v. Poland***, N.º 28761/11,Judgement of 24 July 2014, §§ 518-519.
[1388] ECtHR, **Court Talk on Terrorism**, CoE, 2016, p. 7.
[1389] ECtHR, Case ***Vasiliciuc v. the Republic of Moldova***, No. 15944/11, Judgment of 2 May 2017, §§37-38.

Part III

Recommendations and Guidelines

1. Resolution (75) 12 of the Committee of Ministers to member states on the practical application of the European Convention on Extradition

(Adopted by the Committee of Ministers on 21 May 1975 at the 245th meeting of the Ministers' Deputies)

The Committee of Ministers,

Desirous of facilitating the functioning of the system of extradition provided for in the European Convention on Extradition opened for signature in Paris on 13 December 1957,

I. Recommends to the governments of member states Contracting Parties to the convention, as regards:

Article 1

That, 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;

Article 7

That the possibility granted to a requested state by Article 7, paragraph 1, of the convention of refusing extradition for an offence committed in whole or in part in its territory or in a place treated as its territory should not be invoked in the case where proceedings and judgement 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;

Article 9

That, 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;

Article 10

That, when determining whether, according to the law of the requested state, the person claimed has become immune by reason of lapse of time from prosecution or punishment, the competent authorities of the said 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;

Articles 16 and 18

That the time spent in detention by an individual solely for the purpose of extradition in the territory of the requested state or of a state of transit shall be taken into consideration when deciding the penalty involving deprivation of liberty or detention which he has to serve for the offence for which he was extradited;

Article 20

That, in applying the provisions of Article 20, paragraph 3, of the convention, Contracting Parties shall take into consideration the interest of the victim of the offence in a speedy return of the property seized;

That, furthermore, the requested state, when handing over property without demanding that it be sent back, shall not enforce any demand for customs duty or any other claim under its customs or fiscal legislation unless the owner of the property who was the victim of the offence is himself liable for the payment;

Article 22

That the Contracting Parties, whilst providing for a speedy extradition procedure, shall ensure that the person whose extradition has been requested has the right to be heard by a judicial authority and to be assisted by the lawyer of his own choosing and shall submit to a judicial authority the control of his custody for the purpose of extradition as well as the conditions of his extradition;

II. Instructs the Secretary General of the Council of Europe to transmit this resolution to the governments of those Contracting States which are not member states of the Council of Europe;

III. Invites the governments of Contracting States to inform the Secretary General of the Council of Europe every four years of steps taken to give effect to the above recommendations.

2. Resolution (78) 43 of the Committee of Ministers to member states on reservations made to certain provisions of the European Convention on Extradition[1390]

(Adopted by the Committee of Ministers on 25 October 1978 at the 294th meeting of the Ministers' Deputies)

The Committee of Ministers,

Having regard to paragraph 2 of Article 26 of the European Convention on Extradition opened for signature in Paris on 13 December 1957;

Considering the great number of reservations made by member states;

Having taken note of the results of the work of the European Committee on Crime Problems concerning certain problems posed by the application of the Convention,

Recommends to the governments of member states Contracting Parties to the European Convention on Extradition that they limit the scope of the reservations or withdraw them, bearing in mind the contribution of the Additional Protocols.

[1390] This resolution replaces Resolution (78) 30 of 11 May 1978.

3. Recommendation No. R (80) 7 of the Committee of Ministers to member states concerning the practical application of the European Convention on Extradition

(Adopted by the Committee of Ministers an 27 June 1980 at the 321st meeting of the Ministers' Deputies)

The Committee of Ministers, under the terms of Article 15.b of the Statute of the Council of Europe,

Recalling Resolution (75) 12 on the practical application of the European Convention on Extradition;

Desirous of extending and further facilitating the application of this convention, which was opened for signature on 13 December 1957 and entered into force on 18 April 1960,

I. Recommends the governments of member states:

1. if they are not yet Contracting Parties to the convention, to ratify it as soon as possible;

2. if they are Contracting Parties to the convention, to be guided in its practical application by the following principles:

Concerning the use of extradition

When deciding on whether to request extradition, the requesting state should take into consideration the hardship which might be caused by the extradition procedure to the person concerned and to his family, where this procedure is manifestly disproportionate to the seriousness of the offence and where the penalty likely to be passed will not significantly exceed the minimum period of detention laid down in Article 2, paragraph 1, of the convention, or will not involve deprivation of liberty.

In the case of enforcement of a sentence or detention order, the requesting state should apply the same principle of proportionality, particularly where the remainder of the sanction to be served does not exceed a period of four months.

Concerning the extradition procedure

Irrespective of the administrative or judicial nature of the extradition proceedings, the person concerned:

a. should be informed, promptly and in a language which he understands, of the extradition request and the facts on which it is based, of the conditions and the procedure of extradition, and, where applicable, of the reasons for his arrest;

b. should be heard on the arguments which he invokes against his extradition;

c. should have the possibility to be assisted in the extradition procedure; if he has not sufficient means to pay for the assistance, he should be given it free.

Concerning summary extradition

With a view to expediting extradition and keeping the period of provisional arrest as short as possible, consideration should be given to the use of a summary procedure enabling the rapid surrender of the person sought without following ordinary extradition procedures, provided that the person concerned consents to it.

Concerning provisional arrest (Article 16 of the convention)

a. The requesting authority should ask for the provisional arrest of the person sought only if there are strong reasons to suggest that otherwise the extradition could not be effected.

b. The period of provisional arrest should be kept as short as possible. It should exceed the period of eighteen days only in cases of necessity, particularly where the requesting authority indicates difficulties in submitting the documents within that period.

Concerning transit (Article 21 of the convention)

a. To render the procedure more expeditious, arrangements for obtaining the consent of the transit states should be made, whenever possible, at the time extradition is requested. The requested state should be promptly informed of the means of transit envisaged and whether transit permission is being sought from other Contracting States.

b. In principle, the requested state should comply with the wishes of the requesting state with regard to the way in which the transit is to be effected. However, in cases of particular difficulty, the two states should consult each other on the appropriate means of transport (rail, road or air) and possibly on the place where the person to be extradited is to be handed over.

c. A Contracting State which has been asked to grant transit should act on the request and make the necessary arrangements in a way as to avoid any delay.

d. If, under the conditions mentioned above, the requested state uses a summary extradition procedure, and transit involves the presence of the person concerned in the territory of the transit state for only a short period, the transit state should consider whether transit can be authorised without the production of all the documents mentioned in Article 12 of the convention.

e. Transit by air should be used as widely as possible because it is likely to facilitate and accelerate the handing over of the person to be extradited. As a general rule, the person to be surrendered should be escorted;

II. Instructs the Secretary General of the Council of Europe to transmit this recommendation to the governments of those Contracting States which are not members of the Council of Europe.

4. Recommendation No. R (80) 9 of the Committee of Ministers to member states concerning extradition to states not party to the European Convention on Human Rights

(Adopted by the Committee of Ministers on 27 June 1980 at the 321st meeting of the Ministers' Deputies)

The Committee of Ministers, under the terms of Article 15.b of the Statute of the Council of Europe,

Desirous of strengthening the protection of human rights in cases concerning extradition requested by states not party to the Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950;

Having regard to the provisions of Article 3, paragraph 2, of the European Convention on Extradition of 13 December 1957,

Recommends the governments of member states:

1. not to grant extradition where a request for extradition emanates from a state not party to the European Convention on Human Rights and where there are substantial grounds for believing that the request has been made for the purpose of prosecuting or punishing the person concerned on account of his race, religion, nationality or political opinion, or that his position may be prejudiced for any of these reasonsnot to grant extradition where a request for extradition emanates from a state not party to the European Convention on Human Rights and where there are substantial grounds for believing that the request has been made for the purpose of prosecuting or punishing the person concerned on account of his race, religion, nationality or political opinion, or that his position may be prejudiced for any of these reasons;

2. to 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 the matter.

5. Recommendation No. R (86) 13 of the Committee of Ministers to member states concerning the practical application of the European Convention on Extradition in respect of detention pending extradition

(Adopted by the Committee of Ministers on 16 September 1986 at the 399th meeting of the Ministers' Deputies)

The Committee of Ministers, under the terms of Article 15.b of the Statute of the Council of Europe,

Recalling its Resolution (75) 12 and Recommendation No. R (80) 7 on the practical application of the European Convention on Extradition;

Desirous of facilitating the application of this convention in respect of detention pending extradition,

I. Recommends the governments of member states party to the convention:

a. to be guided in its practical application by the following principles:

1. Time spent in custody pending extradition should be deducted from the sentence in the same manner as time spent in custody pending trial;

2. Where the requested party considers that the duration of detention pending extradition is disproportionate to the sentence to be enforced or the penalty likely to be incurred upon conviction, it should consult the requesting party with a view to ascertaining whether the request for extradition is maintained. The requesting party should inform the requested party without delay;

b. to examine their legislation with a view to enabling persons who have suffered unjustified detention pending their extradition to claim compensation under the same conditions as those governing compensation for unjustified pre-trial detention;

II. Instructs the Secretary General of the Council of Europe to transmit this recommendation to the governments of those contracting states which are not members of the Council of Europe.

6. Recommendation No. R (96) 9 of the Committee of Ministers to member states concerning the practical application of the European Convention on Extradition

(Adopted by the Committee of Ministers on 5 September 1996, at the 572nd meeting of the Ministers' Deputies)

The Committee of Ministers, under the terms of Article 15.b of the Statute of the Council of Europe,

Desirous of strengthening further European co-operation in the fight against crime;

Having regard to the European Convention on Extradition;

Desirous of facilitating the practical application of that convention,

Recommends the governments of member states party to that convention to have regard, in its practical application, to the following guidelines:

a. concerning Article 20:

in so far as extradition requests communicated in accordance with Article 12 of the convention include a request, based on Article 20, to hand over property, the requested state should take all possible measures to facilitate the handing over of the property sought in the context of the extradition proceedings;

b. concerning Articles 17 and 15:

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.

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 proceedings being brought against that person for offences in respect of which one or more of the concurrent extradition requests were made.

