

# **Extradition**

## **European standards**

### **Explanatory notes**

on the Council of Europe convention and protocols

**and**

### **minimum standards**

protecting persons subject to  
transnational criminal proceedings

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## 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



## **Part I**

### **Explanatory notes on the European Convention on Extradition (ETS No. 24)**

*Opened for signature: 13 December 1957  
Entered into force: 18 April 1960*

### **and its Additional Protocol (ETS No. 86)**

*Opened for signature: 15 October 1975  
Entered into force: 20 August 1979*

### **Second Additional Protocol (ETS No. 98)**

*Opened for signature: 17 March 1978  
Entered into force: 5 June 1983*



# I. European Convention on Extradition (ETS No. 24)

## 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.

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

### **Comments**

#### *1. Extradition of minors*

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

In the case of a minor aged under 18 at the time of the request for extradition and ordinarily resident in the requested state, the competent authorities of the requesting and the requested states shall take into consideration the interests of the minor and, where they think that extradition is likely to impair his or her social rehabilitation, shall endeavour to reach an agreement on the most appropriate measures (Resolution (75) 12 on the practical application of the European Convention on Extradition).

#### *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 Convention 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).”

### *4. 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 European Convention on Extradition. 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.<sup>1</sup>

### *5. 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

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1. 25th PC-OC meeting (13-15 January 1993), report: paragraphs 6-11; and Article 5, Schengen Agreement.

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.<sup>2</sup>

## **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.
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.

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2. 25th PC-OC meeting, report: paragraph 32.

### **Explanatory report**

*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.

*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**

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

## **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.

### **Explanatory report**

*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**

### **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.

### **Explanatory report**

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**

### **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*

The PC-OC discussed the question of provisional surrender of nationals for the purposes of investigation and/or trial and whether a scheme could be set up to transfer persons temporarily for the purposes of investigation and trial subject to the person being returned; the sentence, if any, would be executed in the country of origin. Such a scheme could be linked either to the Convention on Extradition or to the Convention on Mutual Assistance in Criminal Matters.<sup>3</sup>

## **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

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3. 35th PC-OC meeting (22-24 September 1997), report: paragraphs 105-106.

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.

### **Comments**

#### *Limit of application*

This provision should not however be invoked in the case where proceedings and judgment in the territory of the requesting state are warranted in order to arrive at the truth, or by the possibility of applying an appropriate sanction or of effecting the social rehabilitation of the person concerned (Resolution (75) 12 on the practical application of the European Convention on Extradition).

## **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**

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.

### **Explanatory report**

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.

## **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.

### **Explanatory report**

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.

## **Comments**

### *Calculation of time limitation*

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 on the practical application of the European Convention on Extradition).

## **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 by the European Court of Human Rights*

This point has been of particular importance in cases involving extradition to the United States. In the jurisprudence of the court of Human Rights in the *Soering* case,<sup>4</sup> it was further clarified that in cases where the person concerned could risk the death penalty, the European Convention on Human Rights would take precedence over the obligation to extradite in an extradition convention.

<sup>4</sup> *Soering v. the United Kingdom*, 7 July 1989.

The jurisprudence of the Italian Constitutional Court in the case of Venezia (ITA-1996-2005) went further, stating that it is contrary to the Italian Constitution for Italy to help execute penalties which cannot be imposed for any offence in Italy (namely, the death penalty and punishments contrary to humane precepts) and that as the prohibition of the death penalty in Italy is unconditional, a person may not be extradited to a state where they may be susceptible to the death penalty, even when “adequate assurances” are provided by the requesting state that this will not be the case.

See also under Article 1: 4. Extradition to countries that allow the use of life sentences.

## **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.

### **Explanatory report**

*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.

### **Comments<sup>5</sup>**

#### *1. Translation of documents*

Under Article 12, paragraph 2.a, of the European Convention on Extradition, 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 Council of Europe to be chosen by it.

This rule means that very often documents must be translated.

Where 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 arrests are short documents that raise no difficulty with 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, needs only be supported by a warrant of arrest, whereas, for the execution of a sentence, the request must be supported by a court decision, which also may contain material of no importance to the evaluation of the extradition request (for example, other persons' sentences, details of the sentenced person's education and life, etc.).

It was suggested that, in such cases, an appropriate solution might be to require that the request be supported by a warrant of arrest from the relevant judge. The

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5. The PC-OC compiled a "Guide to national procedures on extradition" presenting the procedure applicable in most of the Council of Europe member states. It was updated in 2003. It is available on the website of the committee ([www.coe.int/tcj](http://www.coe.int/tcj)).

warrant of arrest would contain all the evidence required to evaluate the request for extradition (details of the court of first instance and the court of appeal, personal details of the convicted person, the 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 the person wanted carrying out a sentence, a copy of the sentence 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 accepted “simplified translations” and use that as far as possible. Where requested states do not accept that, there appears to be no solution available.<sup>6</sup>

## *2. Exposure of facts*

Problems have arisen when extradition requests from one member state were refused – or only satisfied partly – on the grounds that the warrant of arrest 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.

A warrant of arrest is necessary where extradition is sought. The words “or other order having the same effect and issued in accordance with the procedure laid down in the law of the requesting Party” should be interpreted restrictively to mean a warrant of arrest even where a warrant of arrest 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 that person for an offence are pending in the requesting state. A warrant of arrest has therefore the legal value of certifying that measures taken by the requested state pursuant to the extradition request, which restrict the right of the person concerned to liberty, are justified under Article 5, paragraph 1.c, of the European Convention on Human Rights.

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6. 36th PC-OC meeting (9-11 February 1998), report: paragraphs 53-67.

A warrant of arrest must make reference to facts, namely the facts that amount to the offence or offences for which the person is sought. Article 12, paragraph 2.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 warrant of arrest 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 resolved in terms of 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 for which extradition is granted.

The best practice in this field should probably be for states, when requesting extradition, to use an ad hoc “warrant of arrest” which is issued by a competent authority/*autorité judiciaire* and makes reference to all the facts for which extradition is requested.<sup>7</sup>

### *3. 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 the time limit for the arrest would begin and when it would therefore expire. Would the period begin from the moment of the arrest in the requested state or from the moment of the 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 the warrant (or the extradition request) when the time limit will begin to run.<sup>8</sup>

### *4. Channels of communication*

The question is: does that article concern channels of communication or the production of the request? It appears, however, that requests for extradition are addressed by one state to another state. The convention regulated in Article 12 the channels of communication between states. The question of powers of authority is a domestic one which each state must cope with under its own procedures; it is not one into which the other state may look.<sup>9</sup>

7. 39th PC-OC meeting (27-29 September 1999), report: paragraphs 95-106.

8. 48th PC-OC meeting (1-3 March 2004), report: p. 10.

9. 45th PC-OC meeting (30 September-2 October 2002), report: paragraph 25.

### *5. 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.<sup>10</sup>

### *6. Request of extra documents*

It was 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.<sup>11</sup>

## **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;
  - 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.

10. 46th PC-OC meeting (3-5 March 2003), report: p. 10.

11. 25th PC-OC meeting (13-15 January 1993), report: paragraphs 12-14.

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.

### **Explanatory report**

*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.

## **Comments**

### *1. 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, the term “final discharge” applies. Many experts disagreed with this interpretation and stated that the term “final discharge” applies only to the situation where the person is sure of his legal situation with respect to the proceedings on account of which extradition was carried out.<sup>12</sup>

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

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12. 28th PC-OC meeting (2-4 February 1994), report: paragraphs 31-33.

## *2. Meaning of “be proceeded”*

The question was raised of what meaning should be given to the expression “be proceeded” in Article 14, paragraph 1, above. The query is limited to offences that were committed before the surrender of the person, other than the offence or offences for which the person was extradited. The wording of Article 14, paragraph 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, paragraph 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, paragraph 1.a) 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, a warrant of arrest) 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 in that the effects of extradition be limited to designated offences. The interests of the person concerned, including his 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 European Convention on Extradition, for example the European Convention of Human Rights.

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, paragraph 1.b. One can argue that where a state is barred from instituting proceedings within a given period of time, that 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 where the purpose of the procedure for which the person is being summoned cannot be any other but to institute proceedings against that 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 for the purpose of gathering evidence in order to institute proceedings against other, unprotected, persons.

The person may neither be indicted (formerly accused) nor deprived of his liberty while protected by the rule of speciality.<sup>13</sup>

### *3. Meaning of “for any other reason”*

The prosecution authorities in A recently withdrew its 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 extradition convention. 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, the 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 the immunity is therefore not absolute in terms of time, is it absolute in terms of substance? The words “for any other reason” indicate that the 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 the 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

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13. 40th PC-OC meeting (6-8 March 2000), report: paragraphs 82-94.

of questioning the applicability of Article 14. The response may well be that it belongs to the extraditing state, eventually at the request of the receiving state, to ponder the different public interests at stake in any given circumstances and to decide whether or not to consent to immunity ceasing to apply.

A stop order amounts to a “restriction on 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 party having surrendered the persons consents.

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

## **Article 15: Re-extradition to a third state**

### **Convention**

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

### **Explanatory report**

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.

### **Comments**

#### *1. Transmission of consent and content*

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 (Recommendation No. R (96) 9 concerning the practical application of the European Convention on Extradition).

#### *2. 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.<sup>14</sup>

### *3. 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 applies for the consent of state X to the placing of the person concerned in detention on remand for the purpose of extradition. Once this consent has been given and the formal request for extradition has been submitted by state Z to state Y (within the time limit laid down in the bilateral treaty, even where this time limit is longer than the one laid down in the convention), state Y requests the agreement of state X concerning both the imprisonment of the person with a view to extradition and his re-extradition to the third state, Z. Where the facts pertaining to a request for re-extradition occurred prior to the first extradition the consent of state X is not required prior to issuing a warrant of arrest, but that warrant shall not be carried out without prior consent of state X.<sup>15</sup>

## **Article 16: Provisional arrest**

### **Convention**

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

14. 25th PC-OC meeting (13-15 January 1993), report: paragraphs 17-22.

15. *Ibid.*, paragraphs 15-16.

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<sup>16</sup>**

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 two documents addressing this matter:

- “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, Document PC-OC/INF 19;

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16. The PC-OC compiled, in October 2004, the national replies to a questionnaire addressed to all member states on “Provisional arrest and detention pending extradition – Time limits in each country”. The document (PC-OC/INF 71) is available on the website of the committee ([www.coe.int/tcj](http://www.coe.int/tcj)).

– “Arrest in the context of the European Convention on Extradition – Human rights requirements”, March 2000, Document PC-OC/INF 22.

These documents are available on the website of the committee ([www.coe.int/tcj](http://www.coe.int/tcj)). The study presented in Part II usefully extends the findings of these documents and updates their content.

*1. Opportunities to request provisional arrest: maximal length*

Provisional arrest should only be requested where there are strong reasons to suggest that it would be otherwise impossible to execute the request for extradition and in any case should be as short as possible, the time of detention exceeding eighteen days only in cases of necessity in particular 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 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 extradited offence. 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 (Resolution (75) 12 on the practical application of the European Convention on Extradition). The requested party must therefore provide information on the length of time that the person was detained with a view to surrender when that person is surrendered<sup>17</sup> and in application for compensation for unjustified detention.

*3. Detention pending extradition: deduction, proportion and compensation*

The Committee of Ministers, recommends the governments of member states party to the convention:

a. be guided in the practical application of the convention 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

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17. 25th PC-OC meeting (13-15 January 1993), report: paragraph 33.

ascertaining whether the request for extradition is maintained. The requesting party should inform the requested party without delay;

- b. 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 No. R (86) 13 concerning the practical application of the European Convention on Extradition in respect of detention pending extradition).

#### *4. Use of Interpol “red notices”*

The PC-OC discussed the legal basis of Interpol “red notices” used as requests under this paragraph. It was clear that some member states do not consider red notices to be a request for provisional arrest. Interpol hoped to recommend the recognition of red notices as the basis for provisional arrest. Issues of human rights were brought up concerning the use of red notices where there is not sufficient flow of information between the member states concerned and Interpol.<sup>18</sup>

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.<sup>19</sup>

#### *5. Time limits for translation*

The PC-OC made reference to the difficulties in complying with these time limits when documents need to be translated, combined with the respect of the individual detainee’s rights.<sup>20</sup>

#### *6. Provisional release*

Issue: 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 suspended extradition custody is a useful option. Once the court finds the person extraditable, if the person is already in custody, then the extradition

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18. 35th PC-OC meeting (22-24 September 1997), report: paragraphs 67-76; and 36th meeting (9-11 February 1998), report: paragraphs 78-79.

19. 34th PC-OC meeting (3-5 February 1997), report: paragraphs 45-48.

20. 35th PC-OC meeting (22-24 September 1997), report: paragraphs 60-66; and 36th PC-OC meeting (9-11 February 1998), report: paragraphs 58-59.

custody is suspended. This decision is communicated to the penitentiary department, so that as soon as any domestic decision or trial is over, the custody switches to extradition custody. The danger posed by this solution is that extradition custody (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, the committee's chairperson mentioned the case law of the European Court of Human Rights regarding the issue of expulsion. In particular he referred participants to a document which summarises the situation regarding "Legal co-operation in criminal matters and the rights of the defence".<sup>21</sup>

#### *7. "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 immediate informal request for "provisional arrest" pending a request under Article 16 could be envisaged. 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 pending receipt of the request for provisional arrest.<sup>22</sup>

#### *8. Causes of extradition being refused*

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 of provisional arrest may be questioned where it actually frustrates either the extradition of the wanted person, or the purpose for which extradition is sought.<sup>23</sup>

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21. 46th PC-OC meeting (3-5 March 2003), report: p. 11.

22. 30th PC-OC meeting (1-3 February 1995), report: paragraphs 52-58.

23. 30th PC-OC meeting (1-3 February 1995), report: paragraphs 59-60.

### *9. Provisional arrest and arrest pending extradition – Parties’ obligations*

The usual method of starting an extradition procedure consists of the requesting party asking for the provisional arrest of the wanted person, and of the provisional arrest of the person by the party receiving the request. 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 the provisional arrest of that person – 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 follow – where appropriate – a formal request for extradition.

It was said that the Convention did not literally include an obligation to arrest. However, some experts thought that the conventional obligation to extradite carried as an implicit consequence the obligation to put oneself in the situation of being able to execute that obligation, which means to surrender the person. To the extent that one cannot surrender persons that one does not keep in custody, the obligation to extradite carries with it the obligation to arrest, and keep under arrest for a certain period of time, the person claimed.

Other experts observed that where the person claimed did not object to his or her extradition, coercion – thus arrest – was not necessary. Some experts 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 only applied in a limited number of cases.<sup>24</sup>

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.

## **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

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24. 39th PC-OC meeting (27-29 September 1999), report: paragraphs 35-43.

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**

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.

### **Comments**

#### *Information on the requested state's agreement*

The Committee of Ministers recommends the requested state, subject to the provisions of its national law, to 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 (Recommendation No. R (96) 9 concerning the practical application of the European Convention on Extradition).

## **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**

#### *1. Taking into account the time spent in detention*

The time spent in detention by an individual solely for the purpose of extradition in the territory of a state of transit should be taken into account when deciding on the penalty involving deprivation of liberty or detention which is to be served for the extradition offence (Resolution (75) 12 on the practical application of the European Convention on extradition).

#### *2. Interpol – Transmission of information*

Paragraph 3 was mentioned as being a provision in respect of which states often use Interpol as an intermediary to pass on information concerning the surrender.<sup>25</sup>

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

## **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.

<sup>25</sup> 35th PC-OC meeting (22-24 September 1997), report: paragraph 67.

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 their 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.<sup>26</sup>

#### 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.<sup>27</sup>

## 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.

26. 35th PC-OC meeting (22-24 September 1997), report: paragraphs 105-106.

27. 41st PC-OC meeting (25-28 September 2000), report: paragraphs 69-74.

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**

#### *1. Interests of the victim – Customs and financial rights*

In using paragraph 3 to temporarily retain or to impose the condition that property be returned, the requested state should have regard to the interests of the victim in a speedy return of the property seized. Any demands for customs duty or other fiscal or customs claim connected to the execution of this article should not be enforced except where the owner of the property concerned, who is also the victim, is himself or herself liable for payment thereof (Resolution (75) 12 on the practical application of the European Convention on Extradition).

#### *2. Recommendation to facilitate*

The Committee of Ministers recommends to the member states, where a request under this article is included in a request under Article 12, that the requested state should take measures to facilitate the handing over of property sought in the extradition proceedings (Recommendation No. R (96) 9 concerning the practical application of the European Convention on Extradition).

#### *3. 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.<sup>28</sup>

## 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 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.

### Explanatory report

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

<sup>28</sup> 31st PC-OC meeting (25-27 September 1995), report: paragraph 11, and 46th PC-OC meeting, report: p. 6.

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.

## **Comments**

### *1. Regarding transit procedures*

In Recommendation No. R (80) 7 concerning the practical application of the European Convention on Extradition, certain points regarding transit were 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.
- 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.”

## *2. 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.<sup>29</sup>

## **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.

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29. 25th PC-OC meeting (13-15 January 1993), report: paragraphs 25-28.

## **Comments**

### *1. Judicial supervision*

Resolution (75) 12 on the practical application of the European Convention on Extradition adds that the procedure shall ensure for the person concerned a right to be heard by a judicial authority and to be assisted by a lawyer of his own choosing. Contracting states shall submit the control of custody and conditions to be applied to the execution of extradition requests to a judicial authority.

### *2. Rights of the person and judicial supervision*

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

- should be fully informed in a language which he understands 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; and
- should have the possibility of assistance in the extradition procedure, where necessary for free.

### *3. Use of a summary procedure for 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 (Recommendation No. R (80) 7 concerning the practical application of the European Convention on Extradition).

## **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<sup>30</sup>**

#### *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.<sup>31</sup>

See also under Article 12: 1. Translation of documents.

## **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

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30. The PC-OC compiled, in December 2002, a 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. The document (PC-OC/INF 7) is available on the website of the committee ([www.coe.int/tcj](http://www.coe.int/tcj)).

31. 34th PC-OC meeting (3-5 February 1997), report: paragraphs 58-68; 35th meeting (22-24 September 1997), report: paragraphs 47-59; and 36th PC-OC meeting (9-11 February 1998), report: paragraph 44.

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).<sup>32</sup>

## **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.)

<sup>32</sup>. 39th PC-OC meeting (27-29 September 1999), report: paragraphs 91-92.

## 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 release 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.<sup>33</sup>

## Article 26: Reservations

### 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.

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33. 43th PC-OC meeting (24-26 September 2001), report: paragraphs 44.

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 of reservations – Protocols*

Resolution (78) 43 on reservations made to certain provisions of the European Convention on Extradition asks contracting states to withdraw reservations where possible bearing in mind the contribution of the additional protocols.

### *2. Withdrawal of reservations – Opportunities*

The committee observed in this respect that Article 26, paragraph 1, of the convention 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.<sup>34</sup>

### *3. “Reservation” or “declaration” – Wording by Article 16*

The Council of Europe “conventions” website incorporates a database where statements entered by states in respect of conventions to which they are a signatory or party are included either under the heading “reservation” or under the heading “declaration”. The 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

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34. 39th PC-OC meeting (27-29 September 1999), report: paragraphs 112-115.

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 given statements should come under the heading of “reservations” or “declarations”. Doubts arise, for example, with respect to certain statements made by states with reference to Article 16 of the European Convention on Extradition (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 that state is modifying the legal effect of the provisions of Article 16, paragraph 2, in their application to it. In other words, that 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 re-state in a clearer fashion what is already contained in the convention. It is therefore producing a “declaration”, not a “reservation”.

