INTERNATIONAL COOPERATION IN CRIMINAL MATTERS IN THE CASE-LAW OF THE EUROPEAN COURT OF HUMAN RIGHTS

INTRODUCTION

International Cooperation in Criminal Matters is essential for effectively combating cross-border and transnational crime, upholding justice and the rule of law, addressing emerging criminal threats, and safeguarding the human rights of both victims and the accused.

Since its founding over fifty years ago, the Council of Europe has developed a series of treaties that provide a common framework for co-operation in criminal matters across Europe and, in some cases, beyond.

These treaties cover cooperation mechanisms such as Mutual Legal Assistance (CETS 030) and its Additional Protocols (CETS 099 and 182), Transfer of Sentenced Persons (CETS 112) and its Additional Protocols (CETS 167 and 222), International Validity of Criminal Judgments (CETS 070), Transfer of Proceedings in Criminal Matters (CETS 073) and Extradition (CETS 024) and its Additional Protocols (CETS 086, 098, 209 and 212). They address specific types of crime that frequently have a cross-border dimension, including organized crime, terrorism, and cybercrime.

The Council of Europe's Committee of Experts on the Operation of European Conventions on Co-operation in Criminal Matters (PC-OC) is the forum in which, since 1981, experts from all member and observer states along with relevant organisations come together to elaborate ways to improve international co-operation in criminal matters and identify solutions to practical problems encountered in the application of Council of Europe Conventions in this field. The PC-OC is one of the main sub-committees of the European Committee on Crime Problems (CDPC) that oversees and coordinates the Council of Europe's activities in the field of criminal law, crime prevention and crime control.

The present note/guide is designed to assist legal professionals engaged in international co-operation on criminal matters by offering them a topic-specific overview of relevant case law of the European Court of Human Rights that have shaped the legal landscape of international cooperation in criminal matters in respect of the international treaties on international cooperation mentioned above. Relevant links to ECHR cases are included.

MUTUAL LEGAL ASSISTANCE

A. Right to Life under Article 2 of the Convention

Article 2 of the European Convention on Human Rights Right to life 1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.

2. Deprivation of life shall not be regarded as inflicted in contravention of this Article when it results from the use of force which is no more than absolutely necessary:
(a) in defence of any person from unlawful violence;
(b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;
(c) in action lawfully taken for the purpose of quelling a riot or insurrection.

Article 2 is a fundamental provision of the Convention, protecting the right to life. It imposes on states both negative obligations (to refrain from unlawfully taking lives) and positive obligations (to take appropriate steps to protect lives).

The latter obligations are relevant in the context of Mutual Legal Assistance and they imply conducting effective investigations into deaths and ensuring justice is served even when a crime concerns multiple jurisdictions, necessitating cross-border cooperation between states.

ECHR judgment in the case of Rantsev v. Cyprus and Russia (2010)

Facts: The applicant's daughter Ms Rantseva, a Russian national, died in unexplained circumstances after falling from a window of a private property in Cyprus in March 2001. She had arrived in Cyprus a few days earlier on a "cabaret-artiste" visa but had abandoned her work and lodging shortly after starting and had left a note to say she wanted to return to Russia. After locating her in a discotheque some days later, the manager of the cabaret had taken her to the central police station at around 4 a.m. and asked them to detain her as an illegal immigrant. The police had contacted the immigration authorities, who gave instructions that Ms Rantseva was not to be detained and that her employer, who was responsible for her, was to pick her up and bring her to the immigration office at 7 a.m. The manager had collected Ms Rantseva at around 5.20 a.m. and taken her to private premises, where he had also remained. Her body had been found in the street below the apartment at about 6.30 a.m. A bedspread had been looped through the railing of the balcony.
An inquest held in Cyprus concluded that Ms Rantseva had died in circumstances resembling an accident while attempting to escape from an apartment in which she was a guest, but that there was no evidence of foul play. Although the Russian authorities considered, in the light of a further autopsy that was carried out following the repatriation of the body to Russia, that the verdict of the inquest was unsatisfactory, the Cypriot authorities stated that it was final and refused to carry out any additional investigation unless the Russian authorities had evidence of criminal activity. No steps were taken by either the Russian or Cypriot authorities to interview two young women living in Russia whom the applicant said had worked with his daughter at the cabaret and could testify to sexual exploitation taking place there.

Allegations: Relying, *inter alia*, on Article 2 of the Convention (right to life), the applicant complained of the failure of the Cypriot authorities to take steps to protect the life of his daughter and the failure of the authorities of both Cyprus and Russia to conduct an effective investigation into her death.

Decision: The Court, in its judgement and considering Article 2 (Right to life), found that, as regards Cyprus, the chain of events leading to Ms Rantseva's death could not have been foreseen by the Cypriot authorities and, in the circumstances, they had therefore no obligation to take practical measures to prevent a risk to her life. However, the Court considered that a number of flaws had occurred in the investigation carried out by the Cypriot authorities and that, there had therefore been a violation of Article 2 as a result of the failure of the Cypriot authorities to investigate effectively Ms Rantseva's death.

As regards the Russian Federation, the Court concluded that it had not violated Article 2 as the Russian authorities were not obliged themselves to investigate Ms Rantseva's death, which had occurred outside their jurisdiction. The Court emphasised that the Russian authorities had requested several times that Cyprus carry out additional investigation and had cooperated with the Cypriot authorities.

Specific paragraph highlighted: "241. Finally, for an investigation into a death to be effective, member States must take such steps as are necessary and available in order to secure relevant evidence, whether or not it is located in the territory of the investigating State. The Court observes that both Cyprus and Russia are parties to the Mutual Assistance Convention and have, in addition, concluded the bilateral Legal Assistance Treaty (see paragraphs 175 to 185 above). These instruments set out a clear procedure by which the Cypriot authorities could have sought assistance from Russia in investigating the circumstances of Ms Rantseva's stay in Cyprus and her subsequent death. The Prosecutor General of the Russian Federation provided an unsolicited undertaking that Russia would assist in any request for legal assistance by Cyprus aimed at the collection of further evidence (see paragraph 70 above). However, there is no evidence that the Cypriot authorities sought any legal assistance from Russia in the context of their investigation. In the circumstances, the Court finds the Cypriot authorities' refusal to make a legal assistance request to obtain the testimony of the two Russian women who worked with Ms Rantseva at the cabaret particularly unfortunate given the value of such testimony in helping to clarify matters which were central to the investigation..."

As a general rule, the procedural obligation falls on the Contracting State under whose jurisdiction the victim was at the time of death (*Emin and Others v. Cyprus, Greece and the United Kingdom* (dec.), 2010), unless there are special features which require a departure from this general approach (*Rantsev v. Cyprus and Russia*, 2010, §§ 241-242). In this context, the Court dismissed Mr Rantsev's complaint to the effect that the Russian authorities should have proceeded to interview two witnesses located in the Russian Federation notwithstanding any request from the Cypriot authorities. It found that there was no free-standing obligation incumbent on the Russian authorities under Article 2 of the Convention to investigate Ms Rantseva's death and concluded that, in the absence of a legal assistance request, the Russian authorities were not required under Article 2 of the Convention to secure the evidence themselves. In the same context, the Court ruled that Article 2 does not require member states' criminal laws to provide for universal jurisdiction in cases involving the death of one of their nationals.

In cases where investigating the circumstances of death that took place in one country requires assistance from another country, Article 2 of the Convention requires that these countries cooperate effectively with each other in order to elucidate the circumstances of the killing and bring those responsible to justice. Article 2 thus creates a mutual obligation for both countries to seek and provide assistance. The specific duties of each country will depend on the circumstances of the case (*Güzelyurtlu and Others v. Cyprus and Turkey* [GC], 2019, §§ 232-233).

ECHR Grand Chamber judgment in the case of Güzelyurtlu and Others v. Cyprus and Turkey (2019)

Facts: The case concerned the investigation into the killing of three Cypriot nationals of Turkish Cypriot origin in the Cypriot-Government controlled area of Cyprus in 2005. The killers fled back to the "Turkish Republic of Northern Cyprus" (the "TRNC"). Parallel investigations into the murders were conducted by the authorities of the Cypriot Government and the Turkish Government, including those of the "TRNC". Both investigations reached an impasse in 2008.

Allegations: In their case before the European Court, the applicants who were the victims' relatives, alleged that the refusal of Turkey and Cyprus to co-operate meant that the killers had not faced justice.

Decision: The Court, in its Grand Chamber judgement, considered that both States had had an obligation to cooperate with each other. It found that Cyprus had done all that could reasonably have been expected of it to obtain the surrender/extradition of the suspects from Turkey, submitting "Red notice" requests to Interpol and, when this proved unsuccessful, extradition requests to Turkey. The Cypriot authorities could not be criticised for refusing to submit all the evidence and to transfer the proceedings to the authorities of the "TRNC" or Turkey. That would have amounted to Cyprus waiving its criminal jurisdiction over a murder committed in its controlled area in favour of the courts of an unrecognised entity set up within its territory.