7. Resolution (75) 11 of the Committee of Ministers on the criteria governing proceedings held in the absence of the accused

(*Adopted by the Committee of Ministers on 21 May 1975 at the 245th meeting of the Ministers' Deputies*)[*]

The Committee of Ministers,

1. Recalling that one of the aims of the Council of Europe is to achieve greater unity among its Members;

2. Whereas the presence of the accused at his trial is of vital importance, from the point of view both of his right to be heard and of the need to establish the facts and, if need be, pass the appropriate sentence; and whereas exemptions should be granted only in exceptional cases;

3. Whereas ways and means should be found of securing the accused's right to a hearing as laid down in the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950, and his right to be present at his trial as recognised in the International Covenant on Civil and Political Rights signed in New York on 19 December 1966;

4. Whereas the possibility of simplified proceedings without a hearing for certain minor offences should nevertheless not be excluded;

5. Whereas the systems adopted by several member states to avoid judgements in the absence of the accused and their consequences do not always appear to be effective when, for example, the accused is resident abroad;

6. Whereas, during the preparation of the European Convention on the International Validity of Criminal Judgments, the question of judgements in absentia raised difficulties and it proved necessary to grant Contracting States the right to formulate reservations with regard to the enforcement of such judgements;

7. Believing that such reservations could be avoided if the procedures for trial in the absence of the accused as currently applied satisfied the requirements of the proper administration of justice;

8. Convinced that the growing mobility of the population has the effect of increasing the number of judgements rendered in the absence of the accused in those states where this procedure is used,

I. Recommends that the governments of the member states apply the following minimum rules:

1. No one may be tried without having first been effectively served with a summons in time to enable him to appear and to prepare his defence, unless it is established that he has deliberately sought to evade justice.

2. The summons must state the consequences of any failure by the accused to appear at the trial.

3. Where the court finds that an accused person who fails to appear at the trial has been served (atteint) with a summons, it must order an adjournment if it considers personal appearance of the accused to be indispensable or if there is reason to believe that he has been prevented from appearing.

[*] When the resolution was adopted, the Representatives of Sweden and the United Kingdom reserved the right of their governments to comply or not with point 6 of its operative part, in accordance with Article 10, paragraph 2.c of the Rules of Procedure for meetings of the Ministers' Deputies.

4. The accused must not be tried in his absence, if it is possible and desirable to transfer the proceedings to another state or to apply for extradition.

5. Where the accused is tried in his absence, evidence must be taken in the usual manner and the defence must have the right to intervene.

6. A judgement passed in the absence of the accused must be notified to him according to the rules governing the service of the summons to appear and the time-limit for lodging an appeal must not begin to run until the convicted person has had effective knowledge of the judgement so notified, unless it is established that he has deliberately sought to evade justice.

7. Any person tried in his absence must be able to appeal against the judgement by whatever means of recourse would have been open to him, had he been present.

8. A person tried in his absence on whom a summons has not been served in due and proper form shall have a remedy enabling him to have the judgement annulled.

9. A person tried in his absence, but on whom a summons has been properly served is entitled to a retrial, in the ordinary way, if that person can prove that his absence and the fact that he could not inform the judge thereof were due to reasons beyond his control.

II. Invites the governments of member states to report to the Secretary General of the Council of Europe every five years on the action taken by them in pursuance of the recommendations contained in this resolution.

8. Resolution 2315 (2019) of the Parliamentary Assembly of the Council of Europe, on Interpol reform and extradition proceedings: building trust by fighting abuse

Text adopted by the Standing Committee, acting on behalf of the Assembly, on 29 November 2019

1. The Parliamentary Assembly stresses the fundamental importance of international co-operation in the field of criminal law. When criminals take advantage of reduced border controls in Europe to escape justice in their own countries and transfer criminal assets abroad, States must react by co-operating with each other efficiently to uphold the rule of law. Given the frequent violations in this regard, States must remain vigilant and prepared to deal with misuse of the co-operation mechanisms by authoritarian States for political and corrupt purposes.

2. The Council of Europe's main legal instrument in this field is the 1957 European Convention on Extradition (ETS No. 24), updated by additional protocols in 1975, 1978, 2010 and 2012 (ETS Nos. 86 and 98, and CETS Nos. 209 and 212). Its practical functioning is aided by the Committee of Experts on the Operation of European Conventions on Co-operation in Criminal Matters (PC-OC). The main objective of the parties to the convention is to facilitate extradition as much as possible to prevent impunity of criminals who abscond across boundaries.

3. A reasonable balance must be struck between the legitimate interest in preventing impunity for serious crimes, which themselves violate human rights, and the rights of the person targeted by an extradition request, who must not be exposed to a serious risk of flagrant denial of justice, cruel and inhuman punishment and/or discriminatory treatment on political, racial, ethnic or religious grounds.

4. International co-operation in the field of criminal law requires a high degree of mutual trust, based on common standards and practices. Trust is built over time and with difficulty, by competent colleagues from different countries getting to know each other, developing mutual respect, based on professionalism and integrity, finally building successes together. But trust can be destroyed quickly and easily, first and foremost when international co-operation mechanisms are misused for political or corrupt purposes.

5. It must also be noted that apart from extradition requests, interstate mutual legal co-operation mechanisms – such as the Schengen information system – are also subject to misuse and may result in violations of privacy, property, professional rights and deprivation of liberty, particularly under the 1990 Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime (ETS No. 141) as well as the 2000 United Nations Convention against Transnational Organized Crime.

6. The Assembly further notes that extradition proceedings are often triggered by an Interpol Red Notice or a "wanted person diffusion". In its Resolution 2161 (2017) "Abusive use of the Interpol system: the need for more stringent legal safeguards", the Assembly recognised Interpol's vital role in the fight against impunity. At the same time, the Assembly found that Interpol's procedures had been frequently abused for political or corrupt reasons by certain countries. It therefore made concrete proposals for reforms aimed at strengthening the Interpol system.

7. The Assembly is now satisfied that many of its proposals have already been implemented, or are in the process of being implemented by Interpol, in particular:

7.1 new Red Notices and wanted person diffusions are vetted by a dedicated, multi-disciplinary task force at Interpol's General Secretariat, prior to their becoming visible to national central bureaus (NCBs);

7.2 work has begun on reviewing older Red Notices authorised before the compliance review was implemented in 2016 and still visible on Interpol's databases;

7.3 a data protection officer was appointed within Interpol, reporting directly to the Secretary General;

7.4 the Commission for the Control of Interpol's Files (CCF), to which persons targeted by notices and diffusions can appeal, has been strengthened by its new statute, which entered into force in March 2017. This new statute has had the following effects:

7.4.1 the CCF's reactivity has improved due to the strengthening of its resources;

7.4.2 the CCF's decisions have become binding on Interpol; a finding of non-compliance of a Red Notice with Interpol's constitution or rules will lead to the deletion of the notice by the General Secretariat;

7.4.3 the CCF's decisions are now reasoned and extracts permitting the better understanding of the interpretation given to relevant rules are published;

7.4.4 the CCF's independence has been strengthened by a "firewall" set up between the General Secretariat of Interpol and the Secretariat of the CCF;

7.4.5 the CCF's members must withdraw from cases when they are nationals of the country which is the source of the data challenged by an applicant;

7.5 a "Policy on refugees" was adopted and published by Interpol in September 2017, intended to prevent the publication of Red Notices and wanted person diffusions against persons who have refugee status under the Geneva conventions;

7.6 a "Repository of practice" on Article 3 of its constitution (on political, military, religious and racial neutrality) has been published on Interpol's website.

8. However, the Assembly also notes with regret that a number of recommendations (including the creation of a compensation fund for victims of abuses of Interpol mechanisms) have not yet been implemented, in particular those intended to improve the transparency of Interpol's work and to strengthen accountability for States whose NCBs abuse Interpol's instruments.

9. Regarding the improvement of extradition and other proceedings in the field of international criminal law co-operation in general, the Assembly calls on the member States of the Council of Europe and the member States of its Group of States against Corruption (GRECO, enlarged partial agreement) to participate actively in the Council of Europe's co-operation activities in the criminal law field, in particular the PC-OC, with the aim of implementing good practices and avoiding problems identified by the PC-OC, in particular:

9.1 as requested parties, by dealing with extradition requests in a timely, co-operative and results-oriented manner, and by swiftly requesting additional information or clarification where needed;

9.2 as requesting parties, by providing sufficiently detailed information on the person whose extradition is requested, the suspected crime and the elements of proof linking the targeted person to the alleged crime; and by swiftly providing informative, well-documented answers to any requests for further information or clarification by the requested party;

9.3 by keeping up-to date with relevant case law of the European Court of Human Rights, in particular by using the tools made available by the PC-OC;

9.4 by refusing any extraditions and other interstate legal assistance, particularly in the field of criminal law co-operation by which the targeted person would be exposed to a serious risk of flagrant denial of justice, cruel and inhuman punishment or discriminatory treatment on political, racial, ethnic or religious grounds, as well as violation of privacy, property, professional rights and deprivation of liberty by searches, seizures, transmission of private, sensitive or confidential information to the requesting State, and arrest;

9.5 by relying on diplomatic assurances by the requesting State only when they are specific, given by an authority having the power to enforce them, credible in view of the length and strength of bilateral relations between the requested and the requesting States and of the requesting State's track record of abiding by similar assurances; when the requesting State has an effective system of protection against torture and when compliance with the assurances can be objectively verified through diplomatic or other monitoring channels;

9.6 by remaining particularly vigilant to any form of Red Notice, wanted person diffusion, extradition and other forms of interstate legal assistance, particularly in the field of criminal law co-operation when the requesting State notoriously lacks independent prosecution and courts and has a track record of frequently misusing Interpol mechanisms and violating diplomatic assurances;

9.7 by refraining from making extradition requests, including European Arrest Warrants (EAWs), when extradition would be disproportionate in relation to the gravity of the alleged crime and the penalty incurred; this would normally be the case when pre-trial detention would be considered inappropriate in similar circumstances in either one of the States involved in the extradition proceedings.