The committee took note of the fact that statements entered by states when signing or ratifying Council of Europe conventions are registered on the Council’s website 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 website lists. It deemed, however, that the fact that a given statement is so categorised (by countries as much as by the Secretariat) does in no way prevent different interpretations of a legal nature of that statement.<sup>35</sup> The European Court of Human Rights has a long-standing case law concerning the differentiation between reservations and declarations.<sup>36</sup>

See also under Article 1: 4. Extradition to countries that allow the use of life sentences.

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35. 41st PC-OC meeting (25-28 September 2000), report: paragraphs 51-58.

36. *Belilos v. Switzerland*, 23 March 1988, paragraphs 40-49; *Loizidou v. Turkey*, 23 February 1995, paragraphs 65-98, and D.M. McRae, The legal effect of interpretative declarations, *British Yearbook of International Law*, Vol. 49, 1978, pp. 155-173.

## **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.<sup>37</sup>

*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**

### **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.

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37. The reference to Algeria no longer has any purpose following its independence, which occurred after the drawing-up of the convention.

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<sup>38</sup>**

#### *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 European Convention on Extradition, 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 European Convention on Extradition.

## **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.

## **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.

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38. The PC-OC compiled, in May 2004, a charter comprising the list of bilateral treaties on extradition, mutual assistance, transfer of sentenced persons, illicit traffic of drugs and assets sharing. The document (PC-OC/INF 8) is available on the website of the committee ([www.coe.int/tcj](http://www.coe.int/tcj)).

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.

## **Article 31: Denunciation**

### **Convention**

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.

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

### Preamble

#### 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 re-examined 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 XXIIInd 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 XXIIInd 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.

## **Chapter 1: Political offence**

### **Explanatory report**

#### *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.

## **Article 1:**

### **Additional Protocol**

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 report**

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.

## **Chapter 2: *Ne bis in idem***

### **Explanatory report**

#### *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.<sup>39</sup>

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.

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

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<sup>39</sup> 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.

- 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 sub-committee 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.

## **Article 2**

### **Additional Protocol**

1. Article 9 of the Convention shall be supplemented by the following text, the original Article 9 of the Convention becoming paragraph 1 and the under-mentioned provisions becoming paragraphs 2, 3 and 4:
  - “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 any thing 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 report**

#### *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 any thing 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 (“any thing 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.

## **Chapter 3: 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 be 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.

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

**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.

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### **III. Second Additional Protocol to the European Convention on Extradition (ETS No. 98)**

#### **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,<sup>40</sup> 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.<sup>41</sup>

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 sub-committee (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.

40. ETS No. 86.

41. Cf. the publication *Legal aspects of extradition among European states*, Council of Europe, Strasbourg 1970.

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);
- 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.

## **Chapter 1: Accessory extradition**

### **Second Additional Protocol**

#### **Article 1**

Paragraph 2 of Article 2 of the Convention shall be supplemented by the following provision:

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

#### **Explanatory report**

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 fine by the administrative authorities, but are subject to appeal to the ordinary criminal courts.

Under the Convention, minor criminal offences which carry only a fine 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.

## **Chapter 2: Fiscal offence**

### **Second Additional Protocol**

#### **Article 2**

Article 5 of the Convention shall be replaced by the following provisions:

“Fiscal offences

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 report**

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).

## Chapter 3: Judgments *in absentia*

### Second Additional Protocol

#### 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 notification 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*.

## **Chapter 4: Amnesty**

### **Second Additional Protocol**

#### **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).

## **Chapter 5: Communication of requests for extradition**

### **Second Additional Protocol**

#### **Article 5**

Paragraph 1 of Article 12 of the Convention shall be replaced by the following provisions:

“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.”

#### **Explanatory report**

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.

### **Comment**

The question was raised of whether Article 5 of the Second Additional Protocol to the Extradition Convention concerns channels of communication or the production of the request.

Article 5 may be interpreted to fill a lacuna left open by the convention where it fails to indicate (Article 12) which authority is empowered to issue requests for extradition. Authority to act, or *locus standi*, is usually an essential requirement in any legal procedure. One might therefore wonder why the convention does not state which entity has powers to issue a request for extradition and see in Article 5 of the second protocol a reply to that question.

It appears, however, that requests for extradition are addressed by one state to another state. The convention regulated in Article 12 the channels of communication between states. The question of powers of authority is a domestic one which each state must cope with under its own procedures; it is not open to inspection by the other state.

Thus, Article 5 will be interpreted by most to mean that requests must be communicated via the Ministry of Justice, namely, that requests “shall be addressed by the Ministry of Justice of the requesting party to the Ministry of Justice of the requested party”. It goes on to provide that “the use of the diplomatic channel is not excluded”. The words “addressed” and “channel” would tend to confirm this interpretation.<sup>42</sup>

## **Chapter 6: Final clauses**

### **Second Additional Protocol**

#### **Article 6**

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**

1. Any State which has acceded to the Convention may accede to this Protocol after the Protocol has entered into force.

<sup>42</sup>. 45th PC-OC meeting (30 September-2 October 2002), report: paragraph 25.

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**

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**

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**

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**

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**

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.

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).

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## **Part II**

### **Minimum standards – Protecting individuals involved in transnational criminal proceedings**

This study was carried out by Ms Danai Azaria (Greece), in September 2005, for the Council of Europe Committee of Experts on Transnational Justice (PC-TJ). It completes and updates the documents of the PC-OC dealing with human rights with respect to extradition (Documents PC-OC/INF 19 and INF 22)



# I. Extradition

## Chapter 1: Rights of the individual during extradition

The present section focuses on the rights of the person involved in extradition procedures before the actual realisation of the extradition itself, that is the handing over to the requesting state. They include access to the file (*lato sensu*), access to a lawyer, access to an interpreter, the right to an expedient procedure and the right to appeal/to be heard.

Extradition is not, *per se*, among the matters covered by the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights)<sup>43</sup> and according to the Court 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.<sup>44</sup> Nevertheless, the provisions of the European Convention on Extradition have to be interpreted in the light of the European Convention on Human Rights, Article 5, paragraphs 1, 2 and 4, as will be shown below. 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, within the meaning of Article 6, paragraph 1, of the Convention.<sup>45</sup> Therefore, Article 6 of the Convention will not be taken into consideration in the analysis of the present section.

Extradition proceedings are only considered in the Convention from the point of view of Article 5, paragraph 1.f, which stipulates that "no one shall be deprived of his liberty save in the case of ... the lawful arrest or detention of a person against whom action is being taken with a view to extradition". Therefore, paragraphs 2 and 4 of Article 5 of the Convention apply in such cases, too.

The European Convention on Extradition<sup>46</sup> and its additional protocols<sup>47</sup> unify the legislation of the contracting states as far as extradition is concerned, but they do not adopt any provision especially centred on the rights of the individual involved. To this end, the Committee of Ministers has adopted a package of principles to guide the member states in the practical application of the European Convention on Extradition, which in fact endorses the multidimensional form of the right to defence that the present project supports.<sup>48</sup>

43. Convention for the Protection of Human Rights and Fundamental Freedoms, opened for signature on 4 November 1950.

44. *X v. Belgium*, 10 December 1976, DR 8, p. 161; and *EGM v. Luxembourg*, 20 May 1994, *Decisions and reports* 77-B, p. 144.

45. *Mamatkulov and Askarov v. Turkey*, 4 February 2005, paragraph 82; and *Maaouia v. France*, 2000, paragraph 40.

46. European Convention on Extradition, Paris, opened for signature on 13 July 1957, ETS No. 24.

47. Additional Protocol to the European Convention on Extradition, Strasbourg, 15 October 1975, ETS No. 86; and Second Additional Protocol to the European Convention on Extradition, Strasbourg, 17 March 1978, ETS No. 98.

48. Recommendation No. R (80) 7 concerning the practical application of the European Convention on Extradition.

Consequently, this section will mainly examine the way that the guarantees and procedures of extradition are articulated in the context of the European Convention on Human Rights. Firstly, the five rights will be analysed in the way they have been interpreted and applied by the bodies of the Council of Europe. Secondly, the implementation of the comprehensive application of these rights will be considered through an example from jurisprudence, in order to highlight the inter-relationship and overlap between them.

### **1. Access to the file**

Article 5, paragraph 2, of the European Convention on Human Rights 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.”

Paragraph 2 applies to all the cases mentioned in the first paragraph of this article.<sup>49</sup> It constitutes a minimum guarantee against arbitrariness.<sup>50</sup> Article 5, paragraph 2, may not require the communication of the whole file to the detainee, but certainly the competent authorities have to provide him or her with a minimum standard of information. This minimum standard corresponds to “sufficient information, which will permit him to exercise the remedy of Article 5, paragraph 4”.<sup>51</sup> Whether the content of the information delivered is sufficient depends on the special features of the case.<sup>52</sup> Therefore, a violation of Article 5, paragraph 2, may give rise to a violation of paragraph 4 of the article.

In cases of arrest for the purpose of bringing a person to trial, as provided for in Article 5, paragraph 1.c of the Convention, it is not necessary to provide the detainee with a complete list of the charges against him.<sup>53</sup> When a person is arrested with a view to extradition (Article 5, paragraph 1.f), the information required under Article 5, paragraph 2, may be oral and even less complete than in case of arrest to bring a person to trial (Article 5, paragraph 1.c).<sup>54</sup> In a recent judgment, the Court ruled that it was sufficient – and, therefore, compatible with the requirements of Article 5, paragraph 2 – that the applicant had been told in the course of his arrest that he was wanted by the authorities of the requesting state.<sup>55</sup> Although the provision of the second paragraph refers in principle to the first arrest, in the case of continued detention it also applies if the grounds for the detention changes or new relevant facts present themselves.<sup>56</sup>

49. *X v. the United Kingdom*, 6 July 1980, B 41, p. 33.

50. *Chamaïev and Others v. Georgia and Russia*, 12 April 2005, paragraph 413.

51. *Ibid.*, paragraph 427.

52. *Fox, Campbell and Hartley v. the United Kingdom*, 30 August 1990, Series A 182, p. 19.

53. *X v. Germany*, 13 December 1978, *Decisions and reports* 16, p. 111.

54. *K v. Belgium*, Commission decision, 5 July 1984, *Decisions and reports* 38, p. 230.

55. *Bordovskiy v. Russia*, 8 February 2005, paragraphs 56-57.

56. *X v. the United Kingdom*, 16 July 1982, B 41, p. 34.

Therefore, when a person is detained on grounds of having committed a criminal offence and a request for extradition is granted by the detaining state, he or she has to be informed of the extradition decision by the authorities.<sup>57</sup> The fact that the detainee heard of the decision regarding his extradition via rumours or journalists (because of the interest of the media in the case) is not sufficient under Article 5, paragraph 2.<sup>58</sup> It should not be forgotten that there is a time limit of expediency concerning the furnishing of information to the individual. An interval of four days, under specific circumstances, may be considered incompatible with the promptness requirement set out in Article 5, paragraph 2.<sup>59</sup>

Furthermore, the denial of access to the file by the lawyers of the detainee gives rise to a violation of Article 5, paragraph 2. The authorities may not prohibit the lawyer's access on grounds of the authorities' need to examine in detail the documents provided by the requesting state.<sup>60</sup> According to the Court, the fact that the European Convention on Human Rights does not guarantee "the right not to be extradited" does not mean that the authorities should not give the applicants access to their file;<sup>61</sup> especially in view of the close relationship between access to the file and exercise of the remedy contained in Article 5, paragraph 4, and Article 13 in combination with Articles 2, 3, 6, 8 of the Convention.<sup>62</sup>

Recommendation No. R (80) 7 of the Committee of Ministers specifies this protection in pre-extradition proceedings. It, therefore, introduces these specific guarantees in the interpretation of the European Convention on Extradition. It suggests that the person to be extradited should be promptly informed, 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 or her arrest.<sup>63</sup>

The right of access to the file and to be informed has also been established by other international fora dealing with criminal matters. According to the EU Arrest Warrant, when an individual is arrested, he or she must be made aware of the contents of the arrest warrant. Article 55, paragraph 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<sup>64</sup> – that there are grounds to believe that he or she has committed a crime within the jurisdiction of the court.

57. *Chamaïev and Others*, cited above, paragraph 415.

58. *Ibid.*, paragraph 416.

59. *Chamaïev and Others*, cited above, paragraph 416; and *Murray v. the United Kingdom*, 28 October 1994, paragraph 78.

60. *Chamaïev and Others*, cited above, paragraph 427

61. *Idem.*

62. *Ibid.*, paragraphs 460-461.

63. Paragraph I, Concerning the extradition procedure, a, Recommendation No. R (80) 7 of the Committee of Ministers to member states concerning the practical application of the European Convention on Extradition, 27 June 1980, 321st meeting of the Ministers' Deputies.

64. Rome Statute of the International Criminal Court, UN Doc. A/CONF. 183/9, Articles 86-102.

## **2. Access to a lawyer**

According to Article 6 of the Convention everyone charged with a criminal offence has the right to be defended by counsel. However, 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. Nevertheless, this cannot be used as a legal basis for denying a detainee awaiting extradition access to a lawyer; it would effectively affect the fulfilment of paragraph 4 of Article 5, which grants the right to a remedy against detention, and of Article 13 combined with other articles of the Convention. These articles presuppose the right to a counsel, as part of the fair trial guaranteed in Article 6.

The Committee of Ministers has adopted the same view. The person concerned should have the possibility to be assisted in the extradition procedure. In case he or she does not have sufficient financial means for assistance, he should be given it free.<sup>65</sup>

In the European Arrest Warrant framework the person concerned is also entitled to the services of a lawyer and an interpreter. The Rome Statute of the ICC also guarantees the same right,<sup>66</sup> before surrender of the suspect to the Court.

## **3. Access to an interpreter**

Article 5, paragraph 2, of the European Convention on Human Rights 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.”

The provision “in a language, which he understands” includes interpretation in a language that is different from the language of the detaining authorities and the giving of information in a simple, non-technical language.<sup>67</sup> It seems that the Court even in this regard implicitly introduces the notion of access to a counsel, as he or she would be the one to understand the technical legal language and the file's content in order to appeal.

It is not relevant whether the person authorised as interpreter by the authorities should have shown devotion in the framework of his service. What is critical is if this agent, empowered by the state hierarchy to accomplish a certain mission, efficiently informed the person concerned that he or she is being detained on the basis of an extradition request.<sup>68</sup> It may be daunting for the competent authority to evaluate the due translation of the information given to the detainee concerning

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65. Paragraph I, Concerning the extradition procedure, c, Recommendation No. R (80) 7 concerning the practical application of the European Convention on Extradition

66. Rome Statute of the International Criminal Court, UN Doc. A/CONF. 183/9, Article 55, paragraphs 2.c and 2.d.

67. *Fox, Campbell and Hartley*, cited above, p. 19.

68. *Chamaïev and Others*, cited above, paragraph 425.

the reasons of his detention. However, in view of the serious interference that the question of extradition could raise for the detainee, the competent authority should be meticulous and precise in the application of Article 5, paragraph 2.<sup>69</sup>

Recommendation No. R (80) 7 of the Committee of Ministers specifically requires that the person be informed in a language that 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 of his arrest.<sup>70</sup>

#### 4. Right to an expedient procedure

Article 5, paragraph 1*f*, of the Convention does not require domestic law to provide a time limit for detention pending extradition proceedings. However, if the proceedings are not conducted with the requisite diligence, the detention may cease to be justifiable under that provision. Within these limits the Court may have cause to consider the length of time spent in detention pending extradition.<sup>71</sup> Four months custody in view of extradition and in view of the fact that there was no reason for the Court to believe that the authorities acted without due diligence were not considered as an excessively long period.<sup>72</sup>

The beginning time for the application of Article 5, paragraph 1*f*, is on the date that the competent authority of the requesting state proceeds to the valid extradition request and the person is arrested by the authorities of the requested state.<sup>73</sup> When the requested state stays the extradition then the time concerning pre-extradition proceedings stops. Moreover, the European Convention on Extradition requires the release of the individual after eighteen and at most thirty days from the appointed date of surrender between the two states.<sup>74</sup>

In the framework of the European Convention on Extradition there is a possibility to request the provisional arrest of the person sought in cases of urgency, which means that a request for extradition has not yet been submitted.<sup>75</sup> The convention itself limits the period of such an arrest to forty days, while the person may be released eighteen days after arrest, if the requested state has not received the extradition request and the necessary documents.<sup>76</sup> It should be noted that the Committee of Ministers has interpreted the respective article in a restrictive manner, rendering the eighteen-day limit applicable only in cases of necessity.<sup>77</sup> Furthermore, the

69. *Idem*.

70. Paragraph I, Concerning the extradition procedure, a, Recommendation No. R (80) 7 concerning the practical application of the European Convention on Extradition.

71. *Chahal v. the United Kingdom*, 15 November 1996, paragraph 113; and *Bordovskiy v. Russia*, 8 February 2005, paragraph 50.

72. *Bordovskiy v. Russia*, 8 February 2005, paragraph 50.

73. *Chamaïev and Others*, cited above, paragraphs 403-6; and *Bordovskiy*, cited above, paragraph 50.

74. Article 18, paragraph 4, European Convention on Extradition.

75. *Ibid.*, Article 16.

76. Article 12, paragraph 2*a*.

77. Paragraph I, Recommendation No. R (80) 7 concerning the practical application of the European Convention on Extradition.

Committee recommended a summary extradition procedure in order to minimise as far as possible the provisional arrest, provided that the person concerned consents to it.

However, detention with a view to extradition is not carried out in a diligent manner when minimising the time requirement to such an extent as to render the rest of the rights granted by the European Convention on Human Rights void and ineffective; especially the right to appeal against a detention pending extradition. In the Chamaïev case, the authorities proceeded to the enforcement of extradition two days after deciding it. The Court resolved that when authorities wish to hasten the extradition procedure they have to act with more celerity and diligence, in order to permit the detainee, on the one hand, to submit his arguments founded on Articles 2 and 3 of the Convention in an independent and rigorous examination and, on the other hand, to permit him to suspend the execution of the disputed measure according to Article 13.<sup>78</sup>

The Committee of Ministers has recommended that the time spent in custody pending extradition should be 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,<sup>79</sup> as Article 5, paragraph 5, of the European Convention on Human Rights stipulates.

In the integrated context of the European Union, the European Arrest Warrant stipulates the right to the expedient procedure. The executing judicial authority must take a final decision on execution of the European Arrest Warrant no later than sixty days after the arrest.

## **5. Right to appeal – Right to be heard**

Article 5, paragraph 4, of the European Convention on Human Rights grants, to everyone who is deprived of his or her liberty by arrest or detention, the right to take proceedings, by which the lawfulness of such deprivation of liberty will be reviewed speedily by a court and his or her release ordered, if the latter decides that the detention is unlawful. This remedy constitutes a *lex specialis* in relation to the more general requirements of Article 13<sup>80</sup> and it introduces into committal proceedings many of the procedural protections of Article 6, paragraph 3, of the Convention.<sup>81</sup> It is an independent provision, even though its application presupposes the unfettered enjoyment of the above-mentioned forms of the right to defence.<sup>82</sup>

78. *Chamaïev and Others*, cited above, paragraphs 460-1.

79. Paragraph I, Recommendation No. R (86) 13 concerning the practical application of the European Convention on Extradition.

80. *Nikolova v. Bulgaria*, 1999, paragraph 69.

81. Nicolls, C., Montgomery, C. and Knowles, J.B., *The law of extradition and mutual assistance, international criminal law: practice and procedure*, Comeron, May, 2002, p. 251.