Turkey, on the other hand, had not made the minimum effort required in the circumstances of the case. They had ignored Cyprus's extradition requests, returning them without reply, contrary to their obligation under Article 2, read in the light of other international agreements, to cooperate by informing the requesting State of its decision and, in the case of rejection, to give reasons.

Specific paragraphs highlighted: "232. The Court has previously held that in interpreting the Convention regard must be had to its special character as a treaty for the collective enforcement of human rights and fundamental freedoms (see *Ireland v. the United Kingdom*, 18 January 1978, § 239, Series A no. 25, referring to its Preamble; *Loizidou v. Turkey* (preliminary objections), cited above, § 70; and *Nada v. Switzerland* [GC], no. 10593/08, § 196, ECHR 2012). This collective character may, in some specific circumstances, imply a duty for Contracting States to act jointly and to cooperate in order to protect the rights and freedoms they have undertaken to secure within their jurisdiction (see for instance, in the area of cross-border human trafficking under Article 4 of the Convention, *Rantsev*, cited above, § 289). In cases where an effective investigation into an unlawful killing which occurred within the jurisdiction of one Contracting State requires the involvement of more than one Contracting State, the Court finds that the Convention's special character as a collective enforcement treaty entails in principle an obligation on the part of the States concerned to cooperate effectively with each other in order to elucidate the circumstances of the killing and to bring the perpetrators to justice.

233. The Court accordingly takes the view that Article 2 may require from both States a two-way obligation to cooperate with each other, implying at the same time an obligation to seek assistance and an obligation to afford assistance. The nature and scope of these obligations will inevitably depend on the circumstances of each particular case, for instance whether the main items of evidence are located on the territory of the Contracting State concerned or whether the suspects have fled there."

The procedural obligation to cooperate under Article 2 should be interpreted in the light of international treaties or agreements applicable between the Contracting States concerned, following as far as possible a combined and harmonious application of the Convention and those instruments, which should not result in conflict or opposition between them (see, *mutatis mutandis, X v. Latvia* [GC], no. 27853/09, § 94, ECHR 2013).

In this context, the procedural obligation to cooperate will only be breached in respect of a State required to seek cooperation if it has failed to trigger the proper mechanisms for cooperation under the relevant international treaties; and in respect of the requested State, if it has failed to respond properly or has not been able to invoke a legitimate ground for refusing the cooperation requested under those instruments (*Güzelyurtlu and Others*, cited above § 236).

For instance, the Court has held, in the context of a terrorist attack carried out in the Republic of Ireland, that the authorities of the United Kingdom – the country to which the perpetrators had fled after the attack and in which evidence of the offence could be located – may be required under Article 2 of the Convention to take effective measures in that regard, if necessary of their own motion. Otherwise, those indulging in cross-border attacks would be able to operate with impunity and the authorities of the Contracting State which has suffered the attack would be foiled in their own efforts to protect the fundamental rights of their citizens (*O'Loughlin and Others v. the United Kingdom* (dec.), 2005; and *Cummins and Others v. the United Kingdom* (dec.), 2005).

A different conclusion was reached later by the Court in *Rantsev*, in the context of killing of a Russian national in Cyprus (see above), where the Court found that Article 2 of the Convention did not impose an obligation on the Russian Federation – the state on the territory of which two witnesses were located – to act of their own motion by hearing them, in the absence of any request from Cyprus (see *Rantsev v. Cyprus and Russia*, cited above, § 245).

A State requested to cooperate in an ongoing investigation into a suspected murder in the requesting State must base a refusal to cooperate on a "legitimate ground" (see *Güzelyurtlu* *and Others*, cited above, § 236). On one hand, the refusal must in substance be in conformity with the norms applicable under the transnational framework of cooperation and, on another, be sufficiently supported by the facts adduced by the authorities of the requested State when reasoning their refusal, also taking account of the Convention rights of third parties.

In the case of *Romeo Castaño v. Belgium*, the Court held that a Member State of the European Union must cooperate with another Member State within the framework of the European Arrest Warrant (EAW) system and duly consider whether to surrender an alleged terrorist fugitive for prosecution (*Romeo Castaño v. Belgium*, 2019, §§ 41-42 and 79-82). At the same time, the Court ruled that upon execution of an EAW, the EU "principle of mutual trust" should not be automatically applied to the detriment of fundamental rights (*Romeo Castaño* §§ 83-84). In particular, the Court held that a risk of ill-treatment for the person whose surrender is requested "may constitute a legitimate ground for refusing to execute the EAW"; yet, the assessment of such a risk should have sufficient factual basis (ibid § 85).

The obligation to cooperate, which is incumbent on States under the procedural limb of Article 2, can only be an obligation of means, not one of result, in line with what the Court has established in respect of the obligation to investigate (see *Armani Da Silva v. the United Kingdom* [GC], no. 5878/08, § 233, 30 March 2016).

In *Saribekyan and Balyan v. Azerbaijan*, 2020, §73, the Azerbaijani authorities refused to respond to a request for mutual legal assistance from the Armenian authorities because they considered that they had no duty to cooperate on account of the suspension of all diplomatic relations between Azerbaijan and Armenia. The Court found that the lack of diplomatic relations between the two countries did not absolve Azerbaijan from the obligation under Article 2 to cooperate in criminal investigations and that that failure amounted to a breach of their procedural obligations under Article 2 of the Convention.

In the case of *Israilov v. Russia*, 2023, §135, the Court held that the failure of the Russian authorities to respond to a request for mutual legal assistance in a timely manner, amounted to a failure by the Russian authorities to comply with their obligation to cooperate with Austria for the purposes of an effective investigation into the circumstance of a murder and, thus, constituted a breach of their procedural obligations under Article 2 of the Convention.

In *Aliyeva and Aliyev v. Azervaijan*, 2014, § 78, the Court found a procedural violation of Article 2 by Azerbaijan, noting, inter alia, that the investigator in charge of the case had not asked the Ukrainian authorities for legal assistance until more than a year and two months after instituting the criminal investigation.

In cases involving a Contracting State and a *de facto* entity under the effective control of another Contracting State, the duty to cooperate, in the absence of formal diplomatic relations, may require these States to use other more informal or indirect channels of cooperation, for instance through third States or international organisations. In such circumstances, the Court takes into account whether the States concerned used all informal or *ad hoc* channels of cooperation used by them outside the cooperation mechanisms foreseen by the relevant international treaties, while at the same time guided by the provisions of those treaties as an expression of the norms and principles applied in international law (*Güzelyurtlu and Others*, cited above, §§ 237-238).

B. Prohibition of torture under Article 3 of the Convention

Article 3 – Prohibition of torture

No one shall be subjected to torture or to inhuman or degrading treatment or punishment.

Article 3 of the European Convention on Human Rights (ECHR) is a fundamental provision that prohibits torture and inhuman or degrading treatment or punishment. It is an absolute right, meaning that it allows no exceptions or derogations, even in times of war or public emergency.

It imposes on states both negative obligations (to refrain from subjecting individuals to such treatment) and positive obligations (to take proactive measures to prevent such treatment and to effectively investigate any allegations of violations).

As in the case of Article 2, the latter obligations are relevant in the context of Mutual Legal Assistance and they imply conducting effective investigations into allegations of treatment contrary to Article 3 and ensuring justice is served even when a crime concerns multiple jurisdictions, necessitating cross-border cooperation between states.

ECHR Grand Chamber judgment in the case of X and Others v. Bulgaria (2021)

Facts: The facts of the case concern three minor siblings, a boy and two girls, who were placed in an orphanage in Bulgaria at a young age after being abandoned by their parents. When they were 12, 10 and 9, they were adopted by an Italian couple and moved to Italy. After the adoption, the children disclosed to their adoptive parents, among other things, that they had been repeatedly sexually abused by adults while in the Bulgarian orphanage. The adoptive parents reported these allegations to the Italian authorities, who then informed the Bulgarian authorities. An investigation was initiated by the Bulgarian authorities but was eventually discontinued due to a lack of sufficient evidence to establish that any offenses had been committed.

Allegations: Relying on Article 3 of the Convention, the applicants alleged, *inter alia*, that the Bulgarian authorities failed to conduct an effective investigation into credible allegations of treatment contrary to Article 3 of the Convention.

Decision: The Court found a breach of Article 3 of the Convention on account of numeous shortcomings in the investigation conducted by the Bulgarian authorities. Some of those shortcomings concerned the failure by the Bulgarian authorities to seek legal assistance from the Italian prosecuting authorities.