10. Regarding the reform process at Interpol, the Assembly calls on:

10.1 Interpol to:

10.1.1 further improve transparency by disclosing data that would help to assess how effective its review mechanisms are, including yearly statistics on Red Notice requests received and refused, appeals to the CCF introduced and decided in favour or against the applicants, with a breakdown by country; and by publishing a "repository of practice" on the interpretation of Article 2 of Interpol's constitution;

10.1.2 further improve preventive and subsequent scrutiny of Red Notices and wanted person diffusions, by examining with particular care any repetitive requests, those that have not given rise to extraditions or extradition requests within a reasonable period of time and those submitted by NCBs which have previously submitted a high number of abusive requests; and by charging the countries responsible for the extra cost involved;

10.1.3 ensure more effective control over the information which flows through its communication system by requiring NCBs to delete data from national databases following a CCF or General Secretariat decision to delete a notice or wanted person diffusion and to provide confirmation of the deletion within a prescribed time limit;

10.1.4 further strengthen the appeals procedure before the CCF by making it speedier, more interactive and more transparent;

10.1.5 consider setting up an independent appeals body against the decisions of the CCF, such as an ombudsperson, who could also make recommendations for any further improvements of Interpol's working methods;

10.1.6 set up a compensation fund for victims of unjustified Red Notices and wanted person diffusions financed by member States in proportion to the number of such notices and diffusions emanating from their NCBs;

10.2 all member States of the Council of Europe to set an example of good co-operation by:

10.2.1 making available to Interpol the human and financial resources necessary to improve the quality and timeliness of both preventive compliance checks and

the subsequent review by the CCF; in particular, to provide increased, ring-fenced, dedicated funding to the Notices and Diffusions Task Force and the CCF;

10.2.2 ensuring that the Red Notice requests and wanted person diffusions they submit to Interpol fulfil high standards of clarity in terms of the identification of the targeted person, the description of the facts and their legal qualification, and the elements of proof linking the targeted person to the alleged crime;

10.2.3 swiftly informing Interpol of any relevant facts concerning a targeted person, such as the granting of refugee status, provided the person concerned agrees;

10.2.4 following up Red Notices by extradition requests in due course and withdrawing Red Notices when extradition is not possible within a reasonable time;

10.2.5 respecting the decisions by the CCF by ensuring that all copies of Red Notices or wanted person diffusions found unjustified by the CCF are also deleted in their national databases;

10.2.6 facilitating, in co-operation with the European Union, the development of a collection of best practices between member States on how to act on Red Notices and diffusions, including practical steps to conduct risk assessments and to apply consistent human rights standards;

10.2.7 making use of their influence within Interpol to support the implementation of further improvements so that Interpol fully respects human rights and the rule of law whilst remaining an effective tool for international police co-operation;

10.2.8 taking into account conclusions and recommendations provided by civil society watchdogs dealing with the matter of misuse of Interpol, extraditions and other forms of interstate legal assistance;

10.2.9 duly probing all instances of misuse of Interpol, extraditions and other forms of interstate legal assistance by the requesting States for political or corrupt purposes.

9. PC-OC Guidelines on the provision of information regarding the detention or other measures of restriction imposed in extradition proceedings

Adopted by the PC-OC at its 75th Meeting

(Document PC-OC(2018)02rev3)

Introduction:

The efficient application of the European Convention on Extradition requires a requested Party to enable the surrender of the person sought to the requesting Party, either for the purpose of prosecution or execution of a sentence, as soon as the final decision to extradite has been made. Under the European Convention on Extradition as well as established case law of the European Court of Human Rights (in particular Articles 5§1 f and 5§4 of the European Convention on Human Rights) and in other international and domestic courts, the detention for the purpose of extradition is the rule; a release even under conditions or on bail is the exception.

To this end, co-operation is most effective when requested Parties ensure that as soon as a request for provisional arrest or extradition has been received, during the extradition process and until surrender, detention or other measures of restriction imposed are adequate and sufficient. The PC-OC underlines that detention or alternative means of restriction only serve to ensure the presence of the person sought during the extradition proceedings and to enable his or her surrender to the requesting Party.

Factors such as appeals, potential parallel domestic prosecution(s), parallel requests, parallel asylum proceedings, the application of the **Petruhhin judgment** etc. tend to increase the duration of extradition proceedings, therefore maintaining the person sought in detention may become problematic in some jurisdictions.

Consequently, the use of alternatives to detention is becoming increasingly important. The Committee agreed that a combination of measures of restriction is probably the most efficient way to avoid escape. Such measures may include, among others: bail, house arrest, electronic monitoring, travel ban, handing over of the passport and the obligation to report regularly to law enforcement authorities.

The PC-OC considered that it would be useful to provide guidelines on the provision of timely information to the Parties requesting extradition on the detention or other measures of restriction imposed on the person sought. Such information might also help to inform victims and organise their protection when necessary.

The guidelines are intended to be as practical as possible, avoiding an unnecessary burden on the requested Party. It should be added that, as a principle, it is the requesting Party's responsibility to follow the progress of their own extradition request.

For the purpose of these guidelines, the term 'detention' is to be understood as holding a person in custody at any stage of the extradition proceedings until surrender. These guidelines apply to alternative measures of restriction during the same time-frame.

There is no practical need to inform the requesting Party of every application the person makes for provisional or conditional release, when such an application is from the onset deemed meritless, or when the outcome of such an application is negative in the first place.

Also, there is no use informing the requesting Party about the outcome of such an application when there is an appeal filed.

As a basic rule, absconding and the outcome of final decisions that have an impact on the situation of the person sought, should be communicated immediately by the requested Party.

The national legislation in some countries limits the duration of extradition detention. In such cases it is important to inform the requesting Party, well in advance, of the date of mandatory release.

The purpose of these guidelines is to improve the communication between the requested and the requesting Party on the subject of detention in a timely manner throughout the extradition proceedings.

Guidelines:

1. *All Parties* to the European Convention on Extradition are invited to complete and update the country information on extradition published on the website of the PC-OC. This should include in particular information on their national legislation and practice as regards detention and other measures of restriction.

2. *Requesting Parties* are invited to:

A. provide the requested Party with all relevant information on the person sought at the earliest stage possible, in particular factors increasing the risk of escape (such as earlier occasions where the person sought has absconded, precedents of abuse of provisional release and / or bail) so as to enable the competent authorities of the requested Party to take these into account when considering possible measures of restriction to be taken;

B. inform the requested Party as soon as possible on any legal or practical time limits concerning the validity of arrest warrants or convictions, that are at the basis of the extradition request and, accordingly, of the withdrawal of (the) extradition request(s).

3. *Requested Parties* are invited to:

A. inform the requesting Party as soon as possible, throughout the extradition proceedings, of any relevant change of the detention situation of the person sought. This applies in particular when the person sought is released (under certain conditions and /or on bail), has absconded after his / her release (despite conditions and / or bail) during the extradition process. Informing the requesting Party is also recommended in case of the re-arrest of the person sought;

B. provide the requesting Party with information about a change of the legal basis for the detention. This is relevant, for example, when the person sought is already in detention for domestic purposes or, conversely, when the person sought is detained for the purpose of extradition and is subsequently in detention for domestic purposes. This information allows the requesting Party to consider the application of Article 19 of the European Convention on Extradition. In addition, this information will affect the calculation of the duration of the detention for the purpose of extradition.

10. Guidelines and model request for extradition

Adopted by the PC-OC at its 79th plenary meeting

Guidelines to the model request on extradition

Introduction

1. Extradition consists in assisting other jurisdictions (that are limited by national borders) to prosecute suspects or person charged or to enforce sentences when the person sought is convicted. The assistance consists of physically surrendering the person sought to the requesting state. Extradition is normally established on a legal basis, i.e. an international instrument, but in some jurisdictions reciprocity may be in itself sufficient to allow extradition.

2. The PC-OC was of the opinion that while the requesting State should indicate the relevant convention to be applied, the States concerned should not consider themselves bound by such a formal reference as they are bound by any convention in force between the two States (the matter was in fact examined in relation to the European Convention on Extradition from 1957 : once the request mentioning only the said convention is received, the requested State is entitled to examine it under the European Convention on the Suppression of Terrorism as well and therefore apply one or the other convention).

3. Sometimes extradition is sought on the basis of a combination of different conventions, for example a combination of a bilateral extradition treaty and a UN convention. This may be necessary when the bilateral extradition treaty contains a limitative list of offences for which extradition may be granted, while more modern transnational offences such as organised crime are not covered by the bilateral treaty. The UN Convention on Transnational Organised Crime for example may then serve as an indirect update of the outdated bilateral extradition treaty that is in place between the requesting and the requested states.

Paragraphs 2 and 3 above are without prejudice to the rules of prevalence in treaty law (article 30 of the Vienna Convention on the Law of Treaties).

4. The text of a given convention might not be exhaustive so it is crucial to check the current status of the reservations and declarations made by (the requested Party) Parties to the Convention and its (four) Protocols before transmitting an extradition request. Often reservations have the effect of limiting obligations arising from the legal instrument (in many cases for example, excluding the possibility to extradite one's own nationals). By means of declarations Parties indicate, for example, which bodies are regarded as the competent (central) authorities dealing with incoming extradition requests.

5. It is also very important to review the signatures and ratifications of the relevant conventions (some conventions do not enter into force before a certain number of States have ratified them).

6. A look at the recommendations and resolutions of the Committee of Ministers of the Council of Europe might be useful. The reading of the explanatory report to a given convention is always useful.

7. On the PC-OC website you will find essential country information on the procedure applicable in each State Party: Country information - Link

8. Last but not least, knowledge of the case law of the European Court of Human Rights is also of importance: see the index and summaries of the case law – Link .

9. For general information on the law of the requested State please note the following convention: the European Convention on Information on Foreign Law (ETS No. 62) and its Additional Protocol (ETS No. 97) which extended the provisions of the latter to criminal law. It should be borne in mind that the more you know about the legal system of the other State the greater the possibility of having your request executed.

10. For further information it might be useful to contact your national PC-OC representative. In more complicated or sensitive extradition cases it is important, even essential to discuss the matter with the central authority of the requested state before transmitting the (final) extradition request. This can avoid a scenario where the extradition would be refused for reasons of lack of clarity as to the time and place of the facts (offences), lapse of time or, in some requested states, the lack of prima facie evidence. In other states, certain formalities such as the proper certification of the documents in support may harm the extradition process. (e.g. South Africa requires an extradition request and the documents in support to be in a booklet form with continuous page numbering etc.)

11. Please note that some States might be bound to obligations arising from bilateral or multilateral instruments or acts having the same effect (for example, instruments from the European Union or the Commonwealth of Independent States). Some of these obligations may stem from binding case law. The EU Court is a prime example.