82. *Chamaïev and Others*, cited above, paragraph 427.

Judicial review of the proceedings must be available in law and in fact.<sup>83</sup> This means that contracting states must at least foresee and adopt provisions of judicial review when establishing inter-state treaties concerning extradition.<sup>84</sup>

The Court has established that the notion of “lawfulness” under paragraph 4 of Article 5 has the same meaning as under paragraph 1, so that the detained person is entitled to a review of his or her detention in the light not only of the requirements of domestic law, but also of those in the text of the Convention, the general principles embodied therein and the aim of the restrictions permitted by Article 5, paragraph 1. Article 5, paragraph 4, does not guarantee a right to a 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. The review should, however, be wide enough to bear on those conditions that are essential for the “lawful” detention of a person according to Article 5, paragraph 1.<sup>85</sup>

Therefore, Article 5, paragraph 4, includes the review of the lawfulness of the detention itself and not of the extradition. The lawfulness of the extradition issue appears in the framework of the European Convention on Extradition. More specifically, the Committee of Ministers recommended the right to be heard regarding one’s extradition. This has been included in the guidelines of the Committee of Ministers: “The person concerned should be heard on the arguments, which he invokes against his extradition”.<sup>86</sup> Even in case of a summary extradition procedure, the person concerned should consent to it.<sup>87</sup> The position of the Committee of Ministers 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 ensured in the Convention, is examined in the field of Article 13 of the Convention.<sup>88</sup> Let us note that also in the integrated field of the EU Arrest Warrant mechanism, pending a decision, the executing authority hears the person concerned.

## 6. Comprehensive application of the rights

The Court has repeatedly found it necessary to examine the comprehensive notion of the right to defence enshrined in Article 5 of the Convention in relation to other provisions therein. According to our point of view it is essential to go through some typical examples of the Court’s case law, in order to explain the way that the Court interprets the comprehensive notion of the article in circumstances of

83. *Dougoz v. Greece*, 6 March 2001, paragraph 63.

84. *Bordovskiy*, cited above, paragraphs 65-66.

85. *Chahal v. the United Kingdom*, 15 November 1996, paragraph 127; and *Dougoz v. Greece*, 6 March 2001, paragraph 61.

86. Paragraph I, Concerning the extradition procedure, b, Recommendation No. R (80) 7 concerning the practical application of the European Convention on Extradition.

87. Paragraph I, Concerning summary extradition, Recommendation No. R (80) 7 concerning the practical application of the European Convention on Extradition.

88. *Chamaiev and Others*, cited above, paragraphs 460-461.

transnational criminal justice. Thus, an example of a recent judgment of the Court will be examined.

According to the Court, it is inadmissible that a person learns that he is going to be extradited just before he or she is driven to the airport, while he wanted to escape from the requesting state because of a sound fear concerning Articles 2 and 3 of the Convention.<sup>89</sup>

Diligent action by the extraditing authorities is required under Article 3 of the European Convention on Human Rights. However, what is this diligent action? Competent authorities are obliged to act in accordance with the procedural guarantees provided by Articles 5, paragraphs 2 and 4, and 13 of the Convention in the framework of an extradition procedure.<sup>90</sup> The detained individual should not be kept in ignorance as far as his or her future is concerned. According to the Court's wording, it is inconceivable that a detainee is presented with a *fait accompli* and that he does not realise that he will actually be transferred to another state; at least not until he is asked to leave his or her cell. Last, but not least, the detainee should not be subjected to anxiety and uncertainty without good reason. In a contrary situation the combined violation of the provisions raises issues in the framework of Article 3 of the Convention.<sup>91</sup>

## **Chapter 2: Procedural aspects of extradition**

Contracting states have the right, afforded by international law and subject to their treaty obligations, including the European Convention on Human Rights, to control the entry, residence and expulsion of aliens.<sup>92</sup> Thus, the European Convention on Human Rights 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.<sup>93</sup> This state right, which stems from the notion of sovereignty,<sup>94</sup> has to be exercised in conformity with the international obligations of the European Convention on Human Rights and, more specifically, with the provisions set out in Article 5.<sup>95</sup> The compatibility of this sovereign discretion with other rights prescribed in the Convention will be examined in the section concerning the limitations that are set throughout the extradition procedure and are relevant to human rights. Even though Article 5 provides human rights

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89. *Ibid.*, paragraph 460.

90. *Ibid.*, paragraphs 381, 428, 432 and 457-461.

91. *Ibid.*, paragraph 381.

92. *Vilvarajah and Others v. the United Kingdom*, 30 October 1991, paragraphs 102-103; *Mamatkulov and Askarov v. Turkey*, 4 February 2005, paragraph 66; *Mamatkulov and Abdurasulovic v. Turkey*, 6 February 2003, paragraph 65; and *Chamaïev and Others*, cited above, paragraph 334.

93. *Öcalan v. Turkey*, 12 May 2005, paragraph 86.

94. 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.

95. *Amuur v. France*, 25 June 1996, paragraph 46.

protection, it is more closely related to the extradition procedure and for this reason it is included in this section.

The European Convention on Human Rights does not contain any provision concerning the circumstances in which extradition may be granted, or the procedures to be followed before extradition may be granted. It only provides for special protection with respect to detention pending extradition under the mantle of Article 5, which refers back to national law and lays down the obligation to conform to the substantive and procedural rules thereof. It requires, in addition, that any deprivation of liberty should be consistent with the purpose of Article 5, that is to protect individuals from arbitrariness.<sup>96</sup>

Article 5 stipulates:

“1. 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.”

Article 5 paragraph 1.f, lays down a threefold requirement for the conditions of detention. Firstly, proceedings against the detainee are being taken with a view to extradition or deportation. Secondly, the basis upon which he or she is being detained must be lawful. Thirdly, the procedures prescribed by domestic law must not be imposed arbitrarily.<sup>97</sup>

Article 5, paragraph 1, primarily requires that any arrest or detention have a legal basis in domestic law.<sup>98</sup> However, these words do not merely refer back to domestic law; they also relate to the quality of the law, requiring it to be compatible with the rule of law, a concept inherent in all articles of the Convention.<sup>99</sup> Quality in this sense means that where national law authorises deprivation of liberty, it must be sufficiently accessible and precise, in order to avoid all risk of arbitrariness.<sup>100</sup>

96. *Bozano v. France*, 1986, paragraph 54; *Quinn v. France*, 22 March 1995, paragraph 47; and *Chahal*, cited above, paragraph 118.

97. Stanbrook, I. and Stanbrook, C., *Extradition law and practice*, 2nd edition, Oxford University Press, 2000, pp. 106-107.

98. *Denizci and Others v. Cyprus*, 23 May 2001, paragraphs 390-393.

99. 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 Council of Europe's Statute stipulates the rule of law as a criterion for membership. Statute of the Council of Europe, London, 5 May 1949, ETS Nos. 1, 6, 7, 8 and 11. See also Garibaldi, O.M., “General limitations on human rights: the principle of legality”, *Harvard International Law Journal*, Vol. 17, No. 3, 1976, pp. 503-559; and Meron, T. and Sloan, J.S., “Democracy, rule of law and admission to the Council of Europe”, *Israel Yearbook of International Law*, Martinus Nijhoff Publishers, 1996, pp. 137-57.

100. *Amuur v. France*, 25 June 1996, paragraph 50; *Dougoz v. Greece*, 6 March 2001, paragraph 55; and *Raf v. Spain*, 17 June 2003.

There is, therefore, a violation of Article 5, paragraph 1, if it is shown that the poor “quality of the law” has tangibly prejudiced the applicant’s substantive Convention rights.<sup>101</sup> Arbitrariness may also be detected when the authorities use domestic law in a way contradicting the purpose of Article 5,<sup>102</sup> which constitutes a misuse of power. For example, the Court censured France in the *Bozano* case<sup>103</sup> for deporting the applicant to Switzerland, where a transfer to Italy had been arranged, as the French courts had refused his extradition to Italy, because he had been tried *in absentia*.<sup>104</sup>

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 deportation according to national law. According to the Court, the fact that a domestic court has already found the deportation procedure to be illegal does not deprive the applicant of his claim to be a victim of a violation of the Convention by reason of his arrest.<sup>105</sup> In the *Chamaïev* case the Court accepted that the arguments concerning extradition being barred because of material human rights guarantees are covered by the right to a remedy enshrined in Article 13 of the European Convention on Human Rights,<sup>106</sup> which in this respect functions in combination with the alleged violated articles.

### **1. Flaws during the extradition process – A transnational perspective**

The complexity and inter-relation of the procedures in the states involved in an extradition procedure raise issues regarding the continuity and legality of the proceedings. The flaws, which will be examined later in the present section, focus on the extraterritorial or irregular seizure of a person. Extraterritorial seizures of individuals are generally classified in two categories; irregular rendition and abduction. The first one refers to the informal surrender of a person by agents of one country to agents of another without formal or legal proceedings. The second one refers to a person’s seizure and removal without the knowledge and consent of the state in which the seizure occurs.<sup>107</sup>

This section analyses the issue in three phases: the case of simple co-operation without an extradition treaty between the states, one of which is a Contracting Party of the European Convention on Human Rights; the case of one contracting and one non-contracting state bound by an extradition treaty; and the case of two

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101. *Bordovskiy*, cited above, paragraphs 47-49.

102. *Chahal*, cited above, paragraph 129.

103. *Bozano*, cited above.

104. For further analysis of the case, see van Dijk, P. and van Hoof, G.J.H., *Theory and practice of the European Convention on Human Rights*, 3rd edition, Kluwer Law International, 1998.

105. *Ibid.*, p. 364.

106. *Chamaïev and Others*, cited above, paragraphs 460-61.

107. Semmelman, J., “Due process, international law and jurisdiction over criminal defendants abducted extraterritorially: the *Ker-Frisbie* doctrine reexamined”, *Columbia Journal of Transnational Law*, 1992, Vol. 30, p. 520.

contracting parties to the Convention irrespective of an extradition instrument between them.

In cases of simple inter-state co-operation and in the absence of a treaty between the two states, the handing over of the individual does not in itself make the arrest unlawful or subsequently give rise to problems under Article 5.<sup>108</sup> However, for a detention in these circumstances to be lawful two requirements have to be met. Firstly, the domestic substantial and procedural rules of the requesting state concerning the arrest should be complied with – according to the Article 5, paragraph 1, “a procedure prescribed by law”, and the purpose of Article 5, namely to protect from arbitrariness.<sup>109</sup> And, secondly, the requesting state’s action has to be compatible with respect for sovereignty of the requested state.<sup>110</sup>

Generally, an atypical extradition, which results from the co-operation of states, in the absence of a treaty, and which has as a legal basis an arrest warrant issued by the competent authorities of the requesting state (Article 5 paragraph 1, “a procedure prescribed by law”) is not as such contrary to the Convention. In order for a violation to arise, it has to be proven in a form of concordant inferences that the requesting state violated the sovereignty of the requested state and, therefore, international law.<sup>111</sup>

In the recent *Öcalan* case, the Court was called to rule on an alleged violation of Article 5, paragraph 1, by Turkey – the requesting state – on grounds of unlawful deprivation of liberty. Kenya and Turkey had not signed an extradition treaty and the Turkish agents arrested the applicant in the international zone of Nairobi airport and transferred him back to Turkish territory.

The Court examined, first, whether the arrest of the applicant complied with Turkish law,<sup>112</sup> namely the existence of a valid arrest warrant; and, then, the compatibility with international law of the acts of the Turkish agents with regard to the applicant’s interception by Kenyan agents, namely respect of Kenyan sovereignty.<sup>113</sup> The Court’s reasoning, which concludes that a violation of the domestic law of Kenya would be considered only if the latter was a contracting party,<sup>114</sup> implies that in case of the requesting state bribing officials of the requested state there

108. *Freda v. Italy*, No. 8916/80, 7 October 1980, *Decisions and reports* 21, p. 250; *Klaus Altmann (Barbie) v. France*, No. 10689/83, 4 July 1984, *Decisions and reports* 37, p. 225; and *Luc Reinette v. France*, No. 14009/88, Commission decision of 2 October 1989, *Decisions and reports* 63, p. 189.

109. *Bozano*, cited above, paragraph 54; and *Wassink v. the Netherlands*, 27 September 1990, paragraph 24.

110. *Öcalan*, cited above, paragraph 90; and *Stocké v. Germany*, 19 March 1991, paragraph 54.

111. *Ibid.*

112. *Mutatis mutandis, Illich Ramirez Sanchez v. France*, where the Court required an arrest warrant to be issued by the authorities of the fugitive’s state of origin in order for an atypical extradition (in the absence of a binding instrument between the concerned states) to be lawful under the Convention.

113. *Öcalan*, cited above, paragraphs 91-99.

114. *Ibid.*, paragraph 90.

would be unlawful conduct attributed to the former,<sup>115</sup> without excluding the responsibility of the latter.<sup>116</sup>

According to the established case law of the Court, the role played by the authorities of the non-contracting party of the European Convention on Human Rights has to be taken into consideration in such cases.<sup>117</sup> The endorsement of the extra-territorial act of the seizing state by the state where the person was located heals the violation of international law. Such approval may be express or may be inferred by the absence of protest. The fact that the Kenyan authorities did not lodge any complaints against the Turkish Government referring to a violation of its sovereignty for seizing Öcalan, or that they did not claim any redress from Turkey, such as the applicant's return or compensation, proves that they had decided to at least facilitate the transfer of the individual to Turkey,<sup>118</sup> notwithstanding the fact that Kenya rejected its involvement in the arrest of the applicant.<sup>119</sup> Therefore, Turkey did not violate Kenya's sovereignty in the arrest of the applicant and the detention of the applicant by the Turkish authorities was lawful.

The Court, while examining the facts concerning Kenya's involvement in the Öcalan case, referred to the reparation that could be asked by Kenya, if it considered Turkey's involvement to be a violation of its sovereignty. It explicitly included the individual's return.<sup>120</sup> This means that in case of a violation of Kenya's sovereignty, the Court would consider a request of return as a logical means of redress. Therefore, the continuity of the inter-state proceedings in Turkey would be impaired; the proceedings would have been enforced against a person, which would not be lawful under the jurisdiction of that state, especially in view of the fact that the return of the person is considered a means of reparation.

In this context, controversy remains as to whether this rule is self-executing. May the person involved invoke the violation of the sovereignty of the state, from where he or she was abducted, as a means to contest the legality of the arrest and detention by the requesting state? The Court examined thoroughly the substance of the applicant's complaint concerning a violation of his right under Article 5 in

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115. International responsibility for the wrongful act would then be raised according to Articles 8 or 17 of the Articles on State Responsibility adopted by the UN General Assembly. "Commentary of the Articles on State Responsibility", *Yearbook of the International Law Commission*, 2001, Doc. A/56/10, pp. 103, footnote 157.

116. "Article 7, Articles on State Responsibility", *Yearbook of the International Law Commission*, 2001, Doc. A/56/10, pp. 103, footnote 157.

117. *Freda v. Italy*, no. 8916/80, Commission decision, 7 October 1980, *Decisions and reports* 21, p. 250; *Klaus Altmann (Barbie) v. France*, no. 10689/83, Commission decision, 4 July 1984, *Decisions and reports* 37, p. 225; *Luc Reinette v. France*, no. 14009/88, Commission decision, 2 October 1989, *Decisions and reports* 63, p. 189.

118. *Öcalan*, cited above, paragraphs 95 and 97.

119. *Ibid.*, paragraph 16.

120. *Ibid.*, paragraph 95. The same obligation of return was stressed by the Inter-American Juridical Committee in its Legal Opinion concerning the Alvarez-Machain case, which related to a Mexican citizen, who was abducted on Mexican soil by US agents and was subsequently tried in the US (Legal Opinion on the Decision of the Supreme Court of the US of the Organization of American States, Permanent Council, Criminal Law Forum, Vol. 4, No. 1, 1993, p. 119).

connection with the breach of sovereignty. Moreover, according to the Court's above-mentioned findings, in order for a breach of sovereignty to be found, the state where the person was located must protest. These elements lead to the conclusion that the individual may invoke the breach of sovereignty of the state under certain conditions. He or she should do that in connection with the rights enshrined in the European Convention on Human Rights. And the state has to have protested against his or her removal or demanded redress. In a sense, it is a "conditionally self-executing" rule. The breach of sovereignty may impair the arrest and detention of the individual, but the motion of the state, where he or she was previously located, proves the existence of a breach. It may be noted that in this way uncertainty is created in the exercise of the individual's right.

Certain commentators have raised the question of the "administration of justice" imperative, which may justify, according to this submission, an unlawful arrest of the accused. The administration of justice means the "effective enforcement of criminal laws against those who violate them".<sup>121</sup> It has to be underlined that these kind of submissions contradict the presumption of innocence, which constitutes a general principle of criminal law and is also stipulated in Article 6, paragraph 2, of the European Convention on Human Rights.

Apart from the flaws concerning the violation of international law based on sovereignty interference, there have been cases of inter-state co-operation that involve non-compatibility with the standards set out in the Convention – or in customary international law<sup>122</sup> – in the requested state's procedure and prior to the handing over of the person concerned. This issue appears both in abduction incidents and in irregular rendition cases. It is a very interesting point, which relates to the concept that the European system has concerning the "continuity of the criminal procedure" and the nature and degree of coherence of transnational proceedings in the framework of the Council of Europe.

Is the deprivation of liberty of an individual in a case of extradition to be taken into account as a whole? In other words, does the fact that the requested state has not respected the procedural rights afforded to the individual during his or her detention pending extradition, namely, Article 5, paragraphs 2 and 4 – which may even amount to a violation of Article 3 depending on the circumstances of the case,<sup>123</sup> as

121. Shin, A.E., "On the borders of law enforcement – The use of extraterritorial abduction as a means of attaining jurisdiction of the international criminal", *Whittier Law Review*, 1995-96, Vol. 17, p. 327-402.

122. UN Working Group on Arbitrary Detention concluded that the detention of Alvarez Machain in the United States is arbitrary, being in contravention of Article 9 of the ICCPR, "Report of the Working Group on Arbitrary Detention", UN Commission on Human Rights, 50th Session, UN Doc. E/CN.4/1994/27, 1993, pp. 139-140; Reisman, "Covert action", *Yale Journal of International Law*, Vol. 20, 1995, pp. 422-424; and Wedgood, R., "The argument against international abduction of criminal defendants", *American University Journal of International Law and Policy*, 1995-96, Vol. 6, pp. 565.

123. *Chamaïev and Others*, cited above, paragraph 381.

will be examined in a subsequent section – affect the lawfulness of the detention in the requesting state?

In certain cases involving a requesting contracting state and a requested non-contracting state, the Commission held that the requesting state was not deprived of a legal basis for the detention of the individual concerned. Irregularities were evident. For example, the person was notified of the arrest warrant only on his arrival in Italy,<sup>124</sup> or when handed over to the French authorities, who took him to France,<sup>125</sup> or when he was made to sign extradition documents that were false.<sup>126</sup>

In all these cases, the proceedings took place between a contracting state and a non-contracting, and where it was not disputed that the latter consented to the transfer. No issue of interference with the sovereignty of the requested state was raised. It was critical that the requesting states – members of the Council of Europe – exercised their jurisdiction over an individual who was not granted the rights, prescribed by the Convention, prior to the handing over and in a state that was not a contracting party to the European Convention.

In the recent *Öcalan* judgment, the Court did not refer to the fact that the procedure, even though not being a breach of the requested state's sovereignty, did not respect the rights stipulated in the Convention prior and during handing over. Furthermore, the Court stated that it would consider the issue of violation of the law of the state, from where the individual was removed, in the case where this state was a contracting party to the European Convention on Human Rights.<sup>127</sup> Therefore, incompatibility of the detention in that state with the Convention's provisions would only be considered in case of membership.

