



## **Explanatory Report to the European Convention on Extradition**

Paris, 13.XII.1957

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The present text is a revised edition of a confidential explanatory report on the European Convention on Extradition, which was opened for signature by member States of the Council of Europe in December 1957.

Events and developments occurring after that date and having a bearing on the contents of the report have been indicated in footnotes. Furthermore, the original report has been slightly amended with a view to preserving the anonymity of governmental or individual opinions expressed during the preparation of the Convention.

It is hoped that this text may facilitate an understanding of the background consideration which led to the final text of the Convention which entered into force on 18 April 1960.

### **Introduction**

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

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

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

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

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

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

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

3. that, should the Committee of Experts find it necessary to make important changes of substance in these Articles, such proposed changes should be discussed at joint meetings to be convened between the appropriate sub-committee of the Assembly's Committee on Legal and Administrative Questions, on the one hand, and the Committee of Governmental Experts or a sub-committee thereof, on the other hand, for the purpose of reaching a solution acceptable to both sides;

4. that the text of the proposed European Convention should be communicated to the Assembly for an opinion before being finally approved by the Committee of Ministers.

5. On the basis of the first report by the Committee of Experts, the Committee of Ministers in Resolution (54) 24 instructed it to examine the Assembly Recommendation 66 (1954) with a view to:

(a) drafting a model *bilateral* convention for the use of such Members as may not be bound together under a multilateral convention on extradition and,

(b) drafting a *multilateral* convention on extradition, it being understood that such convention should afford nonsignatory Members an opportunity of subsequently acceding thereto, if they so desire.

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

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

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

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

8. The present report contains:

(a) general observations on the proceedings of the committee;

(b) comments on the Articles of the Multilateral European Convention on Extradition and a brief account of points which were discussed but not dealt with in this Convention;

(c) the text of the Multilateral European Convention on Extradition.

### **General considerations**

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

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

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

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

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

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

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

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

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

(a) *"Article 6 (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."

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

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

## **Commentaries on the Articles of the Multilateral Convention on Extradition**

### **Article 1 (Obligation to extradite)**

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

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

## Article 2 (Extraditable offences)

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

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

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

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

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

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

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

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

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

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

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

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

### **Article 3 (Political offences)**

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

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

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

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

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

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

### **Article 4 (Military offences)**

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

### **Article 5 (Fiscal offences)**

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

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

### **Article 6 (Extradition of nationals)**

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

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

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

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

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

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

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

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

It was suggested that the principle laid down in paragraph 2 should be extended to cover other cases in which extradition was not granted. However, several experts thought this unnecessary because if one State informs another State that a person on its territory has committed certain offences, the latter State will *ipso facto* make enquiries to discover whether there are grounds for proceeding against that person.

An expert proposed the adoption of an Article 6 (a), worded as follows:

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

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

#### **Article 7 (Place of commission)**

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

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

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

#### **Article 8 (Pending proceedings for the same offences)**

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

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

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

#### **Article 9 (*Non bis in idem*)**

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

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

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

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.

#### **Article 10 (Lapse of time)**

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

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

#### **Article 11 (Capital punishment)**

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

#### **Article 12 (The request and supporting documents)**

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

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

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

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

### **Article 13 (Supplementary information)**

This article does not call for any special comment.

### **Article 14 (Rule of speciality)**

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

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

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

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

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

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

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

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

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

#### **Article 15 (Re-extradition to a third State)**

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

#### **Article 16 (Provisional arrest)**

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

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

*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.

#### **Article 17 (Conflicting requests)**

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

#### **Article 18 (Surrender of the person to be extradited)**

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

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

*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.

#### **Article 19 (Postponed or conditional surrender)**

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

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

#### **Article 20 (Handing over of property)**

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

The *other paragraphs* of this article call for no special comment.

#### **Article 21 (Transit)**

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

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

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

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

*Paragraph 4* deals with transit by air.

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.

#### **Article 22 (Procedure)**

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

#### **Article 23 (Language to be used)**

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

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

#### **Article 24 (Expenses)**

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

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

#### **Article 25 (Definition of "detention order")**

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

### **Article 26 (Reservations)**

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

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

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

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

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

### **Article 27 (Territorial application)**

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

*Paragraph 2* indicates the territory in which the Convention applies so far as France and the United Kingdom are concerned. (Note : The reference to Algeria no longer has any purpose following her acquiring independence, which event occurred after the drawing-up of the Convention.)

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

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

### **Article 28 (Relations between this Convention and bilateral agreements)**

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

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

substance. In view of these considerations, the rule was adopted and set out in *paragraph 1* of this article.

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

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

#### **Article 29 (Signature, ratification and entry into force)**

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

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

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

#### **Article 30 (Accession)**

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

#### **Article 31 (Denunciation)**

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

#### **Article 32 (Notification)**

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

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**Summary of questions which were not dealt with in the Multilateral European Convention but were discussed**

**1. Amnesty**

The question was raised whether extradition should be refused:

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

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

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

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

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

**3. Settlement of disputes**

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

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

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

#### **4. Mutual assistance in criminal proceedings**

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

The experts thought that this was a matter of great practical importance and should be dealt with in a multilateral convention between the member countries of the Council of Europe. They considered that such a convention would be acceptable to more of the Council's Members than the Convention on Extradition. The Committee of Experts therefore recommends to the Committee of Ministers that it should instruct a Committee of Experts to prepare a convention on mutual assistance in criminal proceedings. (*The European Convention on Mutual Assistance in Criminal Matters (ETS No. 30) was open for signature by the member States of the Council of Europe on 20 April 1959.*)