12. It may be useful for States to bear in mind proportionality. Proportionality requires consideration by the requesting State, primarily by its judicial authorities, of the balance between the purpose and need of the measure requested and the seriousness of the offence, the length of the penalty and the degree to which human rights of the concerned person are affected. In some circumstances, a transfer of proceedings (ETS No 73 [1]), laying of information (art. 21 ETS No 30 [2]) or a transfer of the execution of the sentence (ETS No 70 [3]) could be considered as appropriate alternatives to extradition.

13. Extradition requests are traditionally transmitted through the diplomatic channel, as indicated in article 12 of the European Convention on Extradition. Article 5 of the Second Additional Protocol (CETS n° 098) amended article 12 to allow for a direct transmission between the Ministries of Justice. Some Parties to the Protocol however have excluded this possibility through a reservation. The Fourth Additional Protocol (CETS n° 212) has introduced the possibility to transmit extradition request via electronic means (art. 2). Again, the application of this provision requires verification of the reservations that the Parties to this Protocol may have made.

14. The surrender of the person sought is regulated in article 18 of the European Convention on Extradition. Organising the surrender usually takes several weeks, if not longer. Moreover, external factors, such as a pandemic, may have a significant impact on the practical aspects of the surrender. Even if such circumstances qualify under the force majeure clause of article 18 paragraph 5, the prolonged detention of the person sought may come to end due to legal limitations of the duration of the detention for the purpose of extradition / surrender that apply in the requested State. The requested Party should communicate applicable limitations to the duration of the detention well in advance to the requesting Party in order to avoid the release of the person sought before the surrender can take place.

15. The model and the guidelines leave it to the discretion of the Parties to opt for a comprehensive extradition request that includes all elements, such as the text of the applicable criminal law stating the offences and the penalties that apply. An extradition may even include assurances and thus limit the number of attachments to the arrest warrant(s) and / or judgments.

16. As to assurances, it should be underlined that, depending on their content, the assurances may not be made and signed by the same authority – usually the central authority – that makes and signs the extradition request. Assurances regarding prison conditions for example, are

[1] European Convention on the Transfer of Proceedings in Criminal Matters.
[2] European Convention on Mutual Assistance in Criminal Matters.
[3] European Convention on the International Validity of Criminal Judgments.

logically provided by the competent authority, i.e. the prison administration or an equivalent authority that oversees the prison system in the requesting state.

17. The reservations made with respect to article 23 of the Extradition Convention – the use of languages – should also be verified in order to present a proper translation of the extradition request and the documents.

1. Identity and description of the Person Sought

Name:

First name(s):

Aliases:

Gender:

Date of birth:

Place of birth:

Nationality/es:

Passport(s):

Occupation:

Last known residence:

Current location:

Language(s) spoken:

Other.

Any distinguishing features:

Photographs/fingerprints of the sought person are enclosed.

18. The identity of the person sought is the first essential feature of any extradition request. Requesting States should make sure that the person sought is in fact the person sought. In case of doubts raised by the use of false identities and accompanying ID-documents such as passports, police cooperation and, if needed, MLA should be exploited to the fullest in order to establish the correct ID of the person sought. In some cases, the name / ID of the person sought, mentioned in the domestic arrest warrant or even the conviction differs from the real ID or the ID known to the requested state. Such differences should be explained or rectified in the extradition request.

19. Nationality should also be properly established since most Parties to the Extradition Convention do not extradite their nationals. Dual nationality of the person sought, of which one is the nationality of the requested State, could mean that the requested State will not extradite the person sought or might condition it. Nationality is normally established at the time of the (final) extradition decision of the requested state.

20. States that do not have a (national) register, always require univocal information that allows for the proper identification of the person sought, i.e. (if possible recent and high quality) photographs or even better, fingerprints and ideally a DNA-profile. Fingerprints and DNA-profiles should be delivered in internationally accepted standard. Print outs of fingerprints are most often distorted and cannot be used for comparison.

21. For certain states the addition of patronymics and / or matronymics is important to enable the identification of the person sought.

2. Purpose of the extradition request

For prosecution / enforcement of a sentence

A warrant of arrest for the [offence(s)] listed below was issued by the Court for [person sought] on [date]. A copy of [document(s)] is/are enclosed.

An enforceable judgment (in absentia) for the offence(s) listed below was issued by the Court for on… A copy of the judgment is enclosed.

22. Extradition has a twofold purpose: either to pursue (or further) the prosecution of a suspect or a charged person or to start or to resume the execution of a sentence – or a measure involving deprivation of liberty. This means that the case of the requesting state is either in the pre-trial or, following conviction, in the post-trial stage. Extradition requests may combine the two: seeking the surrender of a sentenced person who is also wanted for prosecution for other offences. As for the judgment(s) convicting the person sought, it is not necessary that the judgment(s) is (are) final. It is sufficient that the penalty or measure involving deprivation of liberty that was imposed can be enforced.

23. When the extradition request is based on an enforceable in absentia judgment, the requesting State should indicate whether the defendant was present in person during the trial or part of the trial and/or whether the defendant was represented during the trial. From the onset, the requesting State should provide sufficient details on the course of the trial. As mentioned in paragraph 42 below, a proper assurance on the right to a retrial is required.

24. It should be underlined that an extradition request should be as complete as possible, i.e. be based on all valid (i.e. still enforceable) arrest warrants and / or judgments (convictions). Insofar the person sought does not waive specialty, the requesting state is limited in its ability to prosecute or enforce the sentence. Even if an extradition request can be supplemented at a later stage or even after the surrender has taken place, such complications are best avoided by transmitting a complete extradition request comprising all the facts and offences from the start.

25. The arrest warrant(s) or the judgment(s) or the equivalent thereof must be valid and enforceable. This means that, the arrest warrant(s) and / or the judgment(s), at the time of the extradition request, are a valid legal basis enabling the detention of the person sought.

3. Offences for which the extradition is sought

The extradition of [person sought] from State B is sought for the following offence(s):

[offence(s)], contrary to [relevant provision of the Criminal Code or other legislation]

26. The offences are the legal definitions of the incriminated behaviour. The applicable legislation can be either included in the request or attached as an annex.

27. Where necessary, legislation regarding general principles should be added, for example legislation defining general or more specific concepts such as ‘participation’, ‘conspiracy’, ‘attempt’, ‘recidivism’ etc.

4. Penalty

The penalty foreseen (if extradition is requested for the purpose of prosecution) or imposed (if extradition is requested for the purpose of the execution of a sentence) for [the offence(s)] is:

28. Insofar the death penalty may apply, an assurance as prescribed by article 11 of the European Convention on Extradition should be included.

29. Insofar the offence(s) is / are punishable with a life sentence, an explanation as to the compressible nature of the life sentence might be needed.

5. Statement of facts comprising the offence(s) for which the extradition is sought

30. An essential requirement of the Extradition Convention (article 12) is to state the facts of the offence(s) committed as well as the date and place of their commission. The first purpose of the statement of the facts is to enable the requested Party to verify the double criminality requirement. This verification is in essence a matter of re-qualifying the facts of the matter under its own (criminal) law. When the facts are also punishable to a sufficient degree, the double criminality requirement and the associated penalty threshold have been met. Depending on the law of the requested State the assessment of double criminality should take into account the date of the commission of the offence and the legislation applicable at that time. The date of the commission of the offence is also important to assess the lapse of time criteria. The place where the offence was committed is important to determine jurisdiction, if required.

31. Arguably the most difficult part of any extradition request is the statement of the facts. The same applies when writing acceptable MLA-requests. Such a statement can be challenging when the facts of the case are complicated (e.g. organised crime, financial crime), the facts happened a long time ago or the person sought is wanted for a multitude of charges or convictions.

32. The right balance is to present the relevant facts, avoiding exposés that are only comprehensible to the police officers or prosecutors or the judges that dealt with the case(s). Like an MLA-request, an extradition request is for another state that is normally not at all familiar with the case(s).

33. When the requested State requires prima facie evidence or probable cause under its extradition law, evidentiary elements may be needed to be included in the extradition request.

34. The statement of the facts should be as complete as possible in order to avoid future issues regarding the principle of specialty (see also under 2: Purpose of the extradition request).

6. Lapse of time

The offence(s)/sentence for which extradition is sought from State B is/are not barred from prosecution/enforcement by virtue of Articles [law of requesting State].

35. Lapse of time is essentially the procedural accessory of double criminality. After it is established that the facts are punishable (to a minimum degree) in both Parties, the next step is to certify whether the prosecution or the enforcement of the sentence imposed is still possible under both Parties' laws.

36. Often, a simple statement that "the prosecution of the offences for which the extradition is sought / the execution of the sentence for which the extradition is sought is not elapsed", should be sufficient to avoid any doubt or discussion about the lapse of time condition to extradition.

37. However, in cases where the prosecution in the requesting state regards "old" facts or regards the enforcement of a sentence that was imposed a long time ago, questions regarding lapse of time may raise in either state. In those cases, the requesting State should include additional information on investigative actions or decisions and/or judicial acts that have occurred that have either suspended or interrupted lapse of time including with regard to co-defendants/co-authors. This applies to lapse of time regarding either the prosecution or the enforcement of the sentence.

38. Sometimes both forms of lapse of time may need to be verified. This is in particular the case when the person sought was tried, convicted by a sentence in absentia and when an assurance in the sense of article 3 of the Second Additional Protocol was provided as required. In those cases, the extradition request relies on an enforceable in absentia judgment, meaning that the imposed sentence may be enforced following the eventual surrender of the person sought. At the same time, the surrendered person must have at least the opportunity to obtain a contradictory re-trial. A re-trial means that the prosecution shall revive and may thus not be elapsed. In those cases, both lapse of time regarding the enforcement of the sentence and regarding the prosecution may come under scrutiny.

39. Insofar the Parties involved are also Parties to the Fourth Additional Protocol to the Convention and did not make a reservation, the requesting State is exempted from providing

detailed or additional information on the law regarding lapse of time, since the requested State should no longer look at lapse of time in accordance with its own law. This means that any further assessment in doubtful cases is irrelevant.

7. Other

40. "Other" may regard a wide variety of specific issues that exceed straightforward extradition requests. Currently, issues surrounding fundamental rights may raise even in straightforward requests and may give rise to the inclusion of assurances in that respect.

41. The requesting State should take into account earlier experiences with the requested State in terms of assurances that were requested in the past. Future requests, especially when these regard similar offences or circumstances, will need to include the same or similar assurances than those provided after the transmission of an earlier extradition request.