The judiciary organs of the Council of Europe seem to accept that breach of international obligations by member states concerning Article 5 of the Convention has only an out-coming effect, that is in cases of procedures with a non-member state, when the latter is the requesting state. "As the Convention does not require the contracting parties to impose its standards on third states or territories, France was not obliged to verify whether the proceedings which resulted in the conviction were compatible with all the requirements of Article 6 of the Convention. To require such a review of the manner in which a court not bound by the Convention had applied the principles enshrined in Article 6 would also thwart the current trend towards strengthening international co-operation in the administration of justice, a trend which is in principle in the interests of the persons concerned."<sup>128</sup> The priority of administration of justice over the respect of human rights may pose, as mentioned above, issues of incompatibility with Article 6, paragraph 2, of the European Convention on Human Rights.

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124. *Freda v. Italy*, 7 October 1980.

125. *Illich Ramirez Sanchez v. France*, 24 June 1996.

126. *Luis Rodlan v. Spain*, 16 October 1996.

127. *Öcalan*, cited above, paragraph 90.

128. *Drozd and Janousek v. France and Spain*, 26 June 1992, paragraph 110.

“The contracting states are, however, obliged to refuse their co-operation if it emerges that the conviction is the result of a flagrant denial of justice.”<sup>129</sup> The abuse of rights by the non-contracting requested state does not deprive the procedure in the requesting state party of its subsequent legality,<sup>130</sup> except in cases of flagrant denial of justice in the requested state. The Commission, though, did not determine what constitutes a flagrant denial of justice for the purpose of the specific facts. Could not, for example, torture or denial of the rights of Article 5 of the Convention constitute, under certain circumstances, a flagrant denial of justice?

Furthermore, it has to be underlined that a systemic interpretation of the provisions of the Convention, as will also be emphasised in the part concerning procedures between contracting parties, leads to the conclusion that a problem is raised in case of irregularity in the arrest.

In cases where an extradition treaty exists between a contracting party and a non-contracting party, problems are raised with regard to the respect of treaty procedures.

Rather interesting examples are the cases of Alvarez-Machain<sup>131</sup> and Verdugo-Urquidez<sup>132</sup> in the United States. The Supreme Court concluded that the unilateral action of the United States did not violate the extradition treaty concluded between the two states (USA and Mexico), because it did not explicitly prohibit such a conduct. The Inter-American Juridical Committee based its legal opinion, which asserted a breach of US international obligations, both on the violation of the territorial sovereignty of Mexico and the fact that the Supreme Court did not interpret the extradition treaty “in conformity with its purposes and in relation to the applicable rules and principles of international law”.

In the European arena, the House of Lords stated in *Regina v. Horseferry Road Magistrates’ Court*<sup>133</sup> that when there is a legal process established through extradition, the courts would refuse to try a person if he or she had been forcibly brought within the jurisdiction in disregard of those procedures. In that case, there was no extradition treaty between the UK and South Africa, but there was a possibility under national law for such an agreement to be made.

129. Ibid.

130. Opposite conclusions: Gilbert, G., *Transnational fugitive offenders in international law, extradition and other mechanisms*, Martinus Nijhoff Publishers, International Studies in Human Rights, 1998, pp. 358-359; Shearer, I.A., *Extradition in international law*, Manchester University Press, 1971, pp. 72-76; *United States v. Toscanino*, 500 F.2d 267 (2nd Circuit 1974), where the defendant had been subject to cruel and inhuman treatment before getting in the jurisdiction of the state; *State v. Ebrahim*, South Africa Supreme Court, Appellate Division, 1991, *International Legal Materials*, 1992, Vol. 31, p. 888, where the court ordered the release of the defendant, who had been abducted by agents of the South African Government from Swaziland, without the protest of the latter. According to the judgment “society is the ultimate loser when, in order to convict a guilty, it uses methods that lead to decreased respect for the law”.

131. *US v. Alvarez-Machain*, 504 US 655, 112 S Ct. 2188, 15 June 1992.

132. *US v. Verdugo-Urquidez*, 110 S Ct. 1056, 1990.

133. *Regina v. Horseferry Road Magistrates’ Court, ex Parte Bennett*, Appeals Court, 1994, Vol. 1, p. 42.

When a binding instrument concerning extradition exists between two states, the maxim “*nunquam decurritur ad extarordinarium sed ubi deficit ordinarium*” applies. It means that since there is a treaty, which provides for the normal conduct of the bound states, under circumstances that do not bar application of obligations according to the Vienna Convention on the Law of Treaties<sup>134</sup> or other sources of international law, extradition should be realised through the obligation assumed under the bilateral treaty. The fact that the treaty does not explicitly prohibit unilateral action by one of the contracting parties does not mean that this unilateral action is actually permitted.

The sense of this maxim stems from the “principle of good faith”,<sup>135</sup> which constitutes a general principle of law<sup>136</sup> binding the conduct of the states; it is an autonomic source of international law according to Articles 38 and 21 of the statutes of the International Court of Justice and the International Criminal Court, respectively. In the present case, it means that since the states entered into an agreement, they will use it in cases that fall within its scope.<sup>137</sup>

As regards extradition treaties between states, when both are parties to the European Convention on Human Rights, the issue of “continuity of criminal procedure” is more acute. The Court recently dealt with a case in which a violation of Article 5, paragraphs 2 and 4, arose regarding the extraditing state.<sup>138</sup> However, it mentioned nothing relating to the issue of continuity in the sense of the maxim *male captus, male detentus*.

More specifically, in the Chamaïev judgment,<sup>139</sup> in which the Court had the chance to examine the responsibility of both the extraditing and the receiving states, it did not deal with this specific issue. One could infer from the Court’s silence that the responsibility of the extraditing state arises under the respective articles,<sup>140</sup> but the establishment of jurisdiction over the person concerned by the receiving state remains lawful. Following this interpretation, the principle of *male captus, bene detentus*<sup>141</sup> seems to apply, but there are no straightforward arguments by the Court to support this reasoning unequivocally.

On the contrary, given the fact that the procedural rights stipulated in Article 5, paragraphs 2 and 4, of the Convention are an integral part of the extradition

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134. Vienna Convention on the Law of Treaties, Vienna, 23 May 1969.

135. O’Connor, J.F., *Good faith in international law*, Dartmouth, 1991, pp. 45-81; Zoller, E., *Bonne foi en droit international public*, Paris, 1977; Kolb, R., *La bonne foi en droit international public*, Paris, 2002; Fitzmaurice, G., *The law and procedure of the international court of justice*, 1986, Vol. I, p. 183 and Vol. II, p. 609; Shaw, M.N., *International law*, Cambridge University Press, 2003, p. 97; Dailler, P. and Pellet, A., *Droit international public*, 7th edition, LGDJ, 2002, p. 352.

136. Weiss, W., *Allgemeine Rechtsgrundsätze des Völkerrechts*, AVR, 2001, p. 394.

137. Zimmermann, R., *La coopération judiciaire internationale en matière pénale*, 2nd edition, Bruylant SA Brussels, 2004, p. 93.

138. *Bordovskiy and Chamaïev and Others*, both cited above.

139. *Chamaïev and Others*, cited above.

140. *Ibid.*, pp. 477-478.

141. Zimmermann, R., *op. cit.*, p. 96.

procedure concerning the arrest and detention of the individual – even in the absence of a specific treaty between the states parties – in the event that they are not respected by the requested state, the lawfulness of the subsequent detention in the receiving state may be called into question. It would constitute a violation of the law of extradition of the requested state and, therefore, unlawful conduct under the European Convention on Human Rights. Room for this interpretation has been left opened by the Court in the *Öcalan* judgment, which stated that the question of the violation of the requested state’s legislation would be examined only if the latter were a contracting state.<sup>142</sup> There may, therefore, be a violation of Article 5, if the lawful conditions of arrest in the requested state are not complied with.

Moreover, the European Convention on Human Rights is not a common multilateral treaty; on the contrary, it creates a space of “European public order”<sup>143</sup> and the obligations created therein are “obligations *erga omnes partes*”.<sup>144</sup> This means that a state’s obligations are not only to individuals under their jurisdiction, but also to the community of states that have signed the Convention. The right to inter-state petition itself stems from this particular nature of the Convention. Such a community of obligations would be endangered if gaps were to be left in cases of co-operation between the states parties; it would legitimise breaches of common obligations and at the same time it would undermine the inter-state petition system, in the sense that the receiving state would be estopped from using the inter-state petition scheme in view of its acceptance of an unlawful act by the extraditing state.

Additionally, the dictum *ex inuria ius non oritur*, which is part of the principle of good faith<sup>145</sup> and refers to the rule of law, which is an inherent principle in the system of the Council of Europe,<sup>146</sup> reinforces the argument of illegality of arrest and detention by the requesting state of a person in breach of international obligations; not only concerning sovereignty issues, but also international human rights commitments stemming from several sources. It, therefore, circumvents the maxim *male captus, bene detentus*.<sup>147</sup>

## 2. The European Convention on Extradition

A unified extradition procedure has been adopted in the framework of the Council of Europe; the European Convention on Extradition and its additional protocols

142. *Öcalan*, cited above, paragraphs 83, 86, 87 and 90.

143. *Loizidou v. Turkey*, 23 February 1995, paragraph 75

144. Sicilianos, L.-A., “The classification of obligations and the multilateral dimension of the relations of international responsibility”, *European Journal of International Law*, Vol. 13, No. 5, 2002, pp. 1135-1137.

145. Zimmermann, R., op. cit., p. 96.

146. Article 3, Statute of the Council of Europe, London, 5 May 1949, ETS Nos. 1, 6, 7, 8 and 11; Meron, T. and Sloan, J.S., “Democracy, rule of law and admission to the Council of Europe”, *Israel Yearbook of International Law*, Martinus Nijhoff Publishers, 1996, pp. 137-157; and report of the Secretary-General, “The rule of law and transitional justice in conflict and post-conflict societies”, UN S.C., 23 August 2004, S/2004/616, p. 4.

147. Zimmermann, R., op. cit., p. 96.

provide a system of procedural rules that do not, however, refer especially to the procedural and substantive rights of the individual involved. Furthermore, the Committee of Ministers has adopted a package of guiding principles to assist member states in the application of the convention.<sup>148</sup> These principles basically ensure the application of the guarantees afforded by Article 5 of the European Convention on Human Rights in the framework of the extradition procedure.

One cannot understand the scope of the protection without regard to its procedural aspect. The procedure itself, indeed, grants protection to individuals. For example, it guarantees the execution of extradition when the competent authorities of the requesting state proceed to the relevant request. Competent authorities are to be understood as being either the judiciary or the office of the public prosecutor; and not the police authorities.<sup>149</sup> Furthermore, such a request must be made in writing and be supported by documents relating to the conviction, detention order or arrest warrant; a statement of the offences for which extradition is requested; and a statement of the relevant law and information pertaining to the identity and nationality of the person concerned.<sup>150</sup>

The relevance of international co-operation in criminal matters, and especially extradition, to human rights is rather interesting, in view of the problems raised concerning the “self-executing” character of the Convention. Does the Convention create domestically enforceable rights in individuals? US case law seems to leave room for a positive response.<sup>151</sup> The European Convention on Extradition does not seem to follow the same approach. However, an interpretation based on the European Convention on Human Rights could lead to a standing relating to procedural aspects of the extradition itself, as they are going to be analysed in detail in the following chapters.

### **3. Extradition offences**

Moreover, the convention determines the offences that are extraditable, whilst excluding political, military and fiscal offences (Articles 3, 4, and 5 of the European Convention on Extradition). The latter offences have acquired extraditable status under the Second Additional Protocol to the European Convention on Extradition.<sup>152</sup>

As far as political offences are concerned, the convention prohibits extradition without defining them. Article 3 states:

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148. Paragraph I, Recommendation No. R (80) 7 concerning the practical application of the European Convention on Extradition.

149. Article 1, explanatory report, European Convention on Extradition.

150. *Ibid.*, Article 12; and *Chamaïev and Others*, cited above, paragraph 403.

151. Blakesley, C.L., “Ruminations on extradition and human rights”, in Trechsel, S. (ed.), *Strafrecht, Strafprozessrecht und Menschenrechte*, Schulthess, 2002, pp. 209-214.

152. Second Additional Protocol to the European Convention on Extradition, Strasbourg, 17 March 1978, ETS No. 98.

- “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.”

The political offence exemption has been raised in a wide variety of circumstances and has been imprecisely and inconsistently interpreted.<sup>153</sup> There is no concrete definition in the instruments of the Council of Europe, nor an internationally accepted definition. There are no concrete criteria either, but there have been attempts to list certain of them.<sup>154</sup>

However, exceptions to the exclusion of political offences have been established in international law; the *clause d’attentat*, which is explicitly included in the European Convention on Extradition in Article 3, paragraph 3; genocide<sup>155</sup> according to the 1948 Geneva Convention on the Prevention and Punishment of the Crime of Genocide<sup>156</sup> and war crimes,<sup>157</sup> according to the Four Geneva Conventions, and terrorism. According to Article 1 of the European Convention on the Suppression of Terrorism.<sup>158</sup>

“For the purposes of extradition between Contracting States, none of the following offences shall be regarded as a political offence or as an offence connected with a political offence or as an offence inspired by political motives:

- a. an offence within the scope of the Convention for the Suppression of Unlawful Seizure of Aircraft, signed at The Hague on 16 December 1970;
- b. an offence within the scope of the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, signed at Montreal on 23 September 1971;

153. Van den Wijngaert, C., *The political offence exception to extradition, the delicate problem of balancing the rights of the individual and the international public order*, Kluwer, 1980, pp. 95-132; Gilbert, G., *Transnational fugitive offenders in international law, extradition and other mechanisms*, Martinus Nijhoff Publishers, International Studies in Human Rights, 1998, pp. 203-268.

154. Stanbrook, I. and Stanbrook, C., op. cit., pp. 68-70; Poncet, D. and Gully-Hart, P., “The European approach – Legal framework of extradition in Europe”, in Bassiouni, C. (ed.), *International criminal law, procedural and enforcement mechanisms*, 2nd edition, Transnational Publishers, 1999, p. 293.

155. Article 3, Additional Protocol to the European Convention on Extradition.

156. See generally, Schabas, W., *Genocide in international law*, Cambridge, 2000.

157. Article 3, Additional Protocol to the European Convention on Extradition.

158. European Convention on the Suppression of Terrorism, Strasbourg, 27 January 1977, ETS No. 90.

- c. a serious offence involving an attack against the life, physical integrity or liberty of internationally protected persons, including diplomatic agents;
- d. an offence involving kidnapping, the taking of a hostage or serious unlawful detention;
- e. an offence involving the use of a bomb, grenade, rocket, automatic firearm or letter or parcel bomb if this use endangers persons;
- f. an attempt to commit any of the foregoing offences or participation as an accomplice of a person who commits or attempts to commit such an offence.”

Article 20 of the recent Council of Europe Convention on the Prevention of Terrorism<sup>159</sup> stipulates that:

“1. None of the offences referred to in Articles 5 to 7 and 9 of this Convention, shall be regarded, for the purposes of extradition or mutual legal assistance, as a political offence, an offence connected with a political offence, or as an offence inspired by political motives. Accordingly, a request for extradition or for mutual legal assistance based on such an offence may not be refused on the sole ground that it concerns a political offence or an offence connected with a political offence or an offence inspired by political motives.”

More specifically, Articles 5, 6, 7 and 9 of the convention refer to recruitment for terrorism, public provocation to commit a terrorist offence, training for terrorism and certain ancillary offences.

In relation to extradition the word political equates to non-criminal and it may result in immunity from prosecution and punishment, thus having an effect similar to excuses for the punishability of the offender in domestic criminal law.<sup>160</sup> Therefore, application of the principle *aut dedere, aut judicare*<sup>161</sup> provides no alternative to the political offence exception.

#### **4. Double criminality**

The principle of double criminality, *réciprocité d'incrimination*, founded in the long-standing international principle of legality, *nulla poena sine lege*, 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 and is enshrined in the convention.<sup>162</sup> Traditionally, it has been considered closely related to the notion of sovereignty and reciprocity.<sup>163</sup>

159. Council of Europe Convention on the Prevention of Terrorism, Warsaw, 16 May 2005, CETS No. 196.

160. Van Den Wyngert, C., op. cit., pp. 368-428; and Poncet, D. and Gully-Hart, P., op. cit., p. 293.

161. See generally Bassiouni, C. and Wise, E.M., *Aut dedere aut judicare The duty to extradite or prosecute in international law*, Martinus Nijhoff Publishers, 1995.

162. Article 2, European Convention on Extradition.

163. 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.

Some experts advocate that the individuals should be placed at the centre of transnational proceedings and that even therefore any basic principles of extradition are reviewed. They consider that the double criminality requirement is an expression of the individual's human rights and can therefore constitute an exception to extradition.<sup>164</sup> In their views, the lawfulness of detention is to be assessed according to the laws of the requesting state.<sup>165</sup>

Because of the sharp divergences among national criminal laws and of the enormous differences in the punishment imposed for various offences, an issue is raised concerning its substantial meaning. A distinction is made between two approaches in double criminality. The first one is more flexible and refers mainly to the facts being punishable in both states. While the second one requires difficult conditions to be met; namely, checking off detailed punishment criteria in both states.

An individual could invoke the double criminality principle linked to Article 7 of the European Convention on Human Rights. Article 7 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 would be possible for the argument to be challenged since extradition proceedings are not covered by "criminal charges", as stipulated in Article 6 of the Convention.

Let us note another aspect of double criminality. The Second Additional Protocol to the European Convention on Extradition provides that extradition is denied when amnesty is granted in the requesting state.

## 5. Principle of speciality

The principle of speciality<sup>166</sup> is one of the traditional tools in the extradition framework included in the European Convention on Extradition.<sup>167</sup> It guarantees that the individual concerned will not be prosecuted in a state for previous crimes other than for the ones for which extradition was granted. If the principle is found to have been violated, the person concerned must be released and allowed to leave the country, before he or she may be tried for offences committed before his or her extradition. Article 14 of the European Convention on Extradition stipulates:

"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:

164. Blakesley, C.L., *op. cit.*, pp. 191-204.

165. Poncet, D. and Gully-Hart, P., *op. cit.*, p. 292.

166. Zairi, A., *Le principe de la spécialité de l'extradition au regard des droits des l'homme*, LGDJ, 1992.

167. Articles 14 and 15, European Convention on Extradition.

- a. when the Party which surrendered him consents. A request for consent shall be submitted, accompanied by the documents mentioned in Article 12 and a legal record of any statement made by the extradited person in respect of the offence concerned. Consent shall be given when the offence for which it is requested is itself subject to extradition in accordance with the provisions of this Convention;
  - b. when that person, having had an opportunity to leave the territory of the Party to which he has been surrendered, has not done so within 45 days of his final discharge, or has returned to that territory after leaving it.
2. The requesting Party may, however, take any measures necessary to remove the person from its territory, or any measures necessary under its law, including proceedings by default, to prevent any legal effects of lapse of time.
  3. When the description of the offence charged is altered in the course of proceedings, the extradited person shall only be proceeded against or sentenced in so far as the offence under its new description is shown by its constituent elements to be an offence which would allow extradition.”

If the legal qualification of the facts on which the individual is being charged is altered, he or she may be prosecuted or punished only if extradition would be granted in respect of the constituent elements of the newly qualified offence. There is an evident attachment to the facts, instead of the offence. And this is an element that can be used as an argument concerning the perspective followed in the interpretation of the double criminality restriction and the *ne bis in idem* principle.