Specific paragraphs highlighted: “217. The Court reiterates that, according to its case-law, in transnational cases the procedural obligation to investigate may entail an obligation to seek the cooperation of other States for the purposes of investigation and prosecution (see paragraph 191 above). The possibility of recourse to international cooperation for the purposes of investigating child sexual abuse is also expressly provided for by Article 38 of the Lanzarote Convention (see paragraph 127 above). In the present case, although the Milan public prosecutor declined jurisdiction on the grounds that there was an insufficient jurisdictional link with Italy in respect of the facts, it would have been possible for the applicants to be interviewed under the judicial cooperation mechanisms existing within the European Union in particular (see paragraph 137 above).
218. Even if they had not sought to interview the applicants directly, the Bulgarian authorities could at least have requested from their Italian counterparts the video-recordings made during the applicants’ conversations with the psychologists from the RTC and their interviews with the public prosecutor for minors (see paragraphs 16 and 82 above). Because of this omission in the investigation, which could very easily have been avoided, the Bulgarian authorities were not in a position to request professionals “trained for this purpose” to view the audiovisual material and assess the credibility of the accounts given (see Article 34 § 1 and Article 35 § 1 (c) of the Lanzarote Convention).
219. Similarly, as the applicants did not produce medical certificates, the Bulgarian authorities could, again in the context of international judicial cooperation, have requested that they undergo a medical examination which would have enabled certain possibilities to be confirmed or ruled out, in particular the first applicant’s allegations of rape.”

In this case, the Court held that an investigation into treatment contrary to Article 3 of the Convention, when involving a trans-border element, must adhere to the same principles as those governing investigations into deaths under Article 2 of the Convention. The requirement for an effective criminal investigation may, in certain circumstances, require that the investigating authorities cooperate with the authorities of another State, necessitating either the provision or request of assistance. The nature and scope of these obligations will inevitably depend on the specific circumstances of each case, such as whether the key evidence is located within the territory of the concerned Contracting State or whether suspects have fled there. Consequently, the States involved must take all reasonable steps to cooperate with each other, fully utilising in good faith the available mechanisms under relevant international instruments on mutual legal assistance and cooperation in criminal matters. Although the Court is not empowered to oversee compliance with international treaties or obligations beyond the Convention, it typically examines whether the respondent State have made use of the opportunities provided by these instruments (*X and Others v. Bulgaria*, § 191).

In *Nasr and Ghali v. Italy*, 2019, §§ 270 and 272, the Court found that Italy had failed to fulfil its procedural obligations under Article 3 of the Convention. Although Italy had convicted and sentenced those responsible for subjecting the applicants to treatment contrary to Article 3, it did not seek their extradition from the United States, despite the existence of a mutual extradition treaty between the two countries. The Court concluded that this failure effectively created a situation of impunity for the perpetrators, resulting in Italy's non-compliance with its positive obligations under Article 3 of the Convention.

C. Right to a fair trial under Article 6 of the Convention

> Article 6 – Right to a fair trial
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> 1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.
>
> 2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.
>
> 3. Everyone charged with a criminal offence has the following minimum rights:
> (a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;
> (b) to have adequate time and facilities for the preparation of his defence;
> (c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests
> of justice so require;
> (d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against
> him;
> (e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court.

Article 6 is a cornerstone of the Convention, guaranteeing the right to a fair trial in both civil and criminal matters. It secures a wide range of safeguards, including the right of access to a court, the right to have one's case heard within a reasonable time by an independent and impartial tribunal established by law, and the principle of public hearings and public pronouncement of judgments. In criminal proceedings, Article 6 further guarantees the presumption of innocence, the right to be informed promptly of the charges, the right to adequate time and facilities to prepare a defence, the right to legal assistance, the right to examine or have examined witnesses, and the right to the free assistance of an interpreter if needed.

These guarantees are highly relevant in the context of Mutual Legal Assistance, since cross-border cooperation must respect procedural fairness and the rights of the accused. States must ensure that evidence gathered or shared internationally does not undermine the fairness of proceedings and that individuals receive a just trial irrespective of the complexity of transnational cases.

The case law of the European Court of Human Rights that touches on elements of mutual legal assistance in relation to Article 6 primarily concerns the right to examine witnesses. Nonetheless, other aspects of Article 6 are also relevant in this context. A comprehensive overview of the Court's case law under Article 6 can be found in the Guide on Article 6 of the European Convention on Human Rights, with the relevant section available here.

In certain cases, issues of mutual legal assistance arise in the context of Article 6 of the Convention, in particular where the fairness of criminal proceedings depends on the execution of requests for international judicial cooperation. The Court has examined such situations notably in cases involving the use of letters of request addressed to another Contracting State.

ECHR judgment in the case of Bivolaru v. Romania (No. 2) (2018)

Facts: The case concerned criminal proceedings conducted in Romania against the applicant, who at the relevant time had refugee status in Sweden. After the applicant had been acquitted at first instance and on appeal, the Romanian High Court of Cassation and Justice, examining the case on points of law, decided to re-examine the merits. In that context, the applicant requested to be heard by way of an international letter of request in Sweden. The Romanian authorities transmitted a formal request for mutual legal assistance to the Swedish authorities. Despite repeated exchanges between the authorities of the two States, the letter of request was not executed and no foreseeable time-frame for its execution was indicated.

Allegations: Relying on Article 6 of the Convention, the applicant complained, inter alia, that he had been convicted by the Romanian High Court without having been personally heard, despite his request to be examined through international judicial cooperation mechanisms.

Decision: The Court examined whether the domestic authorities had complied with their procedural obligations under Article 6 of the Convention in circumstances involving international mutual legal assistance. It noted that the Romanian authorities had formally activated the available mechanisms of international judicial cooperation and had repeatedly sought the execution of the letter of request. The failure to obtain the applicant's examination was not attributable to the requesting State. The Court assessed the fairness of the proceedings as a whole and found that, in the specific circumstances of the case, the domestic authorities' decision to proceed with the examination of the case, after prolonged and unsuccessful attempts to secure international assistance, did not amount to a violation of Article 6 of the Convention.

Specific paragraphs highlighted: §§ 132–146, concerning the assessment of the domestic authorities' efforts to secure the execution of a letter of request through international mutual legal assistance mechanisms, the delays and uncertainty attributable to the requested State, and the implications of those factors for the overall fairness of the proceedings under Article 6 of the Convention.

TRANSFER OF SENTENCED PERSONS

A. Prohibition of inhuman or degrading treatment under Article 3 of the Convention

Article 3 – Prohibition of torture

No one shall be subjected to torture or to inhuman or degrading treatment or punishment.

The States' obligations under Article 3 in the context of the Transfer of Sentenced Persons have been examined by the Court, *inter alia*, with regard to the issue of severity of the sanction imposed on the transferred individual.

ECHR Decision in the case of Willcox and Hurford v. the United Kingdom (2013)

Facts: The applicants were detained in prisons in the United Kingdom serving sentences which had been imposed on them by courts in Thailand for possession of drugs, after pleading guilty to the charges. They had been transferred to the United Kingdom to serve the remainder of their sentences pursuant to a prisoner transfer agreement which operated between the United Kingdom and Thailand. They had been informed that upon transfer they would not be able to challenge the duration of their sentences, and they had accepted the terms of the transfer.

Allegations: In their applications to the European Court, the applicants contended that their sentences were grossly disproportionate, being four to five times longer than the sentences they would have been likely to receive had they been convicted of the same offences in the United Kingdom and that their continued enforcement violated their rights under Article 3 of the Convention.

Decision: The Court declared inadmissible the complaint under Article 3 of the Convention after finding that the applicants' sentences were consistent with penalties in Thailand for similar offenses and aligned with the maximum sentences in England for equivalent crimes. Thailand's severe penalties for drug offenses reflected its serious drug problem.

Specific paragraph highlighted: "74. While, in principle, matters of appropriate sentencing largely fall outside the scope of the Convention, the Court accepts that a grossly disproportionate sentence could amount to ill-treatment contrary to Article 3 at the moment of its imposition. However, gross disproportionality is a strict test and it will only be on rare and unique occasions that the test will be met (see Harkins and Edwards, cited above, § 133). In Harkins and Edwards, which involved the applicants' complaint that grossly disproportionate sentences would be imposed by the State which requested their extradition, the Court explained that in a removal case a violation would arise if an applicant were able to demonstrate that he was at real risk of receiving a grossly disproportionate sentence in the receiving State. However, it emphasised that the Convention was not a means of requiring the Contracting States to impose Convention standards on other States. Due regard had to be had for the fact that sentencing practices varied greatly between States and that there would often be legitimate and reasonable differences between States as to the length of sentences which were imposed, even for similar offences. Accordingly, it would only be in "very exceptional" cases that an applicant would be able to demonstrate that the sentence he would face in a non-Contracting State would be grossly disproportionate and thus contrary to Article 3 (ibid., § 134)."