42. In case the extradition request relies on an in absentia conviction, the right to a retrial must be assured in accordance with article 3 of the Second Additional Protocol to the Extradition Convention.

43. Other assurances may regard article 3 of the European Convention on Human Rights, more specifically on the conditions of the prison where the person sought may be held after his / her surrender.

44. When the person sought is considered dangerous or has a serious medical condition, it is useful to provide the requested state with a risk assessment, including indications on the risk of escape, violent behaviour, medical history and criminal records. The transfer of medical records is subject to the consent of the person concerned.

8. Enclosures

45. Standard enclosures are:

1. The arrest warrant(s) and / or

2. The enforceable judgment(s)

3. A statement of the facts

4. The applicable legislation (offences and their sanctions, where needed additional legislation)

5. Assurances

- Retrial in case of an in absentia conviction;
- Fundamental rights issues

Model request for extradition

LOGO

Requesting State's Authority

(State A)

Re. [name of person sought]

To

Requested State B

Ref.

Pursuant to the European Convention on Extradition (Council of Europe) of 13 December 1957 (ETS No 024) and its applicable Additional Protocols,

the [name of competent authority] of State A has the honour to herewith request the competent authorities of State B to extradite the person mentioned hereinafter.

1. Identity and description of the Person Sought

Name:

First name(s):

Aliases:

Gender:

Date of birth:

Place of birth:

Nationality/es:

Passport(s):

Occupation:

Last known residence:

Current location:

Language(s) spoken:

Other .

Any distinguishing features:

Photographs/fingerprints of the sought person are enclosed.

2. Purpose of the Extradition Request

For prosecution / enforcement of a sentence

A warrant of arrest/sentence for the [offence(s)] was issued by the Court for [person sought] on [date]. A copy of [document(s)] is/are enclosed. /

An enforceable judgment (in absentia) for the offence(s) listed below was issued by the Court on [date]. A copy of the judgment is enclosed.

3. Offence(s) for which extradition is sought

The extradition of [person sought] from State B is sought for the following offence(s):

[offence(s)], contrary to [relevant provision in Penal Code or other legislation]

4. Penalty

The penalty foreseen/imposed for [the offence(s)] is:

5. Statement of facts comprising the offence(s) for which the extradition is sought

6. Lapse of time

The offence(s)/sentence for which extradition is sought from State B is/are not barred from prosecution/enforcement *by virtue of Articles [law of requesting State]*.

7. *Other*

8. Enclosures

On behalf of the requesting Authority,

Signature(s)

TITLE

Seal

"Requesting Authority"

11. Guidance on good practices regarding the post-surrender phase in extradition proceedings

Adopted by the PC-OC at its 84th meeting

(Strasbourg , 14-16 November 2023)

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The PC-OC identified the post-surrender phase as a lengthy and sometimes troublesome stage in extradition proceedings. Although it is an inevitable aspect of the application of the European Convention on Extradition (CETS No. 24, hereinafter: "the Convention"), this phase is seldom discussed in the PC-OC meetings and suffers from lack of guidance. The PC-OC considered that such guidance should also comprise all aspects of potential relevance to the post-surrender phase.

This document is based on a draft prepared by a special working group set up by the PC-OC, and has been amended and reworked by the PC-OC Mod and PC-OC over several meetings in 2022 and 2023. It was finalised by the PC-OC at its 84th plenary meeting on … November 2023.

The following paper consists, lengthwise and crosswise, of two layers:

a. Listing legal occurrences and needs which take place during the post-surrender phase and require the PC-OC's further attention. The working group identified such occurrences in connection with articles 14, 15, 18 and 19.2 of the Convention as well as in practices which were developed during the years, which are not explicitly covered in the Convention;

b. Recommendations on non-binding and sometimes informal courses and methods of action, which would be considered as "good practice", vis-a-vis various legal situations. At the same time, the PC-OC calls on the parties to make sure that their central authorities fulfil the obligations stemming from the Convention also during this segment of the post-surrender phase.

For the purposes of this guidance, informal communications should be considered as confidential in principle.

Legal occurrences and methods of action

Article 18: Decision regarding extradition – flow of information

The article requires transmission of information from the requested State to the requesting State, of its decision with regard to the extradition, as well as introduction of the reasons for any complete or partial rejection (subsections 1 and 2).

This article deals with a matter which has a great significance to the post-surrender phase, in particular when extradition of the requested person is sought for prosecution. Clearly, the article regulates the formal obligation to transmit the most relevant information, such as the final decision on extradition (or, by analogy, the requested person's renunciation of entitlement to the rule of speciality – see article 4 of the 3rd Additional Protocol). However, on the informal level, a requested central authority should be open to the idea of transmitting the information as soon as possible after the decision(s) are taken, well-before surrender. In this regard, there was agreement in the PC-OC that the requested central authority should inform the requesting Party of the main decisions taken regarding its request for extradition, even before the decisions become final, for two main reasons:

a. Early notice allows the authorities of the requesting State to analyse the legal significance of the decision and to make the necessary adjustments to their proceedings. Such information might be highly significant in cases where proceedings against co-perpetrators or seizure proceedings are already conducted at the requesting Party's courts.

b. When the denial of extradition is based upon reasons stemming from the proceedings in the requesting State, its law or the conditions in it, information provided by its authorities might serve as a basis for the consideration of the authorities of the requested State whether to file an appeal or not against the denial before their courts, when such a possibility exists.

Whenever possible, the requested State should communicate, at an informal level, information concerning the content and terms of extradition decisions even before they become final.

A flexible interpretation for Article 18's term "reasons" is desirable. While a clear although partial decision should not require elaboration, a complicated one could affect the extent to which the requesting Party would be able to conduct the proceedings, within the new prosecutorial frame drawn and dictated by the decision of the requested Party.

The central authority(ies) of the requested State should remain available to respond to inquiries from the requesting State to clarify terms of the extradition decision following surrender, when they are in a position to do so.

In addition, it should be reminded that usually, the decision on extradition does not provide the overall information regarding the period and the forms of custody and restrictive measures taken against the requested person in the requested Party, or medical and social information; all of which might be significant factors in the scope of the legal proceedings against and deprivation of liberty of the extradited person following the surrender (frequently in their favour). This information could include, for example:

- addictions and rehabilitation;

- vulnerabilities which might put at risk their rehabilitation efforts or prevention of deterioration;

- sources of moral support;

- any other information which might contribute to the continuity of the treatment, if given, and the welfare of the extradited person, in particular if expected to be held in custody after surrender.

The PC-OC encourages the transmission of a wide range of such information, when available, provided that specific legal constraints, such as the applicable data protection framework, do not prevent it.

As for the timetable for the transmission of the information, information regarding the length of deprivation of liberty should be transmitted according to Article 18, paragraph 3 of the Convention with the surrender, and the right occasion to do that seems to be the surrender. Obtaining the information regarding medical and social conditions of the extradited person from other agencies (the prison services) should not delay the surrender and may be transmitted afterwards. The PC-OC considered that while this information is typically not transmitted outside specific situations (for example for dangerous persons, or where medical attention is required during transport), it would be useful for the authorities of the requesting State to receive them on a more regular basis. The PC-OC noted that the authority which can obtain and transmit such information might not always be the central authority.

Another type of additional information that States considered useful in this context concerned the behaviour of the person in prison in the requested State, which can have an impact for sentencing in the requesting State.

The requested State should endeavour to communicate medical and social information regarding the extradited person, as well as information on their behaviour in prison, where this information would be relevant for the authorities of the requesting State. The requesting State should communicate particular needs in this regard as early as possible.

Article 14: Speciality

In complicated cases, conducting legal proceedings following the surrender in a manner which takes into account and respects the rule of speciality (as defined by the Convention or by the 4th Additional Protocol), requires the requesting Party to fully understand the requested Party's decision and its grounds. This is crucial for the on-going cooperation between the two parties as well as a guarantee for the rights of the extradited person. Difficulties may occur in two aspects, alternatively or cumulatively:

A. The "additional" offences attributed to the extradited person: attribution of facts and offences which did not serve as a basis for extradition vs. modification of facts and offences which might be covered by the extradition decision;

B. The measures taken against the extradited person: measures which are considered to be "proceedings", "sentencing" or "detention" and therefore are not allowed in the context of additional offences vs. measures which are allowed, such as mere interrogation.

The decision whether to take a certain act vis-à-vis the risk of violation of the Rule of Speciality is in the hands of the requesting Party and its courts. Nevertheless, it is in the interest of the two parties to avoid an unintended breach of speciality and therefore it is most advisable that in complicated cases and when relevant, the requested Party's central authority would, at an informal level, contribute its insights, based on its national law. Such a cooperation is even more crucial when the extradited person argues that their rights (derived from the requested Party's rights in accordance with the rule of speciality) were breached. No affirmative conclusion regarding alleged violation of speciality by the requesting Party can be reached, if the arguments were not communicated to the requesting Party's central authority for its attention.

When it comes to questions regarding the application of the rule of speciality, direct communication between central authorities should be prioritised and occur at the earliest possible stage.

The central authorities of the requested State should promptly respond to requests for clarification, including at an informal level to help the requesting State in interpreting the extradition decision in the light of the national law of the requested State.

Article 15: Re-extradition

Despite the similarity between requests for exception and re-extradition, the scenario of the latter – as rare as it is – might become more complex as it involves three parties.

When the requested Party (Party A), the requesting Party (Party B) and the third Party (Party C) are parties to a/the Treaty/Convention and all terms of extradition are met, the consideration of the re-extradition request should not pose significant difficulties. However, the request might become rather complicated, when a condition to extradition (such as dual criminality or lack of legal barrier such as prescription) is not fulfilled. While Party B is, and will remain, the requesting Party, direct communication between Party A and Party C becomes crucial for thorough consideration of the matter. Translation requirements also need to be taken into account in this context, as it could be onerous for Party B to ensure translation into the language of Party A of documentation it received in its own language.

The PC-OC considered that direct transmission of information and documents between Party A and Party C would be desirable in these cases, while the continuing involvement of Party B is also crucial.

Consultations between all three parties would be beneficial in cases involving re-extradition, including before submitting the request whenever possible. It is a good practice for Party B's request to be accompanied by information, such as a form or a checklist, drafted by Party C's authorities, detailing the relevant information in first-hand, and not by proxy.