However, it is not clear if the person is entitled to claim the protection under the principle of speciality as a right,<sup>168</sup> except if combined with a right provided for in the European Convention on Human Rights.

The doctrine of speciality is related to the right enshrined in Article 5, paragraphs 2 and 4, and Article 6 of the European Convention on Human Rights.<sup>169</sup> 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 of the right guaranteed in the above-mentioned paragraphs and Article 13.<sup>170</sup>

According to the case law of the Court, the time for the application of Article 6, paragraph 1, begins for the requesting state on the day that the authorities of the requested state arrest him or her.<sup>171</sup> In this respect, the principle of speciality refers to the application of Article 5, paragraph 3, in the requested state and Article 6, paragraph 3, in the requesting state. Therefore, the doctrine of speciality enshrined in the European Convention on Extradition completes the continuity and the harmonised application of the provisions of the European Convention on Human Rights.

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168. Runtz, D., “Notes. The principle of speciality: a bifurcated analysis of the rights of the accused, *Columbia Journal of Transnational Law*, Vol. 29, 1991, pp. 421 and 437.

169. Zairi, A., op. cit., pp. 41-53, 126-153.

170. Ibid., pp. 129-130 and 132.

171. *Gelli v. Italy*, 19 October 2000, paragraph 37.

It should be noted that the principle has also been included in the ICC Statute.<sup>172</sup> 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.

## 6. Ne bis in idem

The *ne bis in idem* principle, as part and parcel of all transnational proceedings, will be examined below. It has to be borne in mind though that it also constitutes a procedural aspect of co-operation proceedings included in the general *problématique* mentioned in the general part above.

## 7. Nationality of the individual

The nationality of the individual is one of the defences against extradition in the European Convention on Extradition. The 1996 European Convention on Extradition between the member states of the European Union has removed nationality as an obstacle to the surrender of the individuals concerned. The nationality restriction seems to be flexible today, since the Convention on the Transfer of Sentenced Persons<sup>173</sup> gives the opportunity for a person sentenced in the requesting state to serve the sentence within that state or his or her home state. In any case, if the state of nationality does not extradite on this ground it is required, at the request of the requesting state, to submit the case to its competent authorities in order for proceedings to be taken if they are considered appropriate.<sup>174</sup>

## Chapter 3: *Aut dedere, aut judicare* in transnational procedures

According to international law, a state may not shield a person suspected of certain categories of crimes under the principle of *aut dedere, aut judicare*. The state is required either to punish the offender itself or to extradite him or her to a state able and willing to do so. In the era of international criminal tribunals, the principle may 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 International Criminal Court.<sup>175</sup>

The European Convention on Human Rights does not contain any reference to the *aut dedere, aut judicare* principle. The European Convention on Extradition imposes a duty on contracting states to surrender, according to the provisions and conditions of the convention, all persons wanted by the competent authorities of another contracting party.<sup>176</sup> At the same time, it excludes extradition for certain offences – as analysed in the respective chapters – and for the nationals of the

172. Rome Statute of the International Criminal Court, UN Doc. A/CONF. 183/9, Article 101.

173. Convention on the Transfer of Sentenced Persons, 21 March 1983, Strasbourg, ETS No. 112.

174. Article 6, paragraph 2, European Convention on Extradition.

175. Article 17, Rome Statute of the International Criminal Court, 17 July 1998.

176. Article 1, European Convention on Extradition.

requested state. However, the latter is under the duty to prosecute the person concerned, at the request of the requesting state.<sup>177</sup>

Aside from extradition procedures, the entire functioning of the European Convention on the Transfer of Proceedings in Criminal Matters<sup>178</sup> 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 that state and not 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 jurisdictions: territorial jurisdiction, when the offence has been committed in its own territory; the active personality principle, meaning that the offender, who acts outside the territory of the state, is a national of the state; passive personality, meaning the nationality link between the requesting state and the victim of the offence; and universal jurisdiction, which is based on the nature of the offence itself, whereby every state shares an equal concern. Article 6 leaves room for such an interpretation.

Article 8 of the convention contains a provision that facilitates the application of the *aut dedere, aut judicare* principle:

- “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;

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177. *Ibid.*, Article 6.

178. European Convention on the Transfer of Proceedings in Criminal Matters, 15 May 1972, ETS No. 73.

- 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. ...”

Moreover, the Convention on the Protection of the Environment through Criminal Law<sup>179</sup> provides for the principle in Article 5:

- “2. Each Party shall adopt such appropriate measures as may be necessary to establish jurisdiction over a criminal offence established in accordance with this Convention, in cases where an alleged offender is present in its territory and it does not extradite him to another Party after a request for extradition.”

Articles 6 and 7 of the European Convention on the Suppression of Terrorism strengthen the *aut dedere, aut judicare* principle and Article 14 of the recently adopted Council of Europe Convention on the Prevention of Terrorism<sup>180</sup> requires that each state party take such measures as may be necessary to establish its jurisdiction over the offences set forth in the convention in the case where the offender is present in its territory and it does not extradite him or her to a party whose jurisdiction is based on a rule of jurisdiction existing equally in the law of the requested party.

Also, the Council of Europe Convention on Action against Trafficking in Human Beings<sup>181</sup> has included the principle in Article 31:

- “Each Party shall adopt such measures as may be necessary to establish jurisdiction over the offences referred to in this Convention, in cases where an alleged offender is present in its territory and it does not extradite him/her to another Party, solely on the basis of his/her nationality, after a request for extradition.”

No reservation is permitted with regard to the obligation to establish jurisdiction in cases falling under the principle of *aut dedere, aut judicare*. According to the explanatory report of the convention:<sup>182</sup>

“In the case of trafficking in human beings, it will sometimes happen that more than one Party has jurisdiction over some or all of the participants in an offence. For example, a victim may be recruited in one country, then transported and harboured for exploitation in another. In order to avoid duplication of effort, unnecessary inconvenience to witnesses and competition between law-enforcement officers of the countries concerned, or to otherwise facilitate the

179. Convention on the Protection of the Environment through Criminal Law, Strasbourg, 4 June 1998, ETS No. 172.

180. Council of Europe Convention on the Prevention of Terrorism, Warsaw, 6 May 2005, CETS No. 196.

181. Council of Europe Convention on Action against Trafficking in Human Beings, Warsaw, 16 May 2005, CETS No. 197.

182. Article 31, explanatory report, paragraph 333, Council of Europe Convention on Action against Trafficking in Human Beings.

efficiency or fairness of proceedings, the affected Parties are required to consult in order to determine the proper venue for prosecution.”

Therefore, the principle is evidently linked to the choice of forum issue as it has also been noticed in the analysis of double criminality. Necessity of harmonisation of efforts in criminal proceedings is often the motivation for the function of the principle. As one may notice from the above-mentioned provisions, most of the conventions that adopt the principle seek at the same time the unification of the contracting states’ criminal legislation. Therefore, double criminality is guaranteed in order to ensure prosecution through the principle *aut dedere, aut judicare*. Moreover, from the above-mentioned analysis, the rule means that the contracting parties need to prosecute if they do not extradite. Emphasis, therefore, is given to extradition.

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 European Convention on Human Rights. 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.

However, one should not forget the precedent set by the International Court of Justice in the Lockerbie judgment. The ICJ did not rule 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 court did not look into the obligations of the parties to the dispute before the adoption of the resolution. Nevertheless, the decision of the court may lend credence 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.<sup>183</sup> This approach may also be found in the International Criminal Court complementarity principle, which asserts jurisdiction when the state is unwilling or genuinely unable to carry out the investigation or prosecution.<sup>184</sup>

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183. 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.

184. Article 17, paragraph 1.a, Rome Statute of the International Criminal Court; Swak-Goldman, O., “Recent developments in international criminal law: trying to stay afloat between Scylla and Charybdis”, *International and Comparative Law Quarterly*, Vol. 54, 2005, pp. 691-704.

## Chapter 4: Material human rights guarantees as limitations to extradition

The European Convention on Human Rights obliges contracting parties to “secure to everyone within their jurisdiction” the rights and freedoms stipulated therein.<sup>185</sup> 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.<sup>186</sup> 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.<sup>187</sup> In such cases, the responsibility of the contracting state is raised because of its having acted in a way that has as a direct consequence the exposure of an individual to proscribed ill-treatment.<sup>188</sup>

More specifically, as regards the Court’s case law, the notion has appeared in relation to Article 2, which ensures the right to life; Article 3, which prohibits torture, inhuman and degrading treatment or punishment; Article 6, which ensures the right to a fair trial; and Article 8, which ensures the right to private and family life. The Committee of Ministers has gradually extended this responsibility to cover cases of political, racial, religious or other prejudice.

### 1. Risk of capital punishment or illegal execution

Protocols Nos. 6 and 13 to the European Convention on Human Rights abolish capital punishment in the jurisdiction of the contracting parties. The convention itself does not exclude application of the death penalty, but it restricts it to special

185. Article 1, European Convention on Human Rights.

186. *Öcalan v. Turkey*, 12 May 2005; *Mamatkulov and Askarov v. Turkey*, 4 February 2005; *Mamatkulov and Abdurasulovic v. Turkey*, 6 February 2003; *Khavara and 15 Others v. Italy and Albania*, 11 January 2001; *Cyprus v. Turkey*, 10 May 2001; *Issa and Others v. Turkey*, 30 May 2000; *Ilaşcu, Lesco, Ivantoc and Petrov-Popa v. Moldova and Russia*, 4 June 2001; *Bankovic and Others v. Belgium and 16 Other Contracting States*, 19 December 2001; *Soering v. the United Kingdom*, 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, [www.icj-cij.org/igwww/idocket/imwpframe.htm](http://www.icj-cij.org/igwww/idocket/imwpframe.htm), paragraph 109; Report of the Human Rights Committee, UN GAOR, 46th Session, Supp. No. 40, paragraph 652; 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; and “Legal opinion of the Attorney General, Lord Goldsmith, on the occupation of Iraq, 26 March 2003, [www.informationcleaninghouse.info/article3505.htm](http://www.informationcleaninghouse.info/article3505.htm), paragraph 5.

187. *Kirkwood v. the United Kingdom*, 12 March 1984, *Decisions and reports* 37, p. 158.

188. *Soering*, cited above, paragraphs 89-91.

conditions, according to Article 2. Therefore, a Contracting Party of the European Convention on Human Rights that has not ratified Protocols Nos. 6 or 13 may apply capital punishment under the conditions laid down in Article 2, paragraph 2, of the Convention.<sup>189</sup> Also, it may only extradite the person concerned if it receives credible guarantees by the requesting state that it will enforce the punishment in accordance with Article 2 of the Convention; this would not exclude, though, the possibility of a violation under Article 3 of the Convention, as will be examined below.

On the other hand, a party to the protocols to the Convention may only extradite a person to a state that has not abolished capital punishment, if it has been granted credible guarantees by that state that it will not apply the death penalty to the person concerned.

In fact, the Committee of Ministers, in the framework of the fight against terrorism, adopted the “Guidelines on human rights and the fight against terrorism”.<sup>190</sup> Article 13, paragraph 2, of the guidelines stipulates that:

“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,
- 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 to extradite. Guarantees given by the general prosecutor, who under the national law is invested with the power to control the action of every prosecutor of the state, is characterised as sufficiently credible.<sup>191</sup>

In any case, as will be examined in the following chapter, it has to be borne in mind that the manner in which such a punishment is executed may give rise to issues under Article 3 of the Convention, which prohibits torture. Of course, the Court has explicitly established that Article 3 should not be interpreted in such a way as to prohibit in principle the death penalty, because in such a case it would render Article 2, paragraph 1, null.<sup>192</sup> 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.<sup>193</sup> The simple possibility of such a risk would not be in itself a violation of Article 2.<sup>194</sup> 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

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189. *Chamaïev and Others*, cited above, paragraph 333.

190. “Guidelines on human rights and the fight against terrorism”, 11 July 2002, 804th meeting of the Ministers’ Deputies.

191. *Chamaïev and Others*, cited above, paragraph 344; and *Mamatkulov and Abdurasulovic*, cited above, paragraphs 75-77.

192. *Soering*, cited above, paragraph 103.

193. *Chamaïev and Others*, cited above, paragraph 372.

194. *Vilvarajah and Others v. the United Kingdom*, 30 October 1991, paragraph 111.

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.<sup>195</sup>

## **2. Prohibition of torture and risk of being subjected to torture or to inhuman or degrading treatment or punishment**

Diligent action of the extraditing authorities during extradition proceedings is demanded by Article 3 of the European Convention on Human Rights. What is this diligent action? Competent authorities are obliged to act in accordance with the procedural guarantees provided by Articles 5, paragraph 2, 5, paragraph 4, and 13 of the Convention in the framework of an extradition procedure.<sup>196</sup> The detained individual should not be kept in ignorance as far as his or her future is concerned. According to the Court's wording, it is inconceivable that a detainee is put before a *fait accompli* and that he or she does not realise that they will actually be transferred to another state until they are asked to leave their cell. Last, but not least, the detainee should not be subjected to anxiety and uncertainty without good reason. All these factors combined create a problem in the framework of Article 3 of the Convention.<sup>197</sup> Therefore, the combined exclusion of the exercise of the above-mentioned provisions may result in a violation of Article 3 of the Convention.

Furthermore, the use of "necessary and proportionate physical violence" and direct medical care of the injured is required in any case relating to deprivation of liberty.<sup>198</sup> For example, the blindfolding of the applicant during his transfer as a measure of precaution and even his being photographed while blindfold under certain circumstances may not be contrary to Article 3.<sup>199</sup>

From an extraterritorial perspective, states parties are obliged not to expel or extradite a person – including political asylum seekers<sup>200</sup> – to a country where substantial grounds have been shown for believing that the person would, if extradited, run a real risk of being subjected to treatment contrary to Article 3 of the Convention.<sup>201</sup> This bar from deportation applies to the full range of the separate maltreatment practices as defined in Article 3 and as interpreted by the established case law of the Council of Europe's bodies.<sup>202</sup>

195. *Chamaïev and Others*, cited above, paragraph 372.

196. *Ibid.*, paragraphs 381, 428, 432 and 457-461.

197. *Ibid.*, paragraph 381.

198. *Ibid.*, paragraphs 375 and 382-385; *Tekin v. Turkey*, 1998, paragraphs 52-53; *Labita v. Italy*, 1999, paragraph 120; and *Algur v. Turkey*, 2002, paragraph 44.

199. *Öcalan*, cited above, paragraph 86.

200. Neither the Convention nor the protocols afford the right to political asylum. (*Vilvarajah and Others*, paragraphs 102-103; *Mamatkulov and Askarov v. Turkey*, 4 February 2005, paragraph 66; *Mamatkulov and Abdurasulovic v. Turkey*, 6 February 2003, paragraph 65; and *Chamaïev and Others*, cited above, 12 April 2005, paragraph 334.

201. *Mamatkulov*, cited above, paragraph 67.

202. *Soering*, cited above, paragraph 92; and *D. v. the United Kingdom*, 21 April 1997, paragraph 53.

Articles 2 and 3 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.<sup>203</sup> 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.<sup>204</sup>

The Committee of Ministers has reached the same conclusion: Article 13, paragraph 3.i, of the guidelines stipulates that:

“Extradition may not be granted if there are serious reasons to believe that:

- i. the person whose extradition has been requested will be subjected to torture or to inhuman or degrading treatment or punishment.”

The establishment of such responsibility requires an assessment of conditions in the requesting state against the standards of Article 3 of the Convention. 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.<sup>205</sup>

In determining whether substantial grounds have been shown for believing that a real risk of treatment contrary to Article 3 exists, the Court examines the facts as a whole, through a twofold procedure. Priority is given to the fact that the contacting state knew or should have known at the moment of the extradition or expulsion. However, this does not preclude the Court from taking into consideration information that came to light following that critical time. Information following extradition serves to confirm or refute the way that the state party to the Convention estimated the well-foundedness of the fear of the applicant before deciding to extradite him.<sup>206</sup> 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.<sup>207</sup> 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.<sup>208</sup> 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.

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203. Pettiti, L., Decaux, E. and Imbert, P., *La Convention européenne des droits de l'homme, commentaire article par article*, Economica, 2nd edition, 1999, pp. 143-153 and 155-157.

204. *Chamaïev and Others*, cited above, paragraph 335; *Ireland v. the United Kingdom*, 1978, paragraph 163; *Tomasi*, 27 August 1992, paragraph 115; and *Öcalan*, cited above, paragraph 179.

205. *Mamatkulov and Askarov*, cited above, paragraph 67; and *Chamaïev et autres c. Georgie et Russie*, 12 April 2005, paragraph 337.

206. *Chamaïev and Others*, cited above, paragraph 337; *Mamatkulov and Askarov*, cited above, paragraph 69; *Mamatkulov and Abdurasulovic*, cited above, paragraph 68; and *Cruz Varas and Others v. Sweden*, 20 March 1991, paragraph 76.

207. *Chamaïev and Others*, cited above, paragraph 345.

208. *Ibid.*, paragraph 341.

Certainly, a general situation of violence or political unrest, supporting the simple possibility of maltreatment, is not sufficient to trigger a violation of Article 3 by the requested state.<sup>209</sup> One should not, however, 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.

Guarantees may also be obtained by the requesting state against maltreatment of the person in question in order to ensure that there is no substantial ground to believe that the applicants will face such a risk in the requesting state.<sup>210</sup> As mentioned above, these guarantees must be characterised by credibility.

### 3. Special examples of Article 3 violations

The Court has established that the “death row” phenomenon, which precedes execution of capital punishment, amounts to a violation of Article 3. 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 are taken into consideration in order to determine whether Article 3 would be violated.<sup>211</sup> The Court has also underlined that it cannot be excluded that the extradition of a person to a state where he or she runs the risk of being sentenced to life imprisonment without any possibility of early release may give rise to an issue under Article 3 of the Convention.<sup>212</sup>

Another example that has been included in cases falling foul of Article 3 is the expulsion of an HIV patient, in the advanced stages of this terminal and incurable illness, to a state where he cannot receive the proper medical and moral support.<sup>213</sup> 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 scrutiny, especially the applicant’s personal situation in the expelling state.<sup>214</sup> It must be noted that the threshold set

209. *Ibid.*, paragraphs 350, 352, 360, and 371-372; *Mamatkulov and Askarov*, cited above, paragraph 73; and *Mamatkulov and Abdurasulovic*, cited above, paragraphs 71-72.

210. *Mamatkulov and Askarov*, cited above, paragraphs 76-77.

211. *Soering*, cited above, paragraph 104.

212. *Weeks v. the United Kingdom*, 2 March 1987; and *Sawoniuk v. the United Kingdom*, 29 May 2001.

213. *D. v. the United Kingdom*, 21 April 1997, paragraphs 49-53.

214. *Ibid.*, paragraph 49.

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.<sup>215</sup>

#### **4. Risk of being subjected to flagrant denial of justice**

As the right to a fair trial holds such a prominent place in a democratic society, there may be issues raised regarding its violation in the extradition hearing itself in the requested state and where the person involved in the criminal proceedings has suffered or risks suffering a flagrant denial of justice<sup>216</sup> in the requesting state.