While dismissing the complaint under Article 3 of the Convention in *Willcox and Hurford*, the Court held that a sentence cannot be deemed grossly disproportionate merely because it is harsher than what would be imposed in the enforcing state. The Court respects the sentencing policies of sovereign states, provided they are not fundamentally inconsistent with the principles of democratic states. In so doing, the Court acknowledged the diverse civil, political, economic, and social conditions across states and the legitimate differences in how states structure their criminal justice systems. Thailand's stricter approach to drug offenses was deemed legitimate in light of its domestic context.

The decision reinforces the principle that Article 3 does not impose uniform sentencing standards but instead focuses on preventing treatment or punishment that is inherently inhuman or degrading. By clarifying the standards for assessing disproportionate sentences and the enforcement of foreign judgments, the ruling facilitates meaningful international cooperation in the field of transfer of sentenced persons while safeguarding fundamental rights.

Another issue concerning Article 3 of the Convention in the context of transfer of sentenced persons arose in the case of *Veermae v. Finland* (2005) (see details below). The applicant argued that his transfer from Finland to Estonia violated Article 3 of the Convention due to the inferior detention conditions he would face in Estonia. The Court reiterated its well-established case-law that Contracting States have the right to control the entry, residence and expulsion of aliens. However, extradition by a Contracting State – or any other type of removal of a foreign national – may give rise to an issue under Article 3, and hence engage the responsibility of that State, where substantial grounds have been shown for believing that the person concerned would face a real risk of being subjected to torture or to inhuman or degrading treatment or punishment in the country to which he is to be removed. A mere possibility of ill-treatment is not in itself sufficient to give rise to a breach of Article 3 (see, for example, *Soering v. the United Kingdom*, judgment of 7 July 1989, Series A no. 161, and *Vilvarajah and Others v. the United Kingdom*, judgment of 30 October 1991, Series A no. 215).

In declaring the complaint inadmissible, the Court found that the evidence submitted by the applicant did not disclose an appearance of a real risk of treatment contrary to Article 3 upon applicant's transfer to an Estonian prison. Moreover, the Court added that it would have been open to the applicant to lodge an application against Estonia should he consider his conditions of detention there to be in breach of Article 3 or any other provision of the Convention.

The Court reached a similar conclusion in respect of a similar Article 3 complaint in its decision in the case of *Csoszánszki v. Sweden* (2006).

B. Right to Liberty and Security

Article 5 – Right to liberty and security

"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:
(a) the lawful detention of a person after conviction by a competent court;
..."

Article 5 of the Convention is, together with Articles 2, 3 and 4, in the first rank of the fundamental rights that protect the physical security of the individual, and as such its importance is paramount. Its key purpose is to prevent arbitrary or unjustified deprivations of liberty. Three strands of reasoning in particular may be identified as running through the Court's case-law: the exhaustive nature of the exceptions, which must be interpreted strictly and which do not allow for the broad range of justifications under other provisions (Articles 8 to 11 of the Convention in particular); the repeated emphasis on the lawfulness of the detention, both procedural and substantive, requiring scrupulous adherence to the rule of law; and the importance of the promptness or speediness of the requisite judicial controls.

The Court was called on several occasions to rule on complaints based on Article 5 of the Convention in the context of transfer of sentenced persons.

ECHR Decision in the case of Veermae v. Finland (2005)

Facts: The applicant, an Estonian citizen, was serving a nine-year prison sentence in Finland when he was issued an expulsion order. The Finnish Ministry of Justice ordered his transfer to Estonia to serve the remainder of his sentence, citing domestic laws aligned with the Additional Protocol to the Convention on the Transfer of Sentenced Persons. The Ministry justified the transfer based on the applicant's stronger social ties to Estonia than to Finland. The applicant appealed, arguing that in Finland he would be eligible for parole after serving half of his sentence (i.e. 4.5 years), whereas in Estonia parole would only be possible after serving two-thirds (i.e. 6 years), and even then, it would be discretionary with low rates of approval. He claimed this could result in a significantly longer *de facto* sentence in Estonia. The Finnish Ministry of Justice confirmed that the applicant would serve four and a half years in Finland as a first-time offender but could only obtain conditional release in Estonia after six years. The Administrative Court dismissed the appeal, stating that, despite the longer sentence likely to be served in Estonia due to differing parole rules, the transfer did not violate Article 5 of the Convention, as the sentence in Estonia would not exceed the original sentence imposed by the Finnish courts.

Allegations: The applicant argued that his transfer to Estonia under the Transfer Convention could result in a longer prison sentence compared to parole eligibility in Finland and contended that there has therefore been a violation of Article 5 §1(a).

Decision: The Court found no violation of Article 5, as his deprivation of liberty in Estonia remained causally linked to his conviction in Finland, which complied with Article 6. The Court emphasized that the Convention should align with international law, including the Transfer Convention, and imposing strict parity in sentencing between countries could hinder international cooperation in justice. As long as the applicant's sentence in Estonia did not exceed the original Finnish sentence, and safeguards such as the right to appeal the transfer existed, the transfer did not render his imprisonment arbitrary.

Specific paragraph highlighted: "The Court does not exclude the possibility that a flagrantly longer de facto sentence in the administering State could give rise to an issue under Article 5, and hence engage the responsibility of the sentencing State under that Article. For this to be the case, however, substantial grounds would have to be shown to exist for believing that the time to be served in the administering State would be flagrantly disproportionate to the time which would have had to be served in the sentencing State (see, mutatis mutandis, Cruz Varas and Others v. Sweden, judgment of 20 March 1991, Series A no. 201, p. 28, §§ 69-70)."

The Court reached a somewhat similar conclusion in *Csoszánszki v. Sweden* (Decision of 2006), where it found that the longer term of imprisonment in Hungary after the applicant's transfer from Sweden did not constitute a breach of Article 5, as it remained within the original sentence and was not arbitrary. While the applicant would serve 20% longer in Hungary that in Sweden, this difference was not disproportionate.

C. Right to a fair trial under Article 6 of the Convention

Article 6 – Right to a fair trial

"In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. ..."

Article 6 of the European Convention on Human Rights guarantees the right to a fair trial in both civil and criminal cases. It ensures that everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. The article also upholds the presumption of innocence in criminal cases and provides essential safeguards for defendants, including the right to be informed of charges in a language they understand, adequate time and facilities to prepare a defence, the ability to examine witnesses, access to legal representation or aid if needed, and free assistance of an interpreter when required.

The Court has been called to rule on complaints under Article 6 of the Convention in relation to the issue of transfer of sentenced persons on numerous occasions. What is of particular interest to the present study is the Court's approach to the issue of applicability of Article 6 to proceedings concerning the transfer of sentenced persons.

ECHR Decision in the case of Csoszánszki v. Sweden (2006)

Facts: The applicant was convicted in Sweden of aggravated drug offenses in 2000 and sentenced to ten years' imprisonment, with a permanent expulsion order. After serving part of his sentence, Swedish authorities initiated a transfer request to Hungary, the applicant's country of origin, under the Transfer Convention and its Additional Protocol. The applicant opposed the transfer, arguing that he would serve a longer sentence under harsher conditions in Hungary. Despite his objections, the Swedish Administration and Government approved the transfer, and the applicant was moved to Hungary in October 2003. In Hungary, the courts converted his sentence into ten years under Hungarian law, requiring him to serve four-fifths of the term under a stricter prison regime. The Hungarian courts upheld the Swedish findings on his guilt but adjusted the sentence execution to comply with domestic law.

Allegations: The applicant complained that the transfer proceedings were unfair as they resulted in him being obliged to serve a longer sentence in Hungary than in Sweden.

Decision: The Court found that the transfer proceedings, being part of the enforcement of a sentence, are not covered by Article 6 of the Convention and, therefore, declared the complaint inadmissible *ratione maeriae* with the provisions of the Convention.

Specific paragraphs highlighted: "As noted above […] the applicant's transfer is likely to delay the date of his conditional release […]. However, the Convention does not confer the right to such release or the right to serve a prison sentence in accordance with a particular regime. Nor does it require that parole decisions be taken by a court. Furthermore, questions of conditional release relate to the manner of implementation of a prison sentence. This conclusion is supported by several provisions of the Transfer Convention and its Additional Protocol, which indicate that a transfer is seen as a measure of execution of a sentence. According to the Court's case-law, proceedings concerning the execution of a sentence are not covered by Article 6 § 1 of the Convention. […] the Court notes that neither the Transfer Convention nor its Additional Protocol stipulates that proceedings relating to a transfer should meet the requirements of Article 6 of the Convention. Thus, for example, Article 9 of the Transfer Convention provides that the administering State may decide on the enforcement of the sentence in accordance with its own laws through either a judicial or an administrative procedure. Furthermore, the Explanatory Report to the Additional Protocol states that persons may be expelled only subject to the conditions laid down in Article 1 of Protocol No. 7 to the Convention. In contrast, it does not refer to Article 6 of the Convention."