Article 19, paragraph 2: Temporary Surrender

Theoretically, "temporary surrender" – which is contained under Article 19 "Postponed or conditional surrender" – is a sophisticated mechanism which should assist delaying the completion of the extradition, or, instead, completing it under the condition to send the extradited person back to requested Party, thus avoiding conflicts of enforcement interest between parties. Functioning mechanisms of scheduling and prioritizing the conduction of parallel proceedings in two countries should minimize immunity and maximize enforcement. However, the extent of uncertainty regarding future events was always large, and apparently led the drafters of the Convention to assign the determination of the terms of the temporary surrender to the parties involved in such a legal event if and when time comes (terms should be set "in accordance with conditions to be determined by mutual agreement between the Parties"). However, in general, this uncertainty, as well as logistical challenges, limit the usefulness of this mechanism. Nevertheless, during its discussions, the PC-OC noted that some States Parties had reached an extent of mutual trust which allows them, under their domestic laws, to use this practice often, with no notable complications.

The mechanism requires, therefore, a fresh consideration. The PC-OC took three main elements into account in this respect:

a. The right of the requested Party to make the surrender temporary and conditional on the return of the extradited person to the requested Party means that the return shall not be considered as extradition, and will not bear the legal consequences of extradition;

b. The condition of return might be set for the purpose of proceedings against the extradited person (temporary transfer of a witness in custody is regulated in the MLA Convention). However, it may not be necessary to issue a warrant of arrest or detention against the extradited person in the requested Party, as their departure from the requested Party is probably involuntary; In any case, any warrant determining preventive measures against the extradited person, anticipating the resumption of their trial upon their return, clearly suffices.

c. No agreement between the two parties' authorities may bind the court in the requesting Party and prevent the release of the extradited person after being extradited, even though some States considered that the agreement must specify that the person must be kept in detention and sent back to the requested Party in all cases (including, for example, when they are nationals of the requesting Party). The PC-OC recommends that, if risk of flight of the person threatens to jeopardise the temporary surrender, the parties should consider that their agreement will expire if the person is released in the requesting Party; accordingly, the requesting Party undertakes to return them to the requested Party immediately.

The PC-OC considered that a model agreement could ease and enhance the use of this mechanism (see Appendix I for a model).

Post-Surrender monitoring

One of the legal consequences of the extradition could be a post-extradition monitoring carried out based on earlier provided guarantees. In that case, depending on the essence of those guarantees, which could vary based on the case circumstances, status of the sought person, overall human rights situation in the requesting Party etc., the representatives of the requested State, including diplomats or consulate officers may visit an extradited person and carry out *tete-a-tete* meetings with them. Moreover, based on the guarantees they could also be allowed to

monitor a trial of this person. Requesting such guarantees should be considered a form of cooperation, since without them extradition would not be possible.

Due diligence while enforcing these guarantees is essential in further cooperation on extradition as once the promises fail to be implemented it could result in losing the trust in the provided guarantees thereby endangering positive decisions in extradition cases in future.

In many cases, conditions are set directly by the courts of the requested State, while monitoring is performed and coordinated mainly by other state agencies such as consular personnel depending from Ministries of Foreign Affairs and Prison authorities. Direct communication between such agencies is inevitable. Nevertheless, the PC-OC considered that the central authorities of both parties should stay closely involved in this sensitive and sometimes lengthy process and co-ordinate it, since it is a part of the extradition process and due to its possible implications for cooperation in the future.

When they are needed, guarantees should be provided by the central authorities of the requesting State. The central authorities of the requested State should always co-ordinate the provision of these guarantees (by indicating precisely how they should be worded) and their monitoring.

The central authorities of the two parties should be defined as the relevant interlocutors for any monitoring activity or its effects and results.

Conclusion of criminal proceedings in the requesting Party

The working group saw some benefit in the transmission of the outcome of the proceedings against the extradited person in the requesting Party to the central authority of the requested Party, at least in some cases. While some States provide this information regularly and as a matter of course, many States do not.

The discussion within the PC-OC revealed that many States considered that this would be very useful information, for example from a public safety and security concern where the requested State should be aware that the person may try to re-enter its territory. This information was considered particularly relevant by States where the central authorities act as the litigating body following requests for extradition submitted by requesting States before national courts.

In cases where the requested Party indicates its need to have information about the outcome of the proceedings following extradition, the authorities of the requesting Party should endeavour to provide that information.

Appendix – Template for an Agreement on Temporary Surrender (Article 19, paragraph 2 of the European Convention on Extradition)

Considering that [……], who is located in the territory of Party B, is sought by Party A for the purpose of prosecution [ ] and his/her/their extradition to Party A was granted in a final decision of Party B's competent authorities, dated […];

Considering that […..]'s presence in Party B's territory is required in order that he/she/they may be proceeded against by Party B's authorities [in… case number…] / in order that he/she/they may serve the sentence of [….] imposed on him/her/them by [the …court /in case number…];

In accordance with Article 19, paragraph 2 of the European Convention on Extradition opened for signature on 13 December 1957,

The parties agree as follows:

- Party B will temporarily surrender [….] to Party A. The surrender shall take place on [date].

- [….] will be kept in custody continuously during his/her/their stay in Party A's territory. Should a decision to release […] be rendered by any of Party A's authorities, this agreement shall expire, and Party A will return […] to Party B without delay, while in custody.

- […] will be returned to Party B no later than [date] unless the period of his/her/their stay in Party's A territory is extended by the parties, in writing; / as soon as possible after completion of the procedural steps described above;

- all direct costs of the surrender will be borne by Party A;

- the return of […] to Party B's territory shall not be considered as extradition and shall not bear the legal consequences of extradition.

Optional:

- the time spent in custody in Party A will be exclusively attributed to the proceedings/sentence in Party B / will be deducted, if at all, by each Party in relation to a sentence imposed by it, according to its laws.

- The practical modalities of the surrender shall be arranged through INTERPOL channels.

12. European Commission

Commission Notice

GUIDELINES ON EXTRADITION TO THIRD STATES

(2022/C 223/01)

[*Part 1 of this document - Summary of the case-law of the CJEU – has been left out; its contents are reflected in appropriate chapters of this publication*]

2. **GUIDELINES APPLICABLE IN CASES WHEN STATES APPLY THE NATIONALITY EXCEPTION**

2.1. **Extradition requests for prosecution purposes**

2.1.1. ***Scope of the Petruhhin mechanism***

a. *Material scope: when does the Petruhhin mechanism apply?*

The *Petruhhin* (notification) mechanism must be triggered in cases where:

— an extradition request is issued for prosecution purposes

and

— the requested State applies the nationality exception to own its nationals only, leading to potential discriminations between its own nationals and nationals of other States who have exercised their right to free movement (*c.f. Annex 2 - an overview of national systems*).

The *Petruhhin* mechanism applies to all extradition requests, either on the basis of:

— the Agreement on extradition between the European Union and the United States of America[(36)];

— the Trade and Cooperation Agreement between the European Union and the European Atomic Energy Community, of the one part, and the UK, of the other part (TCA) [(37)], which includes provisions reflecting the *Petruhhin* mechanism[(38)];

— multilateral agreements concluded by States;

— bilateral agreements concluded by States; or

[(36)] OJ L 181, 19.7.2003, p. 27.
[(37)] OJ L 149, 30.4.2021, p. 10.
[(38)] Article 614(1) and (3) of the TCA provides: 1. If two or more States have issued a European arrest warrant or an arrest warrant for the same person, the decision as to which of those arrest warrants is to be executed shall be taken by the executing judicial authority, with due consideration of all the circumstances, especially the relative seriousness of the offences and place of the offences, the respective dates of the arrest warrants or European arrest warrants and whether they have been issued for the purposes of prosecution or for the execution of a custodial sentence or detention order, and of legal obligations of Member States deriving from Union law regarding, in particular, the principles of freedom of movement and non-discrimination on grounds of nationality. 3. In the event of a conflict between an arrest warrant and a request for extradition presented by a third country, the decision as to whether the arrest warrant or the extradition request takes precedence shall be taken by the competent authority of the executing State with due consideration of all the circumstances, in particular those referred to in paragraph 1 and those mentioned in the applicable convention.

— national law.

b. Personal scope: to whom does the Petruhhin mechanism apply?

The *Petruhhin* mechanism applies to nationals of the 27 EU Member States located on the territory of another Member State, who exercised their right to free movement. Nationals holding also the nationality of the third State requesting extradition are also covered. The Court of Justice clarified that holding a dual nationality cannot deprive the person concerned of the freedoms deriving from EU law as a national of a Member State(39). Moreover, the timing when a person obtained the nationality of a Member State is also irrelevant(40).

The Court of Justice clarified that the *Petruhhin* mechanism also applies to nationals of a Member State of the EFTA which is a party to the Agreement on the EEA and with which the European Union has concluded a surrender agreement (Iceland and Norway)(41). Articles 18 and 21 TFEU do not apply to nationals of third States. However, the Court of Justice considered that Article 4 of the EEA Agreement (42) read together with Article 36 of the EEA Agreement(43), which is an integral part of EU law, guarantee the freedom to provide services, in a way that is identical to Article 56 TFEU, including the right to travel to another State to receive services(44).

Furthermore, the Court of Justice confirmed that the right to free movement under Article 21(1) TFEU/ Article 36 EEA, also applies to a person merely in transit at an airport (45) or receiving services as a tourist (46) in another State.

c. Territorial scope: which authorities are bound by the Petruhhin mechanism?

National authorities of the 27 EU Member States, Iceland and Norway, when applying the nationality exception, are bound by the *Petruhhin* mechanism.