As far as the first aspect of Article 6's involvement in the extradition procedure is concerned, the jurisprudence of the European Commission on the matter is unclear.<sup>217</sup> There are cases where it considered that extradition hearings are not open to a review under Article 6, paragraph 1, of the Convention, as it does not fall within the meaning of a "criminal charge".<sup>218</sup>

However, the recent jurisprudence of the Court has refused the inclusion of extradition hearings within the meaning of Article 6. 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, within the meaning of Article 6, paragraph 1, of the Convention.<sup>219</sup>

As far as the second – extraterritorial – aspect of the application of fair trial standards is concerned, the Court has held that as the Convention does not require the contracting parties to impose its standards on third states or territories, a contracting state is not obliged to verify whether the proceedings that resulted in the conviction are compatible with all the requirements of Article 6 of the Convention. To require such a review of the manner in which a court not bound by the Convention had applied the principles enshrined in Article 6 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. The contracting states are, however, obliged to refuse their co-operation if it emerges that the conviction is the result of a flagrant denial of justice.<sup>220</sup> It did not, however, determine the notion of "flagrant".

The risk of a flagrant denial of justice in the requesting state has to be assessed by reference to the fact that the requested state knew or ought to have known when it

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215. *Bensaid v. the United Kingdom*, 6 February 2001, paragraph 40.

216. *Soering*, cited above, paragraph 113.

217. Gilbert, G., op. cit., pp. 171-172; and Poncet, D. and Gully-Hart, P., op. cit., p. 303.

218. *Guzzardi v. Italy*, 6 November 1980, paragraph 108; *Mamatkulov and Askarov v. Turkey*, 4 February 2005, paragraph 82; and *Maaouia v. France*, 2000, paragraph 40.

219. *Mamatkulov and Askarov*, cited above, paragraph 82; and *Maaouia v. France*, 2000, paragraph 40.

220. *Drozd and Janousek v. France and Spain*, 26 June 1992, paragraph 110; and in general about the denial of justice, Freeman, A., *The international responsibility of states for denial of justice*, Longmans, 1983.

extradited the person in question.<sup>221</sup> The liability test concerning the requested state, which has been adopted in the framework of Articles 2 and 3, as shown above, also applies in the case of a potential violation of Article 6 by the requesting party.

## 5. Examples of a flagrant denial of justice

According to the cases before the judicial bodies of the Council, a situation of flagrant denial of justice occurs when a person convicted *in absentia* is unable subsequently to obtain from a court that has heard him or her, a fresh determination of the merits of the charge, in respect of both law and fact, where it has not been unequivocally established that he or she has waived his or her right to appear and to defend him or herself.<sup>222</sup> The duty to guarantee a criminal defendant the right to be present in the courtroom – either during the original proceedings or in a retrial after he or she emerges – ranks as one of the essential requirements of Article 6 and is deeply entrenched in the provision.<sup>223</sup> It is of capital importance that he or she should appear, both because of his or her right to a hearing and because of the need to verify the accuracy of his or her statements and compare them with those of the victims – whose interests need to be protected – and the witnesses.<sup>224</sup>

## 6. Infringement of the right to respect for private life

There have been several cases before the Court arguing a violation of Article 8 of the European Convention on Human Rights, which ensures the right to private life, concerning expulsion measures against aliens.<sup>225</sup> The Court's case law has established four criteria, in order to affirm the consistency of the state action with the standards of Article 8.

The first criterion is the 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<sup>226</sup> irrespective of the age of the children and of whether they live together or not.<sup>227</sup>

221. *Mamatkulov and Askarov*, cited above, paragraph 90.

222. *Einhorn v. France*, 16 October 2001, paragraph 33.

223. *Stoichkov v. Bulgaria*, 24 March 2005, paragraph 56.

224. *Poitrimol v. France*, 23 November 1993, paragraph 35.

225. Guild, E. and Minderhoud, P. (eds.), *Security of residence and expulsion, protection of aliens in Europe*, Immigration Law and Asylum Policy in Europe, Kluwer Law International, 2001.

226. *Berrehab v. the Netherlands*, 21 June 1988, paragraph 23; *Keegan v. Ireland*, 26 May 1994, paragraph 50; *Irlen v. Germany*, Application No. 12246/86, Commission decision, 13 July 1987, *Decisions and reports* 53, p. 225.

227. *Moustaquim v. Belgium*, 18 February 1991, paragraph 36; and *El Boujaïdi v. France*, 26 March 1992, paragraphs 33-42.

Secondly, there has to be interference with the right to private life; expulsion measures have been considered by the Court as interference with the right.<sup>228</sup> The same would apply to extradition or any kind of deportation that would cause family ties to rupture.

Thirdly, the requirement of the rule of law is essential: 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.<sup>229</sup>

Lastly, interference has to pass the test of proportionality: is the measure founded on a legitimate aim and necessary in a democratic society? Article 8, paragraph 2, articulates the legitimate purpose pursued by the measure: 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.

More specifically, the protection of Article 8 was called upon in the so-called “bad boys” cases, which concerned young individuals who had come to the expelling state and become involved in various criminal activities. The Court established in these cases certain criteria in order to balance the individual’s right to private life and the state’s sovereign discretion to interfere in an exception to the right. It, therefore, reasoned with a certain flexibility, bearing in mind the special circumstances of each case. The factors taken into consideration were factors relating to the interests of the two parties; the nature and the seriousness of the offence; the length of the applicant’s residence in the state; the time that had elapsed between the offence and the expulsion and the individual’s conduct during that period; the nationality of the rest of the family members; the applicant’s family situation and the length of marriage; the existence of the applicant’s children in that state and their age; difficulties that the other family members could face in the country of origin, if they were to follow the individual concerned; links to the country of origin; and ability to speak the language of the country of origin and schooling.

In that respect the Committee of Ministers recommended to states Parties to the European Convention on Extradition, 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 deprivation of liberty. It seems that this recommendation was influenced by the right to respect for family life.<sup>230</sup>

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228. *Amrollahi v. Denmark*, 11 July 2002; *Ciliz v. the Netherlands*, 11 July 2000, paragraph 62; and *Berrehab v. the Netherlands*, 21 June 1988, paragraph 23.

229. *Amuur v. France*, 25 June 1996, paragraph 50; and *Dougoz v. Greece*, 6 March 2001, paragraph 55.

230. Paragraph I, Recommendation No. R (80) 7 concerning the practical application of the European Convention on Extradition, p. 1.

## 7. Risk of being prejudiced

Article 5 of the European Convention on the Suppression of Terrorism stipulates:

“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<sup>231</sup> 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”:<sup>232</sup>

“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.”

It constitutes a continuation of the Committee’s general recommendation to the contracting parties not to extradite a person to a state not party to the Convention, where there are substantial grounds for believing that the request has been made for one of the above-mentioned purposes.<sup>233</sup>

This protective approach concerning the avoidance of prejudice in the requesting state is not founded on the non-discrimination provision of Article 14 of the Convention, which has a special dependent function.<sup>234</sup>

## 8. Right to effectively address the European Court of Human Rights and interim measures

The European system of protection as it operates today – after its modification by Protocol No. 11 – ensures the right of individual petition independently of any declaration by the contracting parties. Individuals enjoy, at the international level, a real ability to assert the rights to which they are directly entitled under the Convention. This new form of the system makes it necessary to examine the effective protection of this independent right, which at the end guarantees the effective protection of all the rights stipulated in the Convention.

Article 34 stipulates the obligation of the states parties not to interfere with the exercise of the right of individuals to present and pursue effectively their complaint before the Court. Provisional measures indicated by the Court under

231. European Convention on the Suppression of Terrorism, 27 January 1977, ETS No. 90.

232. Article 13, paragraph 3.ii, “Guidelines on human rights and the fight against terrorism”.

233. Paragraph 1, Recommendation No. R (80) 9 concerning extradition to states not party to the European Convention on Human Rights.

234. Pettiti, L., Decaux, E. and Imbert, P., *op. cit.*, pp. 475-87.

Article 39 of its Rules allow the Court to examine effectively a case and facilitate the “effective exercise” of the right of individual petition under Article 34. This protection extends to preservation of the subject matter of the application, when it is considered to be at risk of irreparable damage through the acts or omissions of the respondent state. When a state party does not comply with the Court’s interim measures, a violation of Article 34 of the Convention occurs, as such conduct efficaciously impedes the Court from its task.<sup>235</sup> This is why the Committee of Ministers has already advised states parties to comply with the interim measures of the Court, especially when it concerns a request to stay extradition pending a decision on the matter.<sup>236</sup>

More specifically, when the requested state proceeds to extradition contrary to the 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.<sup>237</sup> 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 interim measures order – 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 exists an inter-relationship of responsibility between the two states throughout the execution of the extradition.

For example, the fact that the Russian Federation’s handling of a case affected the effective examination of the applicant’s allegations against Georgia – as examination of part of the case against Russia was not possible – signifies a violation of Article 34 of the Convention.<sup>238</sup> Therefore, Georgia had violated Article 34 because of the interference against the right therein by Russia, and Russia had violated the same article on grounds of impeding its effective exercise against Georgia. This is an example of the attitude of the Court regarding transnational co-operation.

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235. *Chamaïev and Others*, cited above, paragraph 463; and *Mamatkulov and Askarov*, cited above, paragraph 108.

236. Paragraph 2, Recommendation No. R (80) 9 concerning extradition to states not party to the European Convention on Human Rights.

237. *Chamaïev and Others*, cited above, paragraphs 477-78.

238. *Ibid.*, paragraphs 478 and 517.

## II. Other transnational criminal proceedings

### Chapter I: Rights of the individual in other transnational criminal proceedings

The present section focuses on the rights involved in transnational procedures other than the extradition procedure: access to information, a counsel and an interpreter, and the right to be heard. The analysis will be based on a rights-centred structure, not on a proceedings-based structure.

#### 1. Access to information

Article 4 of the Convention on the Transfer of Sentenced Persons<sup>239</sup> concerns transmission of various elements of information during the course of transfer proceedings to the sentenced person, by both the administering state and the sentencing state. The provision applies to three different phases of the procedure: paragraph 1 concerns information on the substance of the convention by the sentencing state to the sentenced person. This is to make the sentenced person aware of the possibilities for transfer offered by the convention and the legal consequences that such a transfer to his or her home country would have. The information will enable him or her to decide whether to express an interest in being transferred. Therefore, the information to be given to the sentenced person must be in a language that he or she understands.<sup>240</sup> Paragraphs 2 to 4 concern information to be furnished by one state to the other, without involving the individual. Paragraph 5 concerns information to be given to the sentenced person on the action or decision taken with regard to a possible transfer. The sentenced person who has expressed an interest in being transferred must be kept informed, in writing, of the follow-up action taken in the case. He or she must, for instance, be told whether the information referred to in paragraph 3 has been sent to their home country, whether a request for transfer has been made and by which state, and whether a decision has been taken on the request.

The European Convention on the International Validity of Criminal Judgments<sup>241</sup> provides for the possibility of executing a sentence in a state other than the one that rendered the sentence. A person convicted *in absentia* in the requesting state has a right to be informed of the decision of the requesting state, when the requested state decides to take action on the request to enforce a judgment of the requesting state.<sup>242</sup>

239. Convention on the Transfer of Sentenced Persons, Strasbourg, 21 March 1983, ETS No. 112.

240. Paragraph 28, "Explanatory report", Convention on the Transfer of Sentenced Persons, Strasbourg, 21 March 1983, ETS No. 112.

241. European Convention on the International Validity of Criminal Judgments, The Hague, 28 May 1970, ETS No. 70.

242. *Ibid.*, Article 23, paragraph 1.

An issue raised in certain conventions is whether the fact that information that is transferred from one contracting state to another concerning the individual should be notified to that person. For example, paragraph 2 of Article 9 of the European Convention on Offences Relating to Cultural Property<sup>243</sup> requires that the letters rogatory should indicate the identity of the person concerned. The European Convention on the Control of the Acquisition and Possession of Firearms by Individuals<sup>244</sup> in Article 8 obliges states parties to notify one another about the identity, the number of the passport or identity card and the address of the person to whom the firearm in question is sold. An exchange of information is provided in the framework of the Convention on Insider Trading;<sup>245</sup> Article 6 states:

“... ”

4. Save to the extent strictly necessary to carry out the request, the requested authority and the persons seeking the information requested are bound to maintain secrecy about the request, the component parts of the request and the information so gathered.
5. However, at the time of the designation of the authority, provided for by Article 4, each Party shall declare the derogations to the principle set forth in paragraph 4 of this article possibly imposed or permitted by national law:
  - either to guarantee free access of citizens to the files of the administration;
  - or when the designated authority is obliged to denounce to other administrative or judicial authorities information communicated or gathered within the framework of the request;
  - or, provided the requesting authority has been informed, to investigate violations of the law of the requested Party or to secure compliance with such law.”

There is no definite answer in the above-mentioned question. Personal data are part of the private life of a person and therefore the person whose data are being processed has to at least have access to the fact and the content of the information. The Schengen Information System concerning personal data protection provides an interesting paradigm.<sup>246</sup>

## **2. Access to a lawyer**

The right of access to a lawyer is not expressly included in the conventions adopted in the framework of the Council of Europe’s criminal justice schemes. However, since these transnational proceedings concern criminal issues, they require the presence and essential involvement of a lawyer for the person concerned. This

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243. European Convention on Offences Relating to Cultural Property, Delphi, 23 June 1985, ETS No. 119.

244. European Convention on the Control of the Acquisition and Possession of Firearms by Individuals, Strasbourg, 28 June 1978, ETS No. 101.

245. Convention on Insider Trading, Strasbourg, 20 April 1989, ETS No. 130.

246. Articles 28-31, Proposal for the regulation to the European Parliament and the Council on the establishment, operation and use of the second generation Schengen Information System (SIS II) by the Commission on 31 May 2005, 2005/0106 (COD), COM (2005) 236 final.

stems from an analogy to the requirement of Article 6 of the European Convention on Human Rights. In any case, if one was to disagree on the similarity of transnational procedures and criminal charge proceedings, this right would still apply on another basis. In extradition proceedings, access to a lawyer is legally required – even though they are not considered covered by Article 6 standards. Extradition proceedings are not covered by Article 6 of the European Convention on Human Rights. However, access to a lawyer is a legal requirement. Since transnational proceedings are of a more intrusive nature in view of the long-term impact that their enforcement has on the individual, they include *a fortiori* the same right (*argumentum ad minori ad majus*).

### **3. Access to an interpreter**

The right to receive information during transnational procedures involves simultaneously the obligation of the state to provide this information in a language that the individual understands; not only in a non-technical manner, but also in a language that the individual understands. This is the case of the Convention on the Transfer of Sentenced Persons.<sup>247</sup> After all, it seems that there is common ground for communication of the person's rights and duties by the state authorities during transnational proceedings, which may not be lower than that afforded by the European Convention on Human Rights. The right to an interpreter even stems from the rule of law and good faith principles.

### **4. Right to an expedient procedure**

In several conventions drafted in the framework of the Council of Europe concerning criminal matters, the right to an expedient procedure is established indirectly – through the procedural obligation of the requested state to answer promptly. This provision takes into consideration the inter-related obligations and responsibility of the involved states.

Article 16 of the European Convention on the Transfer of Proceedings in Criminal Matters stipulates prompt communication of the requested state's decision concerning the individual's case. Articles 9 and 12 of the European Convention on the Supervision of Conditionally Sentenced or Conditionally Released Offenders<sup>248</sup> impose the same obligation of “without delay” information on the part of the requesting state to the requested state on its decision, minimising the time frame of the whole procedure.

Furthermore, the requirement of promptness has its legal foundation in the obligation of non-arbitrariness in the case of an individual's detention, as has been shown in the section concerning the procedural safeguards provided by Article 5 of the European Convention on Human Rights. The Chamaïev case is an interesting

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<sup>247</sup> Paragraph 28, explanatory report, Convention on the Transfer of Sentenced Persons.

<sup>248</sup> European Convention on the Supervision of Conditionally Sentenced or Conditionally Released Offenders, Strasbourg, 30 June 1964, ETS No. 51.

example of the responsibility of both states involved in the transnational procedure.<sup>249</sup>

## **5. Right to be heard**

In several European instruments concerning transnational criminal proceedings, the right of the individual concerned to express his or her opinion, as regards the procedure relevant to him or her, is ensured. There is no habeas corpus remedy afforded in the framework of these instruments. Of course, on the basis of his or her detention, the right to appeal under Article 5, paragraph 4, of the European Convention on Human Rights works as a safety net, affording him or her the right to a remedy regarding detention.

Generally, the right of the individual to be heard is not guaranteed in terms of strict procedure. The right to be heard, as it is understood for the purposes of the present section, constitutes a flexible right, which runs, though, the danger of being superficially applied by the contracting states, exactly because of this lack of precise procedural safeguards.

More specifically, the right is ensured in the European Convention on the Transfer of Proceedings in Criminal Matters.<sup>250</sup> Article 17 requires that the suspect be informed of the request for proceedings against him or her, with a view to allowing him or her to present his view on the matter before the requested state has taken a decision on the request. According to the explanatory report of the convention, the intention behind this requirement is to respect the individual's right to defend himself or herself, since the decision – even when within the province of an administrative authority – is liable to affect the outcome of the criminal proceedings to a very considerable degree.<sup>251</sup> Furthermore, the Committee of Ministers recommended<sup>252</sup> that the contracting parties should:

“interpret Article 17 in a way as to ensure that the suspected person is heard by the requested state, if he is present in its territory or that of a third state, and by the requesting state, whatever the foundation of its competence if he is present in the latter's territory.”

The Convention on the Transfer of Sentenced Persons<sup>253</sup> affords a sentenced person the possibility to be transferred to another contracting state for the purpose of enforcing the sentence. That other state, that is the “administering (of the sentence) state”, is – by virtue of Article 3.1.a – the state of which the sentenced person is a national. The right to be heard in the present convention is twofold; it appears in

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249. *Chamaïev and Others*, cited above, paragraphs 477-478.

250. European Convention on the Transfer of Proceedings in Criminal Matters, Strasbourg, 15 May 1972, ETS No. 73

251. European Convention on the Transfer of Proceedings in Criminal Matters, “Explanatory report”, Article 17, p. 28.

252. Recommendation No. R (79) 12 concerning the application of the European Convention on the Transfer of Proceedings in Criminal Matters.

253. Convention on the Transfer of Sentenced Persons, Strasbourg, 21 March 1983, ETS No. 112.

the form of the consent of the individual for his or her transfer in Article 3, paragraph 1.*d*; and in Article 2, paragraph 2, as far as his or her interest in which state to serve his or her sentence in.

Although the sentenced person may not formally apply for transfer, his or her consent is essential for the transfer mechanism.<sup>254</sup> It follows from Article 2, paragraph 3, that the transfer may be requested only by the requested or the administering state. But, it does not constitute a “tripartite agreement” between the two states and the individual.<sup>255</sup> Nevertheless, Recommendation No. R (84) 11 of the Committee of Ministers, which stipulates that they inform and translate the possibility of being transferred according to the convention to the prisoners, stresses the importance of the consent of the individual. Moreover, in the absence of the rule of speciality in the convention, the right of consent means that the individual will know if further proceedings are pending against him or her in the administering state, and whether in such a case he or she is willing to submit to the proceedings.<sup>256</sup>

Paragraph 3 of Article 2 signifies an important departure from the rule of the European Convention on the International Validity of Criminal Judgments, whereby only the sentencing state is entitled to make the request. It acknowledges the interest that the prisoner’s home country may have in his repatriation for reasons of cultural, religious, family and other social ties. In a way, it stresses and takes into consideration the interests of the nationals who are closely related to the individual concerned.

According to paragraph 2 of Article 2, he or she may express his or her interest in being transferred under the convention, and he or she may do so by addressing himself or herself to either the sentencing state or the administering state. There is, however, no international obligation on the state to react to such an initiative.