The approach that Article 6 of the Convention generally does not apply to proceedings concerning the transfer of sentenced persons, when these proceedings relate to the execution of a sentence, was reaffirmed in the Court's decisions in *Veermae v. Finland* (2005), *Szabo v. Sweden* (2006) and *Zhernin v. Poland* (2018).

However, the Court reached a different conclusion in the cases of *Smith v. Germany* (2010) and *Buijen v. Germany* (judgment of 2010) where it took a distinct approach due to the close connexion between the proceedings concerning the determination of the criminal charges against the applicants and those concerning their transfer to another country.

ECHR Judgment in the case of Smith v. Germany (2010)

Facts: The applicant, a Dutch national, was convicted by the Lübeck Regional Court of drug offences and sentenced to three and a half years of imprisonment. He had voluntarily returned from the Netherlands to stand trial in Germany after the Lübeck Public Prosecutor gave him an official assurance that the prosecution service would institute proceedings under Article 11 of the Convention on the Transfer of Sentenced Persons. However, later the German Ministry of Justice refused to comply with that assurance and to lodge a formal application for the applicant's transfer to the Netherlands.

Allegations: The applicant complained in substance under Article 6 §1 of the Convention about the lack of access to court, because the German courts did not review the substance of his complaint about the refusal to institute transfer proceedings under Article 11 of the Transfer Convention.

Decision: The Court held that Article 6§1 of the Convention under its criminal head is, under the specific circumstances of the present case, applicable to proceedings concerning the applicant's transfer request in so far as they relate to the assurance given by the public prosecution during the criminal proceedings. The decision taken by the Justice Ministry on the transfer request does not solely depend on the public prosecutor's recommendations and on considerations regarding the execution of sentence, but also on considerations of foreign policy which fall within the core area of public law. It has not been shown that there was a possibility of instituting an effective action for review of the refusal to institute proceedings after a relevant assurance. The applicant has therefore been denied access to a court with regard to the part of the decision on his transfer request which did not concern considerations of public policy.

Specific paragraphs highlighted: “The Court considers [...] that under the particular circumstances of this case it has to be taken into account that the proceedings relating to the applicant's transfer request were very closely related to the criminal proceedings and to the final determination of the sentence. The Court notes, in particular, that the Public Prosecutor, during the proceedings leading to the applicant's conviction, expressly declared that they had no objections to the transfer of the applicant to the Netherlands. It was only in view of this reassurance that the applicant returned to Germany in order to stand trial and gave a full confession leading to his criminal conviction. Although the Lübeck Regional Court imposed a criminal sentence based on the applicant's conviction, this was not to be considered as final having regard to the possibility of converting the sentence following a transfer to the applicant's home country. Finally, the Court notes that according to the express statement of the Lübeck Regional Court the oral hearing – and consequently the applicant's conviction – would probably not have been possible without the applicant's cooperation.”

Thus, the Court’s approach to the issue of applicability Article 6 depends on the extent to which the proceedings concerning the determination of the criminal charge against the applicant are connected to those concerning the transfer.

D. Arbitrary or retroactive application of criminal law (Article 7 of the Convention)

Article 7 – No punishment without law

“No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.
...”

Article 7 of the European Convention on Human Rights enshrines the principle of "no punishment without law," ensuring that no one can be convicted for an act or omission that did not constitute a criminal offense under national or international law at the time it was committed. It also prohibits the imposition of a heavier penalty than the one applicable at the time of the offense. By guaranteeing legal certainty and foreseeability in criminal law, this article protects individuals from retroactive legislation and arbitrary punishment, while allowing for the prosecution of acts recognized as criminal under the general principles of law acknowledged by civilized nations, such as crimes against humanity.

The Court has been called upon to rule on complaints under Article 7 of the Convention in relation to the issue of transfer of sentenced persons on numerous occasions. What is of interest to the present study, is the Court’s approach to the issue of applicability of Article 7 to proceedings concerning the transfer of sentenced persons. In order to decide on the applicability of Article 7, the Court made a distinction between measures that constitute a "penalty" and those concerning the "execution" or "enforcement" of a penalty, with Article 7 of the Convention applying only to the former.

ECHR Decision in the case of Müller v. the Czech Republic (2011)

Facts: The applicant, a Czech national, was sentenced to life imprisonment by a German court for aiding and abetting murder. Under German law, he would have been eligible for parole after 15 years, but he was transferred without consent to the Czech Republic, where parole eligibility was extended to 20 years.

Allegations: The applicant complained under Article 7 of the Convention that his penal position had been aggravated as a result of the transfer.

Decision: Transfer decisions, as outlined in the Convention on the Transfer of Sentenced Persons, pertain to the enforcement of a penalty, not the imposition of a new one. The applicant's potential delay in eligibility for conditional release in the Czech Republic, as well as any differences in detention conditions, were considered part of the execution of the sentence rather than a new penalty. As such, Article 7 did not apply.

Specific paragraphs highlighted: "In the Court's established case-law a distinction is drawn between a measure that constitutes in substance a "penalty" and a measure that concerns the "execution" or "enforcement" of a "penalty"; Article 7 applies only to the former (see *Kafkaris v. Cyprus* [GC], no. 21906/04, § 142 and *Grava v. Italy*, no. 43522/98, § 51, 10 July 2003). […] In reply to the applicant's argument that in Germany he was eligible for conditional release after serving fifteen years and that in the Czech Republic he must serve a minimum of twenty years of his sentence the Court refers to the above cited *Kafkaris* judgment that a change in the conditions for release relates to the execution of sentence and Article 7 of the Convention is not applicable."

The approach according to which that Article 7 of the Convention generally does not apply to proceedings concerning the transfer of sentenced persons, when these proceedings relate to the execution of a sentence, was reaffirmed in the Court's decisions in *Csoszánszki v. Sweden (dec.), no. 22318/02, 27 June 2006 and Szabó v. Sweden (dec.), no. 28578/03, 27 June 2006*.

In contrast, the Court found Article 7 to be applicable in cases in which the measure constitutes a "penalty". One such case was *Kupinskyy v. Ukraine.*

ECHR Judgment in the case of Kupinskyy v. Ukraine (2022)

Facts: In 2002, the applicant, a Ukrainian national, was sentenced in Hungary to life imprisonment with the possibility of seeking release on parole after serving twenty years of imprisonment. In 2007 he was transferred to Ukraine to serve his sentence. The Ukrainian courts recognised the sentence imposed on the applicant by the Hungarian courts. However, under Ukrainian law no parole was available for life prisoners.

Allegations: The applicant complained that although the Hungarian courts had sentenced him to a reducible life sentence, the Ukrainian courts had converted that sentence into what had turned out to be a de facto irreducible life sentence, amounting to a heavier penalty, in violation of Article 7 of the Convention.

Decision: Unlike the cases in which a change in a regime for release on parole had been found to belong exclusively within the domain of the execution of a sentence, in the present case the applicant's transfer and, in particular, the manner in which his penalty had been converted, ultimately amounted to a change from a regime for release on parole to no availability of parole at all. The applicant's sentence imposed as a result of the conversion had been irreducible under current Ukrainian law. Irreducible and reducible life sentences differed as to their scope, and the difference had been significant enough for this Court to find the former incompatible with the requirements of the Convention, while the latter had been found compatible.

Specific paragraph highlighted: "54. The Court reiterates that it is not competent to review the Contracting Parties' compliance with instruments other than the European Convention on Human Rights and the Protocols thereto (see Zehnalová and Zehnal v. the Czech Republic (dec.), no. 38621/97, ECHR 2002-V). It is not precluded, however, from assessing whether the State complies with its Convention obligations when implementing international legal assistance treaties (see, among many other authorities, cases on extradition: Soldatenko v. Ukraine, no. 2440/07, 23 October 2008; on transfer of proceedings in criminal matters: Garkavyy v. Ukraine, no. 25978/07, 18 February 2010; and on mutual assistance in criminal matters: Zhukovskiy v. Ukraine, no. 31240/03, 3 March 2011). "

E. Right to private and family life (Article 8 of the Convention)

Article 8 – Right to respect for private and family life

1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety, or the economic well-being of the country,

for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

Article 8 of the European Convention on Human Rights guarantees the right to respect for private and family life, home, and correspondence. It protects individuals from arbitrary interference by public authorities, ensuring this right can only be limited when it is lawful, necessary in a democratic society, and serves legitimate aims such as national security, public safety, economic well-being, crime prevention, health or moral protection, or safeguarding the rights and freedoms of others.

Complaints regarding this article have been examination by the Court in the context of transfer of sentenced persons on multiple occasions. In particular, the Court was called to decide whether the refusal to transfer a sentenced person could result in a breach of his or her right to respect to family life.