2.1.2. ***Steps to be followed by the competent authorities when the nationality exception applies***

a. *Obligations for the requested State*

Articles 18 and 21 TFEU/ Article 4 of the EEA Agreement read together with Article 36 of the EEA Agreement do not require the establishment of absolute equivalence between own nationals and nationals of other States as regards protection against extradition to third States. However, they require States which provide for a different treatment in extradition of their own nationals compared to nationals of other States, to verify, before authorising extradition, whether the legitimate objective of avoiding the impunity pursued

(39) Judgment of the Court of Justice of 13 November 2018, *Raugevicius*, C-247/17, ECLI:EU:C:2018:898, paragraph 29 and judgment of the Court of Justice of 17 December 2020, *Generalstaatsanwaltschaft Berlin (Extradition towards Ukraine)*, C-398/19, ECLI:EU:C:2020:1032, paragraph 32.
(40) Judgment of the Court of Justice of 17 December 2020, *Generalstaatsanwaltschaft Berlin (Extradition towards Ukraine)*, C-398/19, ECLI:EU:C:2020:1032, paragraph 31.
(41) Judgment of the Court of Justice of 2 April 2020, *Ruska Federacija*, C-897/19 PPU, ECLI:EU:C:2020:262.
(42) Article 4 of the EEA Agreement provides that: 'Within the scope of application of this Agreement, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited.'
(43) Article 36(1) of the EEA Agreement provides that: 'Within the framework of the provisions of this Agreement, there shall be no restrictions on freedom to provide services within the territory of the Contracting Parties in respect of nationals of EC Member States and EFTA States who are established in an EC Member State or an EFTA State other than that of the person for whom the services are intended.'
(44) Judgment of the Court of Justice of 2 April 2020, *Ruska Federacija*, C-897/19 PPU, ECLI:EU:C:2020:262, paragraphs 52-55.
(45) Judgment of the Court of Justice of 10 April 2018, *Pisciotti*, C-191/16, ECLI:EU:C:2018:222, paragraph 34.
(46) Judgment of the Court of Justice of 2 April 2020, *Ruska Federacija*, C-897/19 PPU, ECLI:EU:C:2020:262, paragraph 54.

by extradition can be achieved by a less prejudicial measure to the exercise of the right to free movement, which would be equally effective[47].

In the case of a request for extradition for the purpose of criminal prosecution, the requested State is obliged to consult the State of nationality, in order to give that State of nationality the opportunity to issue an EAW/EU-IC/NO arrest warrant, which would be considered an equally effective but less prejudicial measure.

However, the requested State has no obligation to refuse the extradition of a Union citizen who is a national of another Member State or an IC/ NO national and to prosecute the EU citizen/ IC/ NO national for the offences committed in a third State, where its national law permits it to do so[48]. This would go beyond the limits that EU law may impose on the exercise of the discretion enjoyed by that State in relation to the decision on whether to conduct or not a criminal prosecution.

b. Launching the consultation procedure

The requested State is obliged to notify the State of nationality of a pending extradition request.

Regarding the timing for such notification, it is suggested that the requested State notifies the State of nationality of an incoming or pending extradition request at the earliest opportunity. This can happen already when a person is provisionally arrested, if sufficient information is available from an Interpol red notice, and/or at a later stage when the requested State receives the extradition request.

c. Type of information to be provided to a State(s) of nationality

As a minimum, authorities of the requested State should inform the focal point [49] of the State of nationality of:

— the existence of an extradition request concerning that person; and

— all the matters of fact and law communicated by the third State requesting extradition in the context of that extradition request [50] (*c.f.* Annex 3 - template).

Moreover, authorities of the requested State should keep the authorities of the State of nationality informed of any changes in the situation of the requested person that might be relevant to the possibility of an EAW/ EU-IC/NO arrest warrant being issued with respect to that person [51] (c.f. Annex 4 - template).

d. Relations with the requesting third State and confidentiality

Neither the requested State nor the State of nationality are obliged under EU law to submit an application for the transmission of the criminal investigation file to the third State that is requesting extradition[52]. If the requested State or the State of which the requested person is a national were obliged to ask the third State requesting extradition to send the criminal investigation file, the extradition procedure might become substantially more complicated and its duration might be significantly extended, with the risk of jeopardising, ultimately, the objective of ensuring that criminal offences do not go unpunished[53].

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[47] Judgment of the Court of Justice of 6 September 2016, ***Petruhhin***, C-182/15, ECLI:EU:C:2016:630, paragraph 41.
[48] Judgment of the Court of Justice of 17 December 2020, *Generalstaatsanwaltschaft Berlin (Extradition towards Ukraine)*, C-398/19, ECLI:EU:C:2020:1032, paragraphs 49-50.
[49] A list of national focal points nominated by the 27 EU Member States, NO and IC is published on the EJN website, *cf.* 4.1.
[50] Judgment of the Court of Justice of 17 December 2020, *Generalstaatsanwaltschaft Berlin (Extradition towards Ukraine)*, C-398/19, ECLI:EU:C:2020:1032, paragraph 48.
[51] *Idem*.
[52] *Idem*, paragraph 49.
[53] *Idem*, paragraph 51.

Moreover, long proceedings may also be detrimental to the person sought, in particular if the person is kept in detention.

Authorities of the State of nationality are bound to respect the confidentiality of such matters where confidentiality has been sought by the requesting third State. Moreover, the requesting third State should be kept duly informed on that point[54].

However, the State of nationality can apply any cooperation and/or mutual assistance mechanism to obtain evidence from the requested State (e.g. issuing a European Investigation Order (EIO)[55]).

e. *Obligations for the State of nationality*

After the notification, competent authorities of the State of nationality should assess whether it is appropriate to issue an EAW/ EU-IC/NO arrest warrant relating to the same offences as those of which the person concerned is accused in the extradition request, in so far as they have jurisdiction, pursuant to their national law, to prosecute that person for offences committed outside national territory.

2.1.3. ***Time limit to respond to a notification***

The requested State should set a reasonable time limit for the State(s) of nationality to submit a reply. The requested State has a margin of appreciation when determining a reasonable time limit, in particular taking into consideration whether a requested person is in custody based on the extradition procedure and the complexity of the case[56].

The imposed time limit should be indicated in the certificate (*c.f.* Annex 3 - template).

If necessary, the focal point or the issuing judicial authority [57] of the State(s) of nationality could request an extension of the time limit (c.f. Annex 5 - template). The focal point or the authority dealing with the extradition request in the requested State should decide upon the extension (c.f. Annex 6 - template).

2.1.4. ***Refusal of an extradition request***

Only in cases, where a judicial authority of a State of nationality issues an EAW/ EU-IC/NO arrest warrant related to the same offence(s) [58]or acts and informs the requested State accordingly, the requested State should refuse the extradition and surrender the person to the State of nationality (*c.f.* Annex 7 – template).

2.1.5. ***Resumption of the extradition proceedings***

In the absence of a reply within the imposed time limit from authorities of the State(s) of nationality or in the case of a negative reply within the time limit, the authorities of the requested State may, where appropriate, carry out the extradition without being obliged to wait for the State of nationality to reply and/or adopt a formal decision waiving the right to issue an EAW/ EU-IC/NO arrest warrant in respect of that person [59] (*c.f.* Annex 7 – template).

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[54] *Idem*, paragraph 48.
[55] Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 regarding the European Investigation Order in criminal matters (OJ L 130, 1.5.2014, p. 1).
[56] Judgment of the Court of Justice of 17 December 2020, *Generalstaatsanwaltschaft Berlin (Extradition towards Ukraine)*, C-398/19, ECLI:EU:C:2020:1032, paragraph 55.
[57] As designated under Article 6(1) of the **EAW FD** or under Article 9(1) of the Agreement between the European Union and the Republic of Iceland and the Kingdom of Norway on the surrender procedure between the Member States of the European Union and Iceland and Norway.
[58] Judgment of the Court of Justice of 10 April 2018, *Pisciotti*, C-191/16, ECLI:EU:C:2018:222, paragraph 54.
[59] Judgment of the Court of Justice of 17 December 2020, *Generalstaatsanwaltschaft Berlin (Extradition towards Ukraine)*, C-398/19, ECLI:EU:C:2020:1032, paragraphs 53 and 54.

2.2. Extradition requests for the execution of a custodial sentence or a detention order

2.2.1. *Scope*

a. *Material scope*

The *Raugevicius* judgment applies in cases where:

— the request is an extradition request for execution of a custodial sentence or detention order

and

— the requested State applies the nationality exception to own nationals only, leading to potential discrimination between own nationals and nationals of other States who have exercised their right to free movement (*c.f.* Annex 2 - an overview of national systems).

b. Personal scope concerning extradition requests for the execution of a sentence: to whom does the Raugevicius judgment apply?

The obligation of equal treatment in this respect applies only to the extent that own nationals and nationals of other States are in a comparable situation with regard to the objective of avoiding the risk of impunity. Since the execution of custodial sentences in the State of origin of the person concerned promotes the social reintegration of the person concerned once his/her sentence has been completed, a comparable situation exists only with regard to nationals of other States who are permanently resident in the requested State and thus have a certain degree of integration into the society of that State.

Therefore, the Court of Justice held that the personal scope is limited to nationals of other States who reside permanently in a requested State and demonstrate a certain degree of integration into that State's society [(60)] because they are in a comparable situation with nationals of the requested State. On the other hand, a national of a State being arrested at an airport of a requested State, while only transiting, would not fulfil the criterion of being in a comparable situation.

If a requested person cannot be regarded as residing permanently in the requested State, the issue of their extradition is to be settled based on the applicable national or international law[(61)].

2.2.2. *Steps to be followed by the competent authorities when the nationality exception applies*

In cases of a request for extradition for the purpose of executing a sentence, the less prejudicial measure to the exercise of the right to free movement is for the requested State to assume responsibility for the execution of the sentence on its territory instead of extraditing the national of another State to the third State, where such a possibility is also provided for its own nationals. It is expected that the Court of Justice will further clarify the detailed steps to be followed (in particular the extent of obligations for States and whether a consent of a third State is required) in the pending case C-237/21 (62).

2.2.3. *Information exchange between the requested State and the State of nationality*

Articles 18 and 21 TFUE do not require the requested State to inform the State of nationality of a pending extradition request for an execution of a sentence or a detention

[(60)] Judgment of the Court of Justice of 13 November 2018, *Raugevicius*, C-247/17, ECLI:EU:C:2018:898, paragraph 46.
[(61)] *Idem*, paragraph 48.

order. However, the requested State is not prevented from contacting the State of nationality in order to obtain any relevant information it might find useful.

3. GUIDELINES APPLICABLE TO ALL STATES REGARDLESS OF THE NATIONALITY EXCEPTION

3.1. Fundamental rights assessment before an extradition

3.1.1. *Application of the Charter*

The Court of Justice held that the decision to extradite a Union citizen/IC/NO national, in a situation which comes within the scope of Article 18 TFEU and Article 21 TFEU or Article 4 of the EEA Agreement read together with Article 36 of the EEA Agreement, falls under the scope of EU law for the purposes of Article 51(1) of the Charter[(63)]. Therefore, the provisions of the Charter, and in particular Article 19 thereof, are applicable to such a decision.