In the framework of the European Convention on the International Validity of Criminal Judgments<sup>257</sup> a right to opposition is available. A person sentenced *in absentia* who has had a decision made on the enforcement of his or her sentence in another state has the right to oppose this decision either in the requesting or requested state. The convention, in fact, provides a detailed procedural framework for this right in Articles 24 to 30.

## **6. Double criminality**

The principle of double criminality is an indispensable condition for the enforcement of foreign penal judgments. Otherwise, the detention of the transferred

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254. *Ibid.*, Article 3, paragraph 1.*d*.

255. Epp, H., “Transfer of prisoners, the European convention”, in Bassiouni, C. (ed.), *International criminal law, procedural and enforcement mechanisms*, 2nd edition, Transnational Publishers, 1999, p. 573.

256. *Ibid.*

257. European Convention on the International Validity of Criminal Judgments, The Hague, 28 May 1970, ETS No. 70.

person in the administering state, if the action were not considered an offence, would violate the fundamental rights of the individual, such as Articles 5 and 7 of the European Convention on Human Rights. Even the consent of a prisoner to serve a sentence imposed on him for an action which does not constitute a criminal offence in his state of citizenship, could not overcome the double criminality requirement.<sup>258</sup>

## **Chapter 2: Bars and requirements linked to human rights standards**

The European Convention on the Transfer of Proceedings in Criminal Matters ensures that there is no conflict of obligations for contracting states stemming from itself and the human rights obligations concerning protection from running a risk in the requesting state. Article 11 stipulates:

“Save as provided for in Article 10 the requested state may not refuse acceptance of the request in whole or in part, except in any one or more of the following cases:

...

e. if it considers that there are substantial grounds for believing that the request for proceedings was motivated by considerations of race, religion, nationality or political opinion; ...”.

In any case, the material human rights guarantees stipulated in the European Convention on Human Rights, as explained in the respective section, are binding on the contracting parties when they relate to any action or omission concerning persons that are under their jurisdiction. It therefore provides a safety net in any condition.

In any case, the established case law of the Court concerning the risks run by the deportation of an individual applies to any kind of transfer to another state where he or she runs the risk of a violation of his or her rights under the European Convention on Human Rights.

## **Chapter 3: Transnational proceedings of international criminal tribunals**

As new international criminal judicial fora have been created, new procedures have emerged in the field of criminal enforcement. In the context of transnational proceedings, in cases of surrender and transfer of an accused to an international criminal tribunal,<sup>259</sup> the European system of human rights protection is activated when contracting parties get involved. Firstly, during arrest and surrender and,

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258. Epp, H., op. cit., p. 574.

259. Young, S.N., “Surrendering the accused to the International Criminal Court”, *British Yearbook of International Law*, 2000, pp. 317- 356.

secondly, as far as the fair trial standards afforded under the international tribunal's jurisdiction or other extraterritorial human rights standards, as shown above.

More specifically, the ICC Statute requires domestic courts to determine whether the rights of the arrested person were respected before ordering surrender. Article 55 of the Rome Statute stipulates:

- “1. In respect of an investigation under this Statute, a person:
- a. Shall not be compelled to incriminate himself or herself or to confess guilt;
  - b. Shall not be subjected to any form of coercion, duress or threat, to torture or to any other form of cruel, inhuman or degrading treatment or punishment;
  - c. Shall, if questioned in a language other than a language the person fully understands and speaks, have, free of any cost, the assistance of a competent interpreter and such translations as are necessary to meet the requirements of fairness; and
  - d. Shall not be subjected to arbitrary arrest or detention, and shall not be deprived of his or her liberty except on such grounds and in accordance with such procedures as are established in this Statute.
2. Where there are grounds to believe that a person has committed a crime within the jurisdiction of the Court and that person is about to be questioned either by the Prosecutor, or by national authorities pursuant to a request made under Part 9, that person shall also have the following rights of which he or she shall be informed prior to being questioned:
- a. To be informed, prior to being questioned, that there are grounds to believe that he or she has committed a crime within the jurisdiction of the Court;
  - b. To remain silent, without such silence being a consideration in the determination of guilt or innocence;
  - c. To have legal assistance of the person's choosing, or, if the person does not have legal assistance, to have legal assistance assigned to him or her, in any case where the interests of justice so require, and without payment by the person in any such case if the person does not have sufficient means to pay for it; and
  - d. To be questioned in the presence of counsel unless the person has voluntarily waived his or her right to counsel.”

However, the statute does not refer to the consequences of infringement of the individual's rights before or during surrender. The European Court's case law concerning irregular rendition, as has been shown above, could provide a certain guidance, but the states' obligations under the European Convention on Human Rights are not clear in such cases. Of course, the issue of continuity of proceedings before the ICC will be decided by itself. According to certain commentators the interpretative principle of “effective prosecution” and the notion of “putting an end to the impunity of the perpetrators of these crimes”, both enshrined in the Preamble of the Rome Statute, should cure such a flaw. However, a concern has to be highlighted on this point referring to the accused's presumption of innocence.

A critical issue in these cases of multiple international fora adjudicating on the same matter or inter-related facts is the harmonisation and coherence of their judgments. For example, in cases where the continuity of the proceedings would be infringed according to a judgment of the European Court – for example in a case of breach of sovereignty and a demand for repatriation of the individual unlawfully apprehended – while the ICC or an ad hoc tribunal would conclude the contrary. What would be the solution then? The most optimistic answer would be that the international criminal tribunal would interpret its statute in such a way as to achieve consistency with the human rights standards; but this is at their discretion.

Issues of unlawful arrest and transfer to an international tribunal have been raised in the cases of Todorovic, Nikolic and Krajisnik before the International Criminal Tribunal for the former Yugoslavia (ICTY). The tribunal found itself with a fundamental dilemma; namely, whether to encourage the apprehension of suspects and the bringing to justice of individuals who had engaged in serious crimes, on the one hand; or the safeguard of international legality and fundamental human rights, on the other.<sup>260</sup> It seems that administration of justice considerations have prevailed in the reasoning of the ICTY, which, as mentioned above, poses certain questions concerning the presumption of innocence; an obligation found in Article 6 of the European Convention on Human Rights.

#### **Chapter 4: Transnational *ne bis in idem***

*Ne bis in idem* is considered to be a general principle of international law<sup>261</sup> and stipulates that a person should not be tried twice for the same offence. 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 debarring 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 principle has not been generally recognised. No state, in which a punishable act has been committed, is debarred from prosecuting because the same offence has already been prosecuted in another state.

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260. Lamb, S., “Illegal arrest and the jurisdiction of the ICTY”, in May, R. et al., *Essays on ICTY procedure and evidence in honour of Gabrielle Kirk McDonald*, Kluwer Law International, 2001, pp. 39-40.

261. 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 worldwide, as will be discussed in the next paragraphs, see Kittichaisaree, K., *International criminal law*, 2001, p. 291.

At transnational level, namely in the jurisdiction of international tribunals and the proceedings concerning the transfer and surrender of an accused by a state to them, the principle seems to be well founded,<sup>262</sup> but differentiated in view of the diverse nature and function of the international judicial fora.

A central issue in double jeopardy is the operational purpose of it. What constitutes the “same offence” for the purposes of *ne bis in idem*? The same two approaches that apply in double criminality – that is, one centred on the conduct and the other centred on the wording of the offence definition – also apply here. Does it operate to prevent further prosecution based on the facts that formed the basis of an existing conviction or acquittal (*in concreto* application, based on the identity of conduct) or only further prosecution of the same offence or legal liability (*in abstracto* application, relating to the legal identity of the offences)?<sup>263</sup> But, the approach to be followed has to be clearly established, as it seems to be an inconsistency in the framework of the Council.<sup>264</sup> The international criminal tribunals seem to adopt the *in concreto* approach.<sup>265</sup>

In the absence of express treaty provisions, it is uncertain whether the plea *autrefois acquit*, *autrefois convict* will be a ban on extradition; however, it has been submitted that it has attained the status of customary international law.<sup>266</sup> The European Convention on Human Rights does not guarantee respect for the *ne bis in idem* (or double jeopardy) principle.<sup>267</sup> Protocol No. 7 to the European Convention on Human Rights stipulates in Article 4 the absolute, non-derogable character of the right not to be tried or punished twice under the jurisdiction of the same state.<sup>268</sup>

“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. ...

262. Article 20, Rome Statute of the International Criminal Court, UN Doc. A/CONF. 183/9; Article 10, Statute of the International Criminal Tribunal for the Former Yugoslavia, UN Doc. S/RES/827, 1993; Article 9, Statute of the International Criminal Tribunal for Rwanda, UN Doc S/RES/955, 1994; and Article 9, Statute of the Special Court for Sierra Leone.

263. Conway, G., “*Ne bis in idem* and the international criminal tribunals”, *Criminal Law Forum*, Vol. 14, Kluwer Academic Publishers, 2004, p. 356.

264. *Gradinger v. Austria*, 1994; and *Oliviera v. Switzerland*, 1997.

265. Articles 17 and 20, Rome Statute of the International Criminal Court, UN Doc. A/CONF. 183/9; Article 10, paragraph 1, Statute of the International Criminal Tribunal for the Former Yugoslavia, UN Doc. S/RES/827, 1993; Article 9, paragraph 1, Statute of the International Criminal Tribunal for Rwanda, UN Doc S/RES/955, 1994; Article 9, paragraph 1, Statute of the Special Court for Sierra Leone; *Prosecutor v. Bagasora* (Case No. ICTR-96-7-D), decision, 17 May 1996, paragraph 13; and Conway, G., op. cit., pp. 358-359.

266. Frieland, M.L., op. cit., p. 391.

267. *Gestra v. Italy*, 16 January 1985, p. 89.

268. Article 14, paragraph 7, of the ICCPR also provides for the *ne bis in idem* principle and the Human Rights Committee has interpreted the provision restrictively so as to refer only to multiple prosecutions in the same state: *AP v. Italy* (204/1986), ICCPR, A/43/40, 2 November 1987, paragraph 7.3.

3. No derogation from this article shall be made under Article 15 of the Convention.”

Therefore, neither the European Convention on Human Rights nor its protocols ensure the double jeopardy principle in an international or transnational context.

The European Convention on Extradition explicitly establishes the principle in an international context. According to its Article 9:

“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.”

The provision of the first sentence of the article requires that all means of appeal have been exhausted and that the judgment has acquired *res judicata* status. Certainly, the second paragraph of the article does not apply when new facts or other matters concerning the verdict come to light.<sup>269</sup> This provision corresponds to Article 4, paragraph 2, of Protocol No. 7.

The Additional Protocol to the European Convention on Extradition gives a solution to the case of an individual for whom a final judgment has been rendered in a third state.<sup>270</sup>

But is the same protection afforded to an individual by the requested state, in case of a request for extradition by a state that has already tried the person concerned for the same offence? This case would be covered by the extraterritorial application of Article 4 of Protocol No. 7 to the European Convention on Human Rights; in the sense that the state bound by the protocol would violate it, by extraditing the person to be tried twice for the same offence in the same legal order. This argument refers to the jurisprudence of the Court concerning the extraterritorial application of the Convention, as examined in the relevant section. In the absence of such a restraint stemming from Protocol No. 7, one could claim that such a case would constitute a risk of flagrant denial of justice in the requesting state, as has been shown above.

In a recent judgment concerning the trial *in absentia* by French Courts of a German national, in favour of whom a final discharge order had been made in Germany, the Court did not examine the international aspect *per se* of the procedure. It ruled on the fair trial rights of the applicant relating to the *in absentia* proceedings in France. The Court ruled that the domestic courts should have permitted the applicant’s

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269. Article 9, explanatory report, European Convention on Extradition; and reservations of Malta, Moldova and Switzerland to the European Convention on Extradition. The same has been supported in the framework of the ICCPR: general comment on Article 14, paragraph 7, UN Human Rights Committee, General Comment 13/21, paragraph 19; and even though it has been criticised by activists: Tansey, R., “The rule against double jeopardy – *Nemo debet bis vexari pro eadem causa*”, in Anagnostopoulos, I.G. (ed.), *Internationalisierung des Strafrechts*, Nomos Verlagsgesellschaft, Baden-Baden, 2003, pp. 115-129.

270. Chapter II, Additional Protocol to the European Convention on Extradition.

lawyers, who were present at the hearing – he did not present himself, although he had been properly summoned – to put forward the defence case, as the argument they intended to rely on concerned a point of law, namely an objection on public policy grounds based on an estoppel *per rem judicatam* and the *non bis in idem* rule, applied at international level<sup>271</sup> (the accused had been acquitted in Germany). It did not mention in its reasoning the European Convention on Extradition. However, it may be inferred from this ruling that it considers the double jeopardy principle deeply rooted in the European system of protection concerning justice, even in its international context.

The European Convention on the Transfer of Proceedings in Criminal Matters<sup>272</sup> is the most relevant instrument to the *ne bis in idem* principle. It prohibits the requested state from executing the request to take proceedings against an individual, if it is contrary to the principle of *ne bis in idem* in its international dimension. According to Article 10 of the convention:

“The requested state shall not take action on the request:

...

b. if the institution of proceedings is contrary to the provisions of Article 35; ...”.

Article 35 of the convention defines the *ne bis in idem* principle in the framework of transfer proceedings and for the purpose of its functioning:

- “1. A person in respect of whom a final and enforceable criminal judgment has been rendered may for the same act neither be prosecuted nor sentenced nor subjected to enforcement of a sanction in another Contracting State:
  - a. if he was acquitted;
  - b. if the sanction imposed:
    - i. has been completely enforced or is being enforced, or
    - ii. has been wholly, or with respect to the part not enforced, the subject of a pardon or an amnesty, or
    - iii. can no longer be enforced because of lapse of time;
  - c. if the court convicted the offender without imposing a sanction.
2. Nevertheless, a Contracting State shall not, unless it has itself requested the proceedings, be obliged to recognise the effect of *ne bis in idem* if the act which gave rise to the judgment was directed against either a person or an institution or any thing having public status in that state, or if the subject of the judgment had himself a public status in that state.
3. Furthermore, a Contracting State where the act was committed or considered as such according to the law of that state shall not be obliged to recognise the effect of *ne bis in idem* unless that state has itself requested the proceedings.”

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271. *Krombach v. France*, 13 May 2001, paragraph 90.

272. European Convention on the Transfer of Proceedings in Criminal Matters, Strasbourg, 15 May 1972, ETS No. 73.

Therefore, *ne bis in idem* does not apply to the state where the offence has been committed or to the state that has a special interest in the suppression of the crime, according to paragraphs 2 and 3. For those cases, a supplementary rule has been laid down; any period of deprivation of liberty already served in one contracting state as part of the enforcement of a sanction shall be deducted from the sanction that may be imposed in another contracting state (Article 36). The same provisions are adopted by the European Convention on Offences Relating to Cultural Property.<sup>273</sup> One should not forget, though, that according to Appendix I of the criminal proceedings convention, there is a possibility to make a reservation to this section.

The Convention on the Transfer of Sentenced Persons also includes a provision concerning *ne bis in idem* regarding the enforcement of a sentence after the transfer has been effected. Article 8 ensures that the sentencing state is prevented from enforcing the sentence if the administering state considers enforcement of the sentence to have been completed.<sup>274</sup>

The European Convention on the Punishment of Road Traffic Offences<sup>275</sup> bars the state of residence from enforcing a penalty imposed in the state of the offence, in respect of an offence committed in that state on the ground of the *ne bis in idem* rule. In addition, the Agreement on Illicit Traffic by Sea, Implementing Article 17 of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances<sup>276</sup> involves the issue of preferential jurisdiction, providing in this way a measure to prevent double jeopardy problems between the contracting states.

It is worth noting that the *ne bis in idem* principle relates to the issue of choice of forum. Because of the effects of double jeopardy, there has to be a careful choice of jurisdiction. Which legal order is, therefore, the appropriate one to block all other jurisdictions and exercise its own over the person concerned? The state where the person concerned is apprehended by chance may not be the most convincing legal basis for prosecution; solid criteria of “jurisdictional quality” might need to be adopted. Criteria are not only related to jurisdictional bonds, such as territoriality, and passive or active nationality; they are also attached to the interests of the prosecution, of criminal justice in general, meaning the bringing of the accused to justice, and the individual involved.<sup>277</sup> In this sense, they have to do, for example, with the location of the most important evidence, and also with the dom-

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273. Article 17, European Convention on Offences Relating to Cultural Property.

274. Article 8, paragraph 2, Convention on the Transfer of Sentenced Persons.

275. European Convention on the Punishment of Road Traffic Offences, Strasbourg, 30 June 1964, ETS No. 52.

276. Agreement on Illicit Traffic by Sea, Implementing Article 17 of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, Strasbourg, 31 January 1995, ETS No. 156.

277. Ladogny, O., “The legal protection of the accused from a comparative view”, p. 46, Committee of Experts on Transnational Criminal Justice, 2nd meeting, 31 January-2 February 2005, European Committee on Crime Problems.

iciple of the person involved, who must have the possibility to address a court in view of the effects that a criminal charge may have in the long run.

In the integrated framework of the European Union, the Schengen Agreement introduces the application of the *ne bis in idem* principle (Articles 54-58). More specifically, Article 54 of the Schengen Agreement defines the *ne bis in idem* principle in a transnational context:

“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 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.”

It is important to address the issue of transnational transfer proceedings to an international tribunal and its implications for the duty of the member states of the Council of Europe stemming from the principle of *ne bis in idem*. As far as the international criminal tribunals are concerned, there seems to be a difference of application of the principle depending on the statute provisions of each one of them. The two ad hoc tribunals (ICTY and ICTR) are provided with broad exceptions to challenge the judgments of national courts, while the latter are absolutely barred from retrying cases decided by the tribunals. Additionally, they are under no obligation to respect the penalties previously imposed by national courts. These procedural constructions reflect the relationship of the tribunals with the national courts; namely, one of primacy.<sup>278</sup>

On the other hand, the ICC works on the principle of complementarity as far as national jurisdictions are concerned.<sup>279</sup> Article 20 of the Rome Statute introduces the *ne bis in idem* principle at three levels; as it applies to the court's own decisions (paragraph 1), where it affirms the prohibition of retrial of a person by the court for the same conduct, giving priority to the conduct-centred approach. Article 81 of the statute adopts the rule that the *ne bis in idem* principle does not apply until all appeals are exhausted. Furthermore, as it applies to national courts after a decision by the court (paragraph 2). In that respect the statute introduces the notion of the same “crime”, not conduct. The result of this provision is that national courts may prosecute individuals for national crimes outside the ICC's jurisdiction for the same conduct without even applying the principle of deduction, meaning that they may be sentenced without taking into account the sentences previously served for the same conduct. Lastly, as it applies to the ICC for the decisions of national courts. Paragraph 3 of Article 20 reads:

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278. Article 9, Statute of the International Criminal Tribunal for the Former Yugoslavia; Article 8, Statute of the International Criminal Tribunal for Rwanda; Article 8, Statute of the Special Court for Sierra Leone; and Brown, B.S., “Primacy or complementarity: reconciling the jurisdiction of national courts and international criminal tribunals”, *Yale Journal of International Law*, Vol. 23, 1998, pp. 384-436.

279. Articles 13 and 17, Rome Statute of the International Criminal Court; and Holmes, J.T., “The principle of complementarity”, in Lee, R.S. (ed.), *The International Criminal Court: the making of the Rome Statute – Issues, negotiations, results*, 1999.

- “3. No person who has been tried by another court for conduct also proscribed under Articles 6, 7 or 8 shall be tried by the Court with respect to the same conduct unless the proceedings in the other court:
- a. Were for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court; or
  - b. Otherwise were not conducted independently or impartially in accordance with the norms of due process recognized by international law and were conducted in a manner which, in the circumstances, was inconsistent with an intent to bring the person concerned to justice.”

