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**EUROPEAN COMMITTEE ON CRIME PROBLEMS**  
**(CDPC)**

**COMMITTEE OF EXPERTS**  
**ON THE OPERATION OF EUROPEAN CONVENTIONS**  
**ON CO-OPERATION IN CRIMINAL MATTERS**  
**(PC-OC)**

**Note on**  
**the relationship between extradition and deportation/ expulsion**  
**(disguised extradition)**

**Summary of the discussion held during the 62<sup>nd</sup> meeting of the PC-OC**

Secretariat memorandum prepared by  
the Directorate General of Human Rights and Rule of Law  
DG I

## Introduction

During the 62<sup>nd</sup> 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's working group, the PC-OC Mod.

The discussion was a follow up to an exchange of views held during the 61<sup>st</sup> meeting of the PC-OC on a discussion paper on this issue prepared by Mr Eugenio Selvaggi (Italy) including comments by Mr Miroslav Kubicek (Czech Republic) and Mr Erik Verbert (Belgium).

The list of questions (PC-OC Mod (2012)03) and the discussion paper (PC-OC (2011)09 Rev) are published on the agenda of the 62<sup>nd</sup> and 63<sup>rd</sup> meeting of the PC-OC.

It was recalled that extradition is the traditional way to surrender a person in view of prosecution or execution of a sentence. The question arises whether states may use an alternative way of surrender, such as deportation or expulsion<sup>1</sup>, and whether this raises particular questions as regards the protection of human rights.

The PC-OC agreed that the discussion would not address unlawful seizure of persons in other jurisdictions, abductions or extraordinary renditions.

It was pointed out that a state, when receiving a request for extradition, may prefer to expulse the person sought to the requesting state for the following reasons:

- there is no treaty basis to extradite between the states concerned;
- the requested state cannot grant the extradition request;
- to avoid a lengthy extradition procedure.

During the discussions Interpol indicated that in recent years, there is a tendency, in certain states, to request information from other states with a view to expulsion. This is why, in 2011, the red notice requests were revised so as not to exclude deportation/ expulsion.

### **Extradition vs. deportation/expulsion, different procedures**

It was underlined that, unlike an extradition procedure which is based on international co-operation 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<sup>2</sup>.

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 European Court of Human Rights (ECtHR) in this field. The deportation/expulsion procedure 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.

### **Precedence of the extradition procedure?**

The question was raised whether a state may proceed with a deportation/expulsion procedure when an extradition procedure has been initiated.

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<sup>1</sup> Reference is made to the definition of the terms extradition, expulsion and deportation in the discussion paper (PC-OC (2011)09 Rev).

<sup>2</sup> There might also be bilateral or multilateral agreements in this respect (for instance readmission agreements).

It was observed that both the legal situation and the practice vary largely in Europe. No international review has been conducted on this specific subject and the ECtHR has not yet addressed this issue. In states where the legal order imposes a primacy of extradition over deportation/expulsion, it is not always clear at what stage the extradition procedure is considered initiated.

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 the state, 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.

The expert from the USA indicated that for his country extradition and immigration law based expulsion were separate legal regimes each of which was a valid basis to remove a wanted person from the USA. The fact that an extradition request has been made did not rule out that a wanted person might be able to be expelled to the country seeking to prosecute him or her by operation of immigration law. In all cases, the interests of justice and the person concerned are taken into account. Where an extradition procedure is pending, the USA will usually follow this procedure but a switch to an expulsion procedure is not impossible. Where a court decides that a person cannot be extradited, expulsion for violation of the immigration law is not to be excluded. The concepts are entirely different and not incompatible.

The Russian expert supported the practical approach of the USA and reiterated its view that the mandate of the PC-OC did not cover the issue of expulsion. Extradition and deportation/expulsion are two very different legal procedures, both having to respect human rights' requirements. The choice of procedure is up to each state. In practice, the Russian Federation does assist foreign countries in bringing persons to court, including by expulsion procedures, in compliance with its laws and international human rights obligations for instance the UN Convention on refugees.

Another expert observed that extradition and deportation/expulsion procedures each have their own procedural constraints which may determine the choice. It would therefore be useful to gather information on these procedural constraints in other member states, both the positive law aspects and the unwritten principles.

The question was also raised 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 return of the person. One expert stressed that giving such information might cause problems in the national proceedings in the state giving the information.

### **Human rights' aspects**

It was underlined that according to the case law of the ECtHR, the decision of a state to bypass the more stringent procedures of extradition by expelling a person to a country that wishes to prosecute and/or punish that person (disguised extradition) does not constitute, as such, a violation of the European Convention on Human Rights (ECHR). The state may choose to

extradite or to deport/expel. In both cases it is essential that the procedure applied has a legal basis in law and that the decision does not infringe any specific rights of the person concerned laid down in the Convention.

In the case of Klaus Barbie v. France, application n° 10689/83, the Commission found that “the Convention contains no provisions either on the conditions under which extradition may be granted or on the procedure to be applied before the extradition may be granted. It follows that, even if the applicants expulsion could be described as a disguised extradition, this would not, as such, constitute a breach of the Convention”.

It was furthermore recalled that the ECtHR found, in the Grand Chamber case of Öcalan v. Turkey, application n° 46221/99, that “the Convention 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” (para 86) and “The Convention contains no provisions concerning the circumstances in which extradition may be granted. Subject to it being the result of cooperation between states concerned and provided that the legal basis for the order of the fugitive’s arrest is an arrest warrant issued by the authorities of the fugitives state of origin, even an atypical extradition cannot as such be regarded as contrary to the Convention” (para 89).

It was noted that in Öcalan v. Turkey, but also in the earlier judgment on Bozano v. France (application n° 9990/82) there is a clear situation of disguised extradition. Both these cases concerned the respect of Article 5 of the ECHR (right to liberty and security). The principle of non refoulement was hereby reconfirmed as the ultimate limit. Where, as a result of extradition or expulsion, a person risks violation of, for example, Articles 2 (right to life), 3 (prohibition of torture), 5 or 6 of the ECHR (fair trial<sup>3</sup>), a state is not allowed to remove the person.

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<sup>3</sup> In the case Othman v. the United Kingdom (Chamber judgment of 17 January 2012, application n°. 8139/09), the Court has found, for the first time, that an expulsion would be in violation of Article 6, reflecting the international consensus that the use of evidence obtained through torture makes a fair trial impossible.