Moreover, the existence of an international agreement of the Union on extradition is sufficient to trigger the application of the Charter. Therefore, the Charter also applies to extradition requests issued by the US or the UK respectively under the Agreement on extradition between the European Union and the United States of America [(64)] and the Trade and Cooperation Agreement between the European Union and the European Atomic Energy Community, of the one part, and the UK, of the other part[(65)], even when there is no exercise of free movement within the EEA area. Moreover, in such cases the Charter applies also to nationals of third States and stateless persons.

Where the Charter applies, a requested State must first verify that the extradition will not prejudice the rights referred to in Article 19 of the Charter[(66)].

Under Article 19(2) of the Charter, no one may be removed, expelled or extradited to a State where there is a serious risk that they would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment.

The Court of Justice further specified that the mere 'existence of declarations and accession to international treaties guaranteeing respect for fundamental rights in principle are not in themselves sufficient to ensure adequate protection against the risk of ill-treatment where reliable sources have reported practices resorted to or tolerated by the authorities which are manifestly contrary to the principles of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

It follows that, in so far as the competent authority of the requested Member State is in possession of evidence of a real risk of inhuman or degrading treatment of individuals in the requesting third State, it is bound to assess the existence of that risk when it is called upon to decide on the extradition of a person to that State (see, to that effect, as regards

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(63) Judgment of the Court of Justice of 6 September 2016, *Petruhhin*, C-182/15, ECLI:EU:C:2016:630, paragraphs 52 and 53, and judgment of the Court of Justice of 2 April 2020, *Ruska Federacija*, C-897/19 PPU, ECLI:EU:C:2020:262, paragraph 63. Article 51(1) of the Charter provides: '1. The provisions of this Charter are addressed to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers and respecting the limits of the powers of the Union as conferred on it in the Treaties.'

(64) OJ L 181, 19.7.2003, p. 27.

(65) OJ L 149, 30.4.2021, p. 10.

(66) Judgment of the Court of Justice of 6 September 2016, Petruhhin, C-182/15, ECLI:EU:C:2016:630, paragraph 60, order of the Court of Justice of 6 September 2017, *Schotthöfer & Steiner v Adelsmayr*, C-473/15, ECLI:EU:C:2017:633, judgment of the Court of Justice of 13 November 2018, *Raugevicius*, C-247/17, ECLI:EU:C:2018:898, paragraph 49, judgment of the Court of Justice of 2 April 2020, *Ruska Federacija*, C-897/19 PPU, ECLI:EU:C:2020:262, paragraphs 63 to 68.

Article 4 of the Charter, judgment of 5 April 2016 in *Aranyosi and Căldăraru*, C-404/15 and C-659/15 PPU, EU:C:2016:198, paragraph 88).

To that end, the competent authority of the requested Member State must rely on information that is objective, reliable, specific and properly updated. That information may be obtained from, inter alia, judgments of international courts, such as judgments of the ECtHR, judgments of courts of the requesting third State, and also decisions, reports and other documents produced by bodies of the Council of Europe or under the aegis of the United Nations (see, to that effect, judgment of 5 April 2016 in Aranyosi and Căldăraru, C-404/15 and C-659/15 PPU, EU:C:2016:198, paragraph 89)'[(67)].

3.1.2 *Application of the European Convention for the Protection of Human Rights and Fundamental Freedoms*

The European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) applies to the extradition from States to third States in situations to which the Charter does not apply[(68)], such as the extradition of a Union citizen, who has not exercised the right to free movement, or of a third country national to a third State with which the Union has not concluded an extradition agreement.

Article 3 and Article 6 of the ECHR are relevant in particular. Article 3 of the ECHR provides:

No one shall be subjected to torture or to inhuman or degrading treatment or punishment.

Article 6 of the ECHR (right to a fair trial, the presumption of innocence and the rights of defence) provides:

1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgement shall be pronounced publicly by the press and public may be excluded from all or part of the trial in the interest of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.

3. Everyone charged with a criminal offence has the following minimum rights: a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him; b) to have adequate time and the facilities for the preparation of his defence; c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require; d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him; e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court.

3.2. **Unfounded or abusive, including politically motivated red notices, arrest warrants and extradition requests**

[(67)] Judgment of the Court of Justice of 6 September 2016, ***Petruhhin***, C-182/15, ECLI:EU:C:2016:630, paragraphs 57, 58 and 59.
[(68)] *Cf.* 3.1.1. *supra*.

States have been facing cases of unfounded or abusive, including politically motivated extradition requests and parallel Interpol red notices. Therefore, this section could apply already at a stage where no extradition request has yet been issued or where the person has not yet been arrested on the basis of a red notice (e.g. when a State is aware of abusive Interpol red notices, it can inform other focal points proactively, even before the person sought moves to another State).

3.2.1. ***The existing Interpol mechanism on misuse of red notices***

There is an automated screening and detection system of red notices [(69)] in place within Interpol. It allows misuse cases to be filtered out. Each incoming request is checked against a watch list containing requests that have been denied in the past so that they are automatically rejected. Interpol is working to develop new IT automated safeguards to enhance the assessment of incoming requests for the publication of notices and diffusions.

Moreover, a special Task Force, composed of lawyers and police officers from different Interpol Member States, has been established in the Interpol General Secretariat. The Task Force assesses all incoming requests for publications of notices and diffusions from Interpol member countries with regard to their compatibility with the respective legal framework and requirements.

Interpol red notices can be removed on a number of grounds by making submissions to the independent Commission for the Control of Files (CCF) claiming that they breach Interpol's Constitution and its Rules on the Process of Data. Member States can advise the individual concerned by an abusive red notice, in particular by a politically motivated red notice, to exercise their rights before the CCF and alert them beforehand, or ask for the notices or diffusions to be deleted.

A permanent notice advisory group supports these activities.

3.2.2. ***Information exchange by focal points concerning unfounded or abusive, in particular politically motivated extradition requests***

The State of nationality often possesses information of substantial importance to decide whether an extradition request is unfounded or abusive, in particular politically motivated. Therefore, close cooperation and exchange of information with the State of nationality of the requested person can be essential, when a requested State evaluates an extradition request regarding a citizen of another State.

In cases of reasonable suspicion that a request for extradition is abusive, in particular politically motivated or otherwise unfounded (unlawful), the focal point of a State that has received an extradition request from a third State regarding a national of another State, should always inform the focal point of the State of nationality. This will allow to exchange relevant information to take an informed decision on whether the request for extradition is politically motivated or otherwise unfounded (unlawful) (*c.f.* Annex 3 - template and Annex 8 - template).

Moreover, any focal point should in cases of reasonable suspicion that an extradition request is unfounded or abusive, in particular politically motivated, promptly and

[(69)] A Red Notice is neither an extradition request, nor an international arrest warrant. It is an alert to law enforcement worldwide to locate and provisionally arrest a person pending extradition, surrender, or similar legal action. However, a red notice refers to an international arrest warrant or judicial decision, supports the extradition proceedings and contains national crime data (except if the red notice is issued by an international tribunal). According to Article 82 of INTERPOL's Rules on the Processing of Data [IRPD, III/IRPD/GA/2011 (2019)], 'Red notices are published at the request of a National Central Bureau or an international entity with powers of investigation and prosecution in criminal matters in order to seek the location of a wanted person and his/her detention, arrest or restriction of movement for the purpose of extradition, surrender, or similar lawful action.'

proactively inform and consult other focal points, as well as Eurojust, Europol and Interpol (*c.f.* Annex 8 - template).

This notification mechanism among the focal points in cases of unfounded or abusive, including politically motivated extradition requests applies to nationals of States, as well as to nationals of third States and stateless persons.

4. PRACTICAL ASPECTS OF THE PETRUHHIN MECHANISM AND POLITICALLY MOTIVATED EXTRADITION REQUESTS

4.1. Focal points

For the purposes of the *Petruhhin* mechanism and unfounded or unlawful, in particular politically motivated extradition requests, States nominated focal points (e.g. central authorities).

The updated list of the focal points is available at:

https://www.ejn-crimjust.europa.eu/ejn/AtlasChooseCountry/EN

State should swiftly inform the EJN of any changes in their focal points.

Focal points can consult Eurojust and the EJN if they have any issues.

4.2. Language regime and costs

An official language of the State of nationality is proposed as the language regime for documents transmitted between the requested State and the State of nationality.

States can also notify the Commission if they decide to accept translations in one or more other official languages of the EU, Icelandic or Norwegian languages.

The requested State and the State of nationality should each cover their own costs (mainly translation costs).

4.3. Data protection regime

Directive (EU) 2016/680 on the protection of natural persons with regard to the processing of personal data by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and on the free movement of such data [(70)] applies.

[(70)] Directive (EU) 2016/680 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and on the free movement of such data, and repealing Council Framework Decision 2008/977/JHA (OJ L 119, 4.5.2016, p. 89).

PART IV

ADDITIONAL RESOURCES

UN Resources

Manual on MLA and Extradition

Model Treaty on Extradition

Council of Europe Resources

Case law of the ECtHR on international cooperation (PC-OC)

Bilateral treaties binding CoE Member States (PC-OC)

Country information (information on the criminal procedure of countries, PC-OC)

EU Resources

EUROJUST: European Union Agency for Criminal Justice Cooperation - Extradition

EUROJUST: European Union Agency for Criminal Justice Cooperation - EAW

Networks

Europe

Committee of Experts on the Operation of European Conventions on Co-operation in Criminal Matters (PC-OC), CoE

Convention on Cybercrime 24/7 contact points

European Union Agency for Criminal Justice Cooperation (EUROJUST)

Network of National Experts on Joint Investigation Teams (JIT)

European Judicial Network (EJN)

The Genocide Network

Rest of the World

Commonwealth Network of Contact Persons (CNCP)

Hemispheric Network for Legal Cooperation on Criminal Matters (REMJA)

Judicial Regional Platforms of Sahel and Indian Ocean Commission Countries

Network of Specialized Prosecutors Against Organised Crime (REFCO)

Network of West African Central Authorities and Prosecutors against Organised Crime (WACAP)

For an up to date and comprehensive overview of the existing worldwide operational (judicial) networks for international cooperation in criminal matters, see the **"Open ended Catalogue of International Judicial Networks of Operational Relevance in the Fight Against Transnational Organised Crime"**, prepared by CDPC/PC-OC