ECHR Decision in the case of Plepi v. Albania and Greece (2010)

Facts: Denial of transfer of three Albanian nationals (a man, his wife and the wife's sister) from Greece to Albania on the ground that the sentences commuted by the Albanian court were inferior to those imposed by the Greek court and thus incompatible with the gravity of the offence committed by them.

Allegations: The applicants alleged a breach of their right to respect for family life under Article 8 of the Convention.

Decision: The Court dismissed the applicants' complaint regarding the refusal to transfer them to Albania, stating that the Transfer Convention merely provided a procedural framework for inter-State transfers and did not create individual rights or obligations for States to comply with transfer requests. Furthermore, the Court emphasized that the Convention does not grant prisoners the right to choose their place of detention, and the separation from family is an inherent consequence of lawful detention. Therefore, the complaint was deemed incompatible with the provisions of the Convention and rejected.

Specific paragraph highlighted: "[..] the Convention does not grant prisoners the right to choose the place of detention and […] separation and distance from their family are an inevitable consequence of their detention following the exercise by the Greek State of its prerogatives in the area of criminal sanctions […]".

The Court reached similar conclusions in respect of analogous complaints under Article 8 in its decisions in the cases of *Serce v. Romania* (2015) and *Palfreeman v. Bulgaria* (2017).

EXTRADITION

A. Right to Life and prohibition of inhuman and degrading treatment

Article 1 of Protocol No. 13 - Abolition of the death penalty

The death penalty shall be abolished. No one shall be condemned to such a penalty or executed.

Protocols No. 6 and 13 to the Convention, which have been ratified by nearly all Council of Europe member states, led to the interpretation of Article 2 as prohibiting the death penalty in all circumstances. This interpretation now allows for the death penalty, which causes not only physical pain but also intense psychological suffering as a result of the foreknowledge of death, to be considered as inhuman and degrading treatment contrary to Article 3 of the Convention (*Al-Saadoon and Mufdhi v. the United Kingdom*, 2010). Furthermore, Article 1 of Protocol No. 13 prohibits the extradition of an individual to a state where there is a real risk of facing the death penalty (*ibid.*, § 123). In *Al-Saadoon and Mufdhi*, the Court found a violation of Article 3 but, strangely, did not address potential violations of Article 2 or Article 1 of Protocol No. 13 (*ibid.*, §§ 144-145).

ECHR Judgment in the case of Al-Saadoon and Mufdhi v. the United Kingdom (2010)

Facts: The case concerns a complaint by two Iraqi nationals that the British authorities in Iraq had transferred them to Iraqi custody in breach of an interim measure indicated by the European Court under Rule 39 of the Rules of Court, so putting them at real risk of an unfair trial followed by execution by hanging.

Allegations: The applicants alleged that their transfer to the custody of the Iraqi authorities exposed them to a real risk of the death penalty, in breach of Articles 2 and 3 of the Convention and Article 1 of Protocol No. 13.

Decision: The case highlights the evolution of international norms toward the complete abolition of the death penalty, reinforced by Protocols 6 and 13 to the European Convention on Human Rights, both ratified by the United Kingdom. Despite these commitments, the applicants, detained by British forces in Iraq, were transferred to Iraqi custody without sufficient assurances from the Iraqi authorities that they would not face the death penalty, in breach of the UK's obligations under Articles 2 and 3 of the Convention. From May 2006, when Iraqi courts assumed jurisdiction, the applicants faced a credible and ongoing fear of execution, causing severe psychological suffering, intensified by their transfer in December 2008. The Court found that the UK failed to seek alternatives or assurances from Iraq to mitigate the risk of capital punishment, violating its duty to protect the applicants from inhuman treatment.

Specific paragraph highlighted: "143. [...]the Court considers that, in the absence of any such binding assurance, the referral of the applicants' cases to the Iraqi courts and their physical transfer to the custody of the Iraqi authorities failed to take proper account of the United Kingdom's obligations under Articles 2 and 3 of the Convention and Article 1 of Protocol No. 13 since, throughout the period in question, there were substantial grounds for believing that the applicants would face a real risk of being sentenced to death and executed."

By contrast, in *Al Nashiri v. Poland* (2014), the Court ruled that the applicant's transfer to the US created a foreseeable risk of a death penalty, violating Articles 2 and 3 of the Convention alongside Article 1 of Protocol No. 6.

A problem under Article 3 of the Convention might arise if an individual would face a life sentence without the possibility of parole in the requesting state, after extradition. When an individual faces life imprisonment in the requesting State, a two-stage test determines whether extradition complies with Article 3 (*Sanchez-Sanchez v. the United Kingdom* [GC], 2022, §§ 95-99). First, the applicant must show substantial grounds for believing they face a real risk of life imprisonment without parole if extradited and convicted. This risk is more easily established when a mandatory life sentence is involved. If such a risk is proven, the sending State must ensure the requesting State provides a mechanism for sentence review, allowing authorities to assess the prisoner's rehabilitation or other grounds for release.

The Court emphasized that procedural safeguards for life prisoners in the requesting State are not required for compliance with Article 3. Applying this test in *Sanchez-Sanchez* and other cases, the Court found that the applicants had not shown a real risk of life imprisonment without parole.

Treatment contrary to Article 3 in the requesting State can include poor detention conditions (*Liu v. Poland*, 2022), abuse in custody (*Allanazarova v. Russia*, 2017), or inadequate detention conditions for vulnerable individuals, such as those with mental illnesses (*Aswat v. the United Kingdom*, 2013).

It would hardly be compatible with the 'common heritage of political traditions, ideals, freedom and the rule of law' to which the Preamble of the Convention refers, were a Contracting State knowingly to surrender a person to another State where there were substantial grounds for believing that he would be in danger of being subjected to torture or inhuman or degrading treatment or punishment (see *Soering*, § 88).

The Court emphasised that while Article 3 of the Convention is absolute in its nature, not all forms of ill-treatment will prevent removal from a Contracting State. The Convention does not require Contracting States to impose its standards on other countries. Consequently, treatment that might violate Article 3 within a Contracting State may not meet the minimum severity threshold required to bar extradition. For example, while inadequate medical care has led to Article 3 violations domestically (e.g., *Aleksanyan v. Russia*), such violations are less readily established in extra-territorial contexts (e.g., *N. v. the United Kingdom*). Thus, a distinction has to be made between domestic and extraterritorial applications of Article 3 (*Harkins and Edwards v. the United Kingdom,* (nos. 9146/07 and 32650/07, §129).

In determining whether substantial grounds have been shown for believing that a real risk of treatment contrary to Article 3 exists, the Court will assess the issue in the light of all the material placed before it or, if necessary, material obtained *proprio motu*. Since the nature of the Contracting States' responsibility under Article 3 in cases of this kind lies in the act of exposing an individual to the risk of ill-treatment, the existence of the risk must be assessed primarily with reference to those facts which were known or ought to have been known to the Contracting State at the time of the extradition; the Court is not precluded, however, from having regard to information which comes to light subsequent to the extradition. This may be of value in confirming or refuting the appreciation that has been made by the Contracting Party of the well-foundedness or otherwise of an applicant's fears (see *Cruz Varas and Others v. Sweden*, §§ 75-76, and *Vilvarajah and Others*, § 107).

As regards the general situation in a particular country, the Court has often attached importance to the information contained in recent reports from independent international human-rights-protection associations such as Amnesty International, or governmental sources (see, for example, *Chahal*, §§ 99-100; and *Müslim v. Turkey*, § 67. At the same time, it has held that the mere possibility of ill-treatment on account of an unsettled situation in the receiving country does not in itself give rise to a breach of Article 3 (see *Vilvarajah and Others* § 111, and *Fatgan Katani and Others v. Germany* (dec.)) and that, where the sources available to it describe a general situation, an applicant's specific allegations in a particular case require corroboration by other evidence (see *Mamatkulov and Askarov*, cited above, § 73).

When substantial grounds suggest that a person extradited to a requesting State faces a real risk of ill-treatment under Article 3, diplomatic assurances must be assessed to determine if they sufficiently eliminate this risk.

The mere reference to diplomatic assurances, to membership of international treaties prohibiting torture, and to the existence of domestic mechanisms set up to protect human rights, is insufficient. In the modern world there is virtually no State that would not proclaim that it adheres to the basic international human rights norms, such as the prohibition of torture, and which would not have at least some protecting mechanisms at the domestic level. Those elements are important, but they should not be assessed formalistically (*Azimov v. Russia*, 67474/11, §§ 133-134).

The weight given to diplomatic assurances depends on the circumstances at the time (*Khasanov and Rakhmanov v. Russia* [GC], 2022; *Othman (Abu Qatada) v. the United Kingdom*, 2012). The Court examines the quality and reliability of assurances, considering factors such as their specificity, the authority and credibility of those providing them, the receiving State's adherence to international norms, monitoring mechanisms, and the applicant's past treatment. While rare, a country's general human rights situation may preclude reliance on any assurances.