The ICC Statute contemplates the accused challenging his or her surrender in the national courts on the basis of *ne bis in idem*. National courts are required to defer the issue until the ICC has decided on the admissibility of the case, prior to surrender.<sup>280</sup>

In conclusion, there is no general binding rule concerning double jeopardy in the context of international and transnational procedures as far as the Council of Europe is concerned, and in the framework of international law in general. The Council has drafted and opened for signature several international instruments that include the principle, but at the same time it has given the signatory parties the possibility to make reservations on the respective articles, minimising the principle’s force. However, there seems to be a growing tendency at the Court to assert the involvement of the principle in international proceedings of criminal interest.

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280. Article 89, paragraph 2, Rome Statute of the International Criminal Court.

### III. Victims and witnesses in transnational criminal proceedings

#### Chapter 1: Protection of victims in transnational criminal proceedings

The notion of victim differs in each national legal order. Moreover, a distinction must be drawn between the notion of victim used at the national level and that in the context of the European Convention on Human Rights. The second one is independent of the criteria that regulate the locus standi at national level.<sup>281</sup> It refers to victims of violations of rights guaranteed by the Convention and is based on the fulfilment of the requirements set out in its Article 34 and the jurisprudence of the Commission and the Court.<sup>282</sup>

The Council of Europe has endeavoured to unify, through the adoption of international conventions or documents, the protection afforded to victims of criminal law offences; through this procedure it has also unified the notion of “victim”.

In the present section the protection afforded to the victims of criminal offences will be analysed through a rights-centred approach. The comparative study of the instruments adopted in the framework of the Council leads to the conclusion of minimum standards of protection; the right to be informed, which has two dimensions; the right to compensation and legal redress, which includes also the right to participate and be assisted in proceedings; and the right to confidentiality and consideration of the vulnerable situation of the victim.

#### 1. The right to be informed

##### *a. of the rights adhering to the status of victim*

This right is first found in a relevant recommendation of the Committee of Ministers;<sup>283</sup> it affirms the right of the victim to be informed by the police authorities of the possibilities of obtaining assistance, legal advice, and compensation from the offender and state compensation. According to Article 11 of the European Convention on the Compensation of Victims of Violent Crimes<sup>284</sup> the victim has the right to information about the compensation scheme that is available, according to the provisions of the convention, to potential applicants.

Article 12 of the recently adopted Council of Europe Convention on Action against Trafficking in Human Beings stipulates the need for appropriate translation and

281. *Norris v. the United Kingdom*.

282. *Deweer v. the United Kingdom*; and *Modynos v. Cyprus*.

283. Recommendation No. R (85) 11 on the position of the victim in the framework of criminal law and procedure.

284. European Convention on the Compensation of Victims of Violent Crimes, Strasbourg, 24 June 1983, ETS No. 116.

interpretation services; and information, in particular as regards their legal rights and the services available to them, in a language that they can understand.

*b. of the course of the criminal proceedings*

The right to be informed of the course of the proceedings begins with the outcome of the police investigation<sup>285</sup> and covers the proceedings up to the outcome of the courts' decision.<sup>286</sup> However, since the victim may be compensated by the state he or she has to be also informed of the enforcement of the sanction imposed on the offender.

Both forms of the right to be informed ensure the established right to legal redress and compensation; they constitute the prerequisites, in order for the victim to effectively enjoy and exercise his or her rights.

## **2. The right to legal redress and compensation**

The European Convention on the Compensation of Victims of Violent Crimes<sup>287</sup> defines eligibility for protection. The right of the victim to physical, psychological and social recovery also includes the right to assistance from the authorities to enable their rights and interests to be presented and considered at appropriate stages of criminal proceedings against offenders.<sup>288</sup> Moreover, the right to ask for a review by a competent authority of a decision not to prosecute, or the right to institute private proceedings, guarantees the right to standing of the victim.<sup>289</sup> If, in proceedings against offenders, the criminal courts are not empowered to determine civil liability, it must be possible for the victims to submit their claims to civil courts with jurisdiction in the matter and powers to award damages with interest.<sup>290</sup>

Article 15 of the trafficking convention explicitly stipulates:

- “1. Each Party shall ensure that victims have access, as from their first contact with the competent authorities, to information on relevant judicial and administrative proceedings in a language which they can understand.
2. Each Party shall provide, in its internal law, for the right to legal assistance and to free legal aid for victims under the conditions provided by its internal law.

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285. Paragraph I.A.1, Recommendation No. R (85) 11 on the position of the victim in the framework of criminal law and procedure.

286. *Ibid.*, paragraph I.D.9.

287/288. European Convention on the Compensation of Victims of Violent Crimes, Strasbourg, 24 June 1983, ETS No. 116.

288. Article 12, paragraph 1.e, Council of Europe Convention on Action against Trafficking in Human Beings, Warsaw, 16 May 2005, ETS No. 197.

289. Paragraph I.B.7, Recommendation No. R (85) 11 on the position of the victim in the framework of criminal law and procedure.

290. Paragraph 197, explanatory report, Council of Europe Convention on Action against Trafficking in Human Beings.

3. Each Party shall provide, in its internal law, for the right of victims to compensation from the perpetrators.
4. Each Party shall adopt such legislative or other measures as may be necessary to guarantee compensation for victims in accordance with the conditions under its internal law, for instance through the establishment of a fund for victim compensation or measures or programmes aimed at social assistance and social integration of victims ...”.

Reference is made to “court and administrative proceedings” so as to take into account the diversity of national systems. For example, compensation of victims can be a matter for the courts (whether civil or criminal) or sometimes for administrative authorities with special responsibility for compensating victims of offences. In the case of illegally present victims eligible for a residence permit under Article 14, information about the procedure for obtaining the permit is likewise essential. Traditionally, granting of residence permits is an administrative matter but there may also be judicial review by means of appeal to the courts. It is important that victims be informed of all relevant procedures.<sup>291</sup>

Even though Article 6, paragraph 3.c, of the European Convention on Human Rights provides for free assistance from an officially appointed lawyer in criminal proceedings, the Court recognises, in certain circumstances, the right to free legal assistance in a civil matter on the basis of Article 6, paragraph 1, of the Convention.<sup>292</sup> Taking into account the complexity of the proceedings, even in the absence of legislation granting free legal assistance in civil matters, it is for the national courts to assess whether, in the interests of justice, an applicant who is without financial means should be granted legal assistance if unable to afford a lawyer.

In a transnational framework, it is interesting that Article 27 of the trafficking convention stipulates that:

- “2. Each Party shall ensure that victims of an offence in the territory of a Party other than the one where they reside may make a complaint before the competent authorities of their state of residence. The competent authority to which the complaint is made, insofar as it does not itself have competence in this respect, shall transmit it without delay to the competent authority of the Party in the territory in which the offence was committed. The complaint shall be dealt with in accordance with the internal law of the Party in which the offence was committed. ...”.

It is modelled on Article 11(2) of the European Union Council Framework Decision of 15 March 2001 on the standing of victims in criminal proceedings.<sup>293</sup> Its purpose is to make it easier for a victim to complain by allowing him or her to lodge the complaint with the competent authorities of his or her state of residence. If the competent authority with which the complaint has been lodged decides that it does

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291. Paragraph 193, explanatory report, Council of Europe Convention on Action against Trafficking in Human Beings.

292. *Airey v. Ireland*, 9 October 1979.

293. European Union Council Framework Decision of 15 March 2001 on the standing of victims in criminal proceedings, 15 March 2001.

not itself have jurisdiction in the matter, then it must forward the complaint without delay to the competent authority of the party in whose territory the offence was committed. The obligation in Article 27(2) is an obligation merely to forward the complaint to that competent authority and does not place any obligation on the state of residence to institute an investigation or proceedings.

It is highly interesting that the recent instruments involving criminal matters have introduced the possibility for legal persons, groups, foundations and non-governmental organisations to participate in criminal proceedings. The status of these legal persons is elevated; in the trafficking convention they are not provided with *locus standi* as such, but with the consent of the victim they may assist and support it during the proceedings. The Convention on the Protection of the Environment through Criminal Law,<sup>294</sup> though, goes further introducing their right to participate in criminal proceedings. However, the applicability of the provision depends on a declaration of the contracting state.

The European Convention on the Compensation of Victims of Violent Crimes provides for compensation by the contracting states. Article 2 refers to the direct victim in the event of serious bodily injury or damage to health, and the dependants of persons who have died as a result of a violent crime – the indirect victims, who will be further specified by the contracting parties according to their national legislation.<sup>295</sup>

In the framework of the convention, the award of compensation by the states functions according to the complementarity principle. States are to award compensation when no other means are fully available to the victims and they may, therefore, subrogate in the victims' claims. The minimum standard of compensation includes loss of earnings, medical and hospitalisation expenses and funeral expenses, and, as regards dependants, loss of maintenance (Article 4). It has to be underlined that the adoption of a compensation scheme asserts by itself the right of victims to compensation firstly against the offender.

Moreover, there are certain factors that negatively influence the amount of compensation: the applicant's financial situation; the victim's conduct before, during and after the crime or in relation to the injury or death; his or her involvement in organised crime or his membership of an organisation which engages in crimes of violence; the compatibility of an award with a sense of justice or public policy (*ordre public*); and any amount of money received, as a consequence of the injury or death, from the offender, social security or insurance, or any other source. According to Resolution (77) 27 of the Committee of Ministers,<sup>296</sup> which was adopted prior to the convention, the principle of complementarity to compensation awarded by the states should be the "fullest and fairest possible", taking into account the nature and the consequences of the injury.

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294. Article 11, Convention on the Protection of the Environment through Criminal Law.

295. Paragraph 20, explanatory report, European Convention on the Compensation of Victims of Violent Crimes.

296. Resolution (77) 27 on the compensation of victims of crime.

This framework has also been adopted by the European Union; the scheme introduced by the EU is more detailed in its organisation and structure ensuring “fair and appropriate compensation”.<sup>297</sup>

### **3. The right to confidentiality and consideration of the victim’s vulnerable situation**

The European legislator has taken into account the special nature of sexual crimes and has strengthened the protection of victims against publicity and disregard of their special situation. Throughout the judicial and administrative proceedings, states must ensure confidentiality of record and the respect for privacy rights of children and young adults who have been victims of sexual exploitation, by avoiding the disclosure of information that could lead to their identification.<sup>298</sup> Moreover, during the hearings there have to be special conditions that will assist the administration of justice involving children, who are victims or witnesses, but at the same time respect their vulnerable mental situation.<sup>299</sup>

Article 13 of the trafficking convention stipulates a recovery period – from the influence of the offenders – of at least thirty days, in order to allow the person concerned to recover and escape the influence of traffickers and/or to take an informed decision on co-operating with the competent authorities. During this period it is not possible to enforce any expulsion order against him or her.

Article 30 of the above-mentioned convention provides that:

“In accordance with the Convention for the Protection of Human Rights and Fundamental Freedoms, in particular Article 6, each Party shall adopt such legislative or other measures as may be necessary to ensure in the course of judicial proceedings:

- a. the protection of victims’ private life and, where appropriate, identity;
- b. victims’ safety and protection from intimidation ...”.

Measures must comply with Article 6 of the European Convention on Human Rights; a balance has to be struck between defence rights and the interests of victims and witnesses.<sup>300</sup> After all, the appearance of the criminal defendant is of capital importance, both because of the right of the latter to a hearing and because of the need to verify the accuracy of his statements and compare them with those of the victim – whose interests need to be protected.<sup>301</sup>

The detailed analysis of the protective status of the victims during proceedings is closely related to that of the witnesses, all the more so where a victim is also used

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297. Council Directive relating to Compensation to Crime Victims, 2004/80/EC, 29 May 2004.

298. General measures, d, 13, Recommendation No. R (91) 11 concerning sexual exploitation, pornography and prostitution of, and trafficking in, children and young adults, adopted by the Committee of Ministers on 9 September 1991, at the 461st meeting of the Ministers’ Deputies.

299. *Ibid.*, General measures, d, 14.

300. *Doorson v. the Netherlands*, 26 March 1996, paragraph 70.

301. *Stoichkov v. Bulgaria*, 24 March 2005, paragraph 55.

as a witness in the proceedings. Therefore, this issue will be examined in depth in the section below.

## **Chapter 2: Protection of witnesses**

For the purpose of the present analysis it is necessary to define the notion of “witness”. According to Recommendation No. R (97) 13 of the Committee of Ministers it means a person, irrespective of his or her status under national criminal law, who possesses information relevant to criminal proceedings. This definition also includes experts and interpreters.<sup>302</sup> The trafficking convention also includes within it, the notion of whistle-blowers and informers.<sup>303</sup>

The reasoning of the Council of Europe, as far as the protection of witnesses and victims is concerned, is oriented towards a continuing effort to balance the civic duty to give testimony as a witness and the right to be protected from any personal risk. From another point of view, during criminal proceedings, the right to defence and the right to privacy and personal safety need to be balanced.<sup>304</sup> The burden is not on the witness;<sup>305</sup> states have an obligation to ensure special protection in view of the special conditions and dangers that a witness may face. Comprehensive guidance on this issue was given in Recommendation No. R (97) 13 of the Committee of Ministers. The drafters of the trafficking convention seem to have been significantly influenced by this recommendation.

Victims and witnesses commonly risk retaliation and intimidation during and after the investigation and the prosecution. “Effective and appropriate protection” has to be granted by the contracting states<sup>306</sup> with the consent of the person concerned.<sup>307</sup> This may include physical protection, relocation, change of identity and assistance in obtaining jobs. It refers to the need to adapt the level and period of protection to the threats to victims, collaborators with the judicial authorities, witnesses, informers and, when necessary, members of such persons’ families. In fact, the trafficking convention establishes an obligation on the parties to ensure appropriate protection to NGO members, in particular physical protection, when necessary.

In the era of transnational crime, the response to such challenges has to be well organised and transnational as well; therefore, states may need to afford protection

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302. Appendix to Recommendation No. R (97) 13 concerning intimidation of witnesses and the rights of the defence, adopted by the Committee of Ministers on 10 September 1997 at the 600th meeting of the Ministers’ Deputies.

303. Paragraph 284, explanatory report, Council of Europe Convention on Action against Trafficking in Human Beings.

304. *Doorson*, cited above, paragraph 70.

305. Recommendation No. R (97) 13 concerning intimidation of witnesses and the rights of the defence.

306. Article 28, Council of Europe Convention on Action against Trafficking in Human Beings.

307. Paragraph 289, explanatory report, Council of Europe Convention on Action against Trafficking in Human Beings.

by transferring witnesses to the territory of another state.<sup>308</sup> In these cases, modern means of telecommunications, which facilitate simultaneous examination of witnesses and the rights of the defence, may be called for.<sup>309</sup>

However, there is no unified legislation in the member states of the Council of Europe concerning witnesses' examination during criminal proceedings. The main guidelines, therefore, are to be found in the European Convention on Human Rights and its interpretation by the Council's bodies.

Article 6 does not explicitly require the interests of witnesses in general, and those of victims called upon to testify in particular, to be taken into consideration. However, their life, liberty, security of person and interests stemming from Article 8 of the Convention may be at stake. This means that member states are under a duty to organise their legal system in such a way as to effectively safeguard all the Convention rights, and in any case not to put them in unreasonable danger.

### **1. Non-public hearings**

Article 6, paragraph 1, of the Convention states that:

“... the press and public may be excluded from all or part of the trial in the interests of morals ... 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. Audiovisual technology and recordings of testimony**

Admissibility of evidence in the European system of human rights protection is left to the national judicial authorities.<sup>310</sup> The Court's role is to examine whether the proceedings as a whole, including the way in which evidence was taken according to national law, were fair.

As stated above, means that avoid the traumatising of the victim, who participates in the proceedings as a witness, especially in sexual crimes or in cases where children are involved, are called for. This is, moreover, affirmed by:

- paragraph 6, Recommendation No. R (97) 13 of the Committee of Ministers concerning intimidation of witnesses and the rights of the defence;
- Article A.8, European Union Council Resolution on the protection of witnesses in the fight against international organised crime of 23 November 1995;

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308. Appendix V, Recommendation No. R (97) 13 concerning intimidation of witnesses and the rights of the defence; and paragraph 291, explanatory report, Council of Europe Convention on Action against Trafficking in Human Beings.

309. Appendix V, Recommendation No. R (97) 13 concerning intimidation of witnesses and the rights of the defence.

310. *Schenk v. Switzerland*, 12 July 1988; and *Barberà, Messegué and Jabardo v. Spain*, 6 December 1988.

– Article 24, United Nations Convention against Transnational Organised Crime.

The Court has interpreted Article 6, paragraph 3.d, so as to allow exceptions from questions being put directly by the accused or his or her defence counsel, through cross-examination or by other means depending on the circumstances of the case.<sup>311</sup>

### **3. Anonymous testimony**

According to the United Nations Recommended Principles on Human Rights and Trafficking in Human Beings:

“There should be no public disclosure of the identity of trafficking victims and their privacy should be respected and protected to the extent possible, while taking into account the right of any accused person to a fair trial.”

The European Court has ruled that the European Convention on Human Rights does not preclude reliance on anonymous sources; these, however, do not constitute by themselves sufficient evidence to secure a conviction,<sup>312</sup> even though there have been judgments that have accepted it.<sup>313</sup> In any case the use of this measure has to be justified by the circumstances of the particular case.<sup>314</sup> The Court has accepted the use of anonymous testimony even in the absence of any specific threats made by the defendant.<sup>315</sup>

A further issue raised in this framework is the assessment by the competent courts of the credibility of an anonymous witness. Such information must indicate how reliable and credible the witness is and why he or she wishes to remain anonymous.<sup>316</sup> In any case, as underlined above, a conviction should not be based either solely or to a decisive extent on anonymous statements.<sup>317</sup> In addition, while evidence must, as a rule, be produced before the accused in a public hearing with a view to adversarial debate, there are some exceptions, provided that measures are taken to counterbalance the handicaps to the defence.

In the framework of the European system of human rights protection, the witness taking part in criminal proceedings enjoys a special status of protection. The exceptional circumstances, under which he or she will live in view of possible retaliation, demand this special treatment. On the other hand, this special status may not thwart the rights of the accused to a fair trial. One has to strike a balance between the two interests. The Court’s case law has accepted special protection schemes during criminal proceedings, in as far as they are not contrary to Article 6

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311. *S.N. v. Sweden*, 2 July 2002.

312. *Kostovski v. the Netherlands*, 20 November 1989, paragraph 44; and *Doorson v. the Netherlands*, 26 March 1996, paragraph 69.

313. *Van Mechelen and Others v. the Netherlands*, 23 April 1997, paragraph 52; and *Doorson*, cited above, paragraph 69.

314. *Kork v. the Netherlands*, 4 July 2000, p. 655.

315. *Doorson*, cited above, paragraph 71.

316. *Van Mechelen and Others*, cited above, paragraph 62; and *Doorson*, cited above, paragraph 73.

317. *Doorson*, cited above, paragraph 76.

of the European Convention on Human Rights. However, this interpretation is narrow and does not allow a broad margin of exceptional measures.

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## **Part III**

### **Council of Europe resolutions and recommendations on extradition**



**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 occur-

ring 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.

**Resolution (78) 43 of the Committee of Ministers  
to member states on reservations made to certain provisions  
of the European Convention on Extradition<sup>318</sup>**

*(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.

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318. This resolution replaces Resolution (78) 30 of 11 May 1978.

**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 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,

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.

**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 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.

**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.

**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.

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