In cases where an applicant alleges that he or she is a member of a group systematically exposed to a practice of ill-treatment, the Court considers that the protection of Article 3 of the Convention enters into play when the applicant establishes, where necessary on the basis of the sources mentioned in the previous paragraph, that there are serious reasons to believe in the existence of the practice in question and his or her membership of the group concerned (see, *Saadi v. Italy* [GC], no. 37201/06, § 132, 28 February 2008).

The fact that the applicant did not apply for political asylum immediately after his arrival into the requested country does not necessarily refute the applicant's allegations of risks of ill-treatment in the requesting country (see *Khodzhayev v. Russia*, §101).

In *Ansari v. Portugal* (dec.), 2023, the Court addressed a case where an applicant had been extradited based on diplomatic assurances, which were later allegedly breached. The domestic courts of the respondent State subsequently revoked the extradition decision after the applicant was prosecuted on charges beyond those authorized for extradition. While the applicant, detained in the receiving State, claimed that the respondent State had failed to ensure compliance with the assurances or facilitate his return, the Court determined that the authorities had taken all available measures to address the situation. Similarly, in *Boumediene and Others v. Bosnia and Herzegovina* (dec.), 2008, applicants handed over to US forces and later detained in Guantanamo Bay alleged a failure by the respondent State to enforce judicial orders to protect their rights and secure their return.

In cases involving European Arrest Warrants for serving sentences in countries with systemic detention issues, the Court ruled that the presumption of equivalent protection under EU law applies (*Bivolaru and Moldovan v. France*, 2021). However, it found this presumption rebutted for one applicant, as the protection of Convention rights was manifestly deficient in their specific case. The executing judicial authority had sufficient evidence to determine that enforcing the warrant would expose this applicant to a real and individual risk of treatment violating Article 3 due to detention conditions in the issuing State. For the other applicant, no such evidence was available. The Court clarified the obligations of executing judicial authorities to assess individualised risks in systemic detention issues and the applicant's duty to substantiate such risks.

Aliens who are subject to removal cannot, in principle, claim any entitlement to remain in the territory of a Contracting State in order to continue to benefit from medical, social or other forms of assistance and services provided by that State. The fact that the applicant's circumstances, including his life expectancy, would be significantly reduced if he were to be removed from the Contracting State is not sufficient in itself to give rise to breach of Article 3. The decision to remove an alien who is suffering from a serious mental or physical illness to a country where the facilities for the treatment of that illness are inferior to those available in the Contracting State may raise an issue under Article 3, but only in a very exceptional case, where the humanitarian grounds against the removal are compelling. In the case of *D. v. the United Kingdom* (judgment of 2 May 1997, *Reports of Judgments and Decisions* 1997-III) the very exceptional circumstances were that the applicant was critically ill and appeared to be close to death, could not be guaranteed any nursing or medical care in his country of origin and had no family there willing or able to care for him or provide him with even a basic level of food, shelter or social support (see also *N. v. the United Kingdom* [GC], no. 26565/05, § 42, 27 May 2008).

B. Right to liberty: Article 5

As regards extradition arrangements between States when one is a party to the Convention and the other not, the rules established by an extradition treaty or, in the absence of any such treaty, the cooperation between the States concerned for the purpose of bringing fugitive offenders to justice are also relevant factors to be taken into account for determining whether the arrest that has led to the subsequent complaint to the Court was lawful. The fact that a fugitive has been handed over as a result of cooperation between States does not in itself make the arrest unlawful or, therefore, give rise to any problem under Article 5 (see *Illich Ramirez Sánchez v. France*, no. 28780/95, Commission decision of 24 June 1996, DR 86, p. 162; and *Öcalan*, §§ 86-87).

However, given that "lawfulness" also implies absence of any arbitrariness, extra-territorial measures of a respondent State resulting in the applicant's detention which entailed clear violations of international law, for instance in the case of forcing an applicant against his will to enter the respondent State in a manner that is inconsistent with the sovereignty of his host State, raise an issue under Article 5 § 1 of the Convention (see, *Čonka*, §§ 41-42; and *Öcalan*, §§ 90).

ECHR Grand Chamber Judgment in the case of Öcalan v. Turkey (2005)

Facts: The applicant had been arrested by members of the Turkish security forces inside a Turkish-registered aircraft in the international zone at Nairobi Airport. Directly after being handed over to the Turkish officials by the Kenyan officials he had come under effective Turkish authority and had therefore been brought within the "jurisdiction" of that State for the purposes of Article 1 of the Convention, even though in this instance Turkey had exercised its authority outside its territory.

Allegations: The applicant complained inter alia that he had been deprived of his liberty unlawfully, without the applicable extradition procedure being followed. He alleged a violation of Article 5 § 1 of the Convention on that account.

Decision: The applicant's arrest and detention had been carried out in accordance with arrest warrants issued by the Turkish criminal courts with a view to bringing him before "the competent legal authority on reasonable suspicion" of having committed an offence. The arrest and detention had therefore been in accordance with Turkish domestic law. As for the applicant's interception in Kenya immediately before he was handed over to Turkish officials, various aspects of the case led the Grand Chamber to accept the respondent Government's argument that at the material time the Kenyan authorities had decided either to hand the applicant over to the Turkish authorities or to facilitate such a handover. The applicant had not adduced evidence enabling concordant inferences to be drawn that Turkey had failed to respect Kenyan sovereignty or to comply with international law in the present case. Consequently, the applicant's arrest in February 1999 and his detention had to be regarded as having been in accordance with “a procedure prescribed by law” for the purposes of Article 5 § 1.

Specific paragraphs highlighted: “86. The Convention does not prevent cooperation between States, within the framework of extradition treaties or in matters of deportation, for the purpose of bringing fugitive offenders to justice, provided that it does not interfere with any specific rights recognised in the Convention (ibid., pp. 24-25, § 169).

87. As regards extradition arrangements between States when one is a party to the Convention and the other is not, the rules established by an extradition treaty or, in the absence of any such treaty, the cooperation between the States concerned are also relevant factors to be taken into account for determining whether the arrest that has led to the subsequent complaint to the Court was lawful. The fact that a fugitive has been handed over as a result of cooperation between States does not in itself make the arrest unlawful and does not therefore give rise to any problem under Article 5 (see *Freda v. Italy*, no. 8916/80, Commission decision of 7 October 1980, DR 21, p. 250; *Altmann (Barbie) v. France*, no. 10689/83, Commission decision of 4 July 1984, DR 37, p. 225; and *Reinette v. France*, no. 14009/88, Commission decision of 2 October 1989, DR 63, p. 189).

88. Inherent in the whole of the Convention is the search for a fair balance between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights. As movement about the world becomes easier and crime takes on a larger international dimension, it is increasingly in the interest of all nations that suspected offenders who flee abroad should be brought to justice. Conversely, the establishment of safe havens for fugitives would not only result in danger for the State obliged to harbour the protected person, but also tend to undermine the foundations of extradition (see *Soering v. the United Kingdom*, judgment of 7 July 1989, Series A no. 161, p. 35, § 89).

89. The Convention contains no provisions concerning the circumstances in which extradition may be granted, or the procedure to be followed before extradition may be granted. Subject to it being the result of cooperation between the States concerned and provided that the legal basis for the order for the fugitive's arrest is an arrest warrant issued by the authorities of the fugitive's State of origin, even an atypical extradition cannot as such be regarded as being contrary to the Convention (see *Sánchez Ramirez*, cited above).”

Article 5 § 1 (f) of the Convention does not require that the detention of a person against whom action is being taken with a view to extradition be reasonably considered necessary, for example to prevent his committing an offence or absconding. In this connection, Article 5 § 1 (f) provides a different level of protection from Article 5 § 1 (c): all that is required under sub-paragraph (f) is that “action is being taken with a view to deportation or extradition”. It is therefore immaterial, for the purposes of Article 5 § 1 (f), whether the underlying decision to expel can be justified under national or Convention law (see *Čonka v. Belgium*, no. 51564/99, § 38 and *Chahal v. the United Kingdom*, § 112).

Detention for the purposes of extradition is governed by Article 5 § 1 (f) of the Convention and does not impose an obligation on the authorities to bring the applicant promptly before a judge, as required under Article 5 § 3 of the Convention in cases concerning detention under Article 5 § 1 (c). Nevertheless, the applicant has a right to "take proceedings" before a court and to actively seek his release under Article 5 § 4 of the Convention. Once an application for release had been lodged, judicial review of the lawfulness of detention had to follow speedily (see *Shcherbina v. Russia*, 41970/11, §§ 63-64).

In *Zandbergs v. Latvia* (71092/01, § 63), the Court held that neither Article 5 § 3 nor any other provision of the Convention creates a general obligation for a requesting State to take into account the length of a pre-trial detention suffered in the requested State.

C. Fairness of extradition proceedings and flagrant denial of justice: Article 6

Article 6 of the Convention is not applicable *ratione materiae* to extradition proceedings (*Mamatkulov and Askarov v. Turkey* [GC], 2005, §§ 81-83).

ECHR Grand Chamber Judgment in the case of Mamatkulov and Askarov v. Turkey (2005)

Facts: The applicants are two Uzbek nationals and members of an opposition party in Uzbekistan. They were arrested by Turkish police under international arrest warrants on suspicion of having committed terrorist acts in their country of origin. The Republic of Uzbekistan made a request for their extradition to which the Turkish authorities acceded. The applicants appealed in vain.

Allegations: The applicants alleged that they had not had a fair hearing in the criminal court that had ruled on the request for their extradition, in that they had been unable to gain access to all the material in the case file or to put forward their arguments concerning the characterisation of the offences they were alleged to have committed.

Decision and specific paragraph highlighted: "82. The Court reiterates that decisions regarding the entry, stay and deportation of aliens do not concern the determination of an applicant's civil rights or obligations or of a criminal charge against him, within the meaning of Article 6 § 1 of the Convention."

In the context of criminal proceedings in different States, respect for the *ne bis in idem* principle is not guaranteed by the Convention (*E.G.M. v. Luxembourg*, 24015/94, Decision of 20 May 1994).

In cases where a person faces a flagrant breach of Article 6 of the Convention in the destination country, this provision may, in exceptional circumstances, prevent their expulsion, extradition, or transfer. While the Court has not provided a precise definition of "flagrant denial of justice," it has identified certain unfair practices that could constitute such a breach. These include: conviction *in absentia* without the possibility of a new determination of the charge (see Chapter on trials in absentia below); summary trials disregarding the rights of the defence; detention without access to an independent tribunal to review its legality; deliberate denial of access to a lawyer, particularly for detainees abroad; and the use of statements obtained through torture in violation of Article 3 (*Harkins v. the United Kingdom* (dec.) [GC], 2017, §§ 62-65).

The Court was called to examine whether there had been a breach of Article 6 of the Convention as a result of the applicant's extradition from France to the USA on account of the fact of alleged flagrant denial of justice during the retrial proceedings after extradition in the case of *Einhorn v. France* (71555/01). The applicant argued that the law in the United States, enacted to allow retrials for individuals convicted *in absentia* (including him), violated the separation of powers under the Pennsylvania Constitution and was passed solely to facilitate his extradition. The Court emphasized that it was not for France (or the Court) to rule on the constitutionality of another state's laws. Although, there were some appearances of unconstitutionality of the impugned law, the Court considered that that could not amount to "flagrant denial of justice" which would have precluded the French authorities to extradite the applicant to the USA.

Like the risk of treatment proscribed by Article 2 and Article 3 of the Convention, the risk of a flagrant denial of justice in the country of destination must primarily be assessed by reference to the facts which the Contracting State knew or should have known when it extradited the persons concerned (*Mamatkulov and Askarov v. Turkey* [GC], 2005, § 80).

D. Right to private and family life (Article 8 of the Convention)

The Convention does not guarantee a right not to be extradited (*Soering*, § 85). Nevertheless, an extradition decision may constitute an interference with the right to respect for family life. Such an interference would be in breach of Article 8 (Art. 8) unless it is justified under paragraph 2 of this provision as being "in accordance with the law" and "necessary in a democratic society" for one of the aims set out therein (*Launder v. UK* (dec.)).

TRIALS IN ABSENTIA

Article 6 – Right to a fair trial "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. ..."

In the context of international cooperation in criminal matters, the practice of conducting trials *in absentia* - where the defendant is tried without being present - creates a challenging balance between national legal systems and international human rights standards. While some legal systems permit trials *in absentia* under specific conditions, others prohibit them entirely to safeguard the accused person's right to a fair trial. This divergence becomes particularly significant when states are required to cooperate across borders, whether through extradition, mutual legal assistance, or the enforcement of foreign judgments.

The European Court of Human Rights through its case-law, has played a significant role in shaping the standards that govern trials *in absentia*. Article 6 of the Convention guarantees the right to a fair trial, which includes the right of the accused to be present at their trial. This has significant implications for international cooperation, as states must ensure that their actions in support of foreign criminal proceedings do not infringe upon these fundamental rights.

The Court's case-law on trials in absentia has had a serious impact on how states engage in international criminal justice. The Court has established key principles that must be respected, such as the necessity of proper notification of the accused and the availability of a retrial. The Court's rulings influence whether a state will comply with an extradition request or recognize a foreign judgment, particularly if there are concerns about the fairness of the proceedings in the requesting state.

As international cooperation becomes crucial in combating transnational crime, war crimes and crimes of aggression, understanding the ECHR's practice on trials in absentia is important.

The principle of an oral and public hearing is particularly important in the criminal context, where a person charged with a criminal offence must generally be able to attend a hearing at first instance (*Jussila v. Finland* [GC], 2006, § 40; *Tierce and Others v. San Marino*, 2000, § 94; *Igor Pascari v. the Republic of Moldova*, 2016, § 27, concerning the applicant's exclusion from the proceedings in which his guilt for a road traffic accident had been determined).

Without being present, it is difficult to see how that person could exercise the specific rights set out in sub-paragraphs (c), (d) and (e) of paragraph 3 of Article 6, namely the right to "defend himself in person", "to examine or have examined witnesses" and "to have the free assistance of an interpreter if he cannot understand or speak the language used in court". The duty to guarantee the right of a criminal defendant to be present in the courtroom ranks therefore as one of the essential requirements of Article 6 (*Hermi v. Italy* [GC], 2006, §§ 58-59; *Sejdovic v. Italy* [GC], 2006, §§ 81 and 84; *Arps v. Croatia*, 2016, § 28).

At the same time, the Court has also held that the impossibility of holding a trial by default may paralyse the conduct of criminal proceedings, in that it may lead, for example, to dispersal of the evidence, expiry of the time-limit for prosecution, or miscarriage of justice (*Colozza v. Italy*, 1985, § 29). Thus, holding a hearing in an accused's absence is not in itself contrary to Article 6. However, when domestic law permits a trial to be held notwithstanding the absence of a person "charged with a criminal offence" who is in the applicant's position, that person should, once he becomes aware of the proceedings, be able to obtain, from a court which has heard him, a fresh determination of the merits of the charge (*Sanader v. Croatia*, 2015, §§ 77-78).

Although proceedings that take place in the accused's absence are not of themselves incompatible with Article 6 of the Convention, a denial of justice nevertheless occurs where a person convicted *in absentia* is unable subsequently to obtain from a court which has heard him a fresh determination of the merits of the charge, in respect of both law and fact, where it has not been established that he has waived his right to appear and to defend himself or that he intended to escape trial (*Sejdovic v. Italy* [GC], 2006, § 82). This is because the duty to guarantee the right of a criminal defendant to be present in the courtroom – either during original proceedings or at a retrial – ranks as one of the essential requirements of Article 6 (*Stoichkov v. Bulgaria*, 2005, § 56).

ECHR Grand Chamber Judgment in the case of Sejdovic v. Italy (2006)

Facts: The applicant was suspected of murder and an order was made for his detention pending trial. However, since he was untraceable, he was declared to be a "fugitive". The authorities did not manage to contact him to invite him to choose his own defence counsel. Instead, they assigned him a lawyer, who was informed that his client had been committed for trial on a specified date in the Assize Court. The lawyer took part in the trial, but the applicant was absent. He was found guilty. The applicant's lawyer was informed that the Assize Court's judgment had been deposited with the registry. He did not appeal, and the conviction accordingly became final. Two and a half years later, the applicant was arrested in Germany. The German authorities refused a request by Italy for his extradition, on the ground that Italian law did not guarantee with sufficient certainty that the proceedings conducted in his absence could be reopened.

Allegations: The applicant complained that he had been convicted *in absentia* without having had the opportunity of presenting his defence before the Italian courts. He relied on Article 6 of the Convention.
Decision: The Court found that the applicant, who had been tried in absentia and had neither sought to evade trial nor unequivocally waived his right to appear in court, had not been given the opportunity to obtain a fresh determination of the merits of the charges against him by a court that had heard him in accordance with his defense rights. Therefore, the Court that there had been a breach of Article 6 of the Convention.

Specific paragraph highlighted: "104. It follows that the remedy provided for in Article 175 of the CCP did not guarantee with sufficient certainty that the applicant would have the opportunity of appearing at a new trial to present his defence. It has not been argued before the Court that the applicant had any other means of obtaining the reopening of the time allowed for appealing, or a new trial."

In *Sanader v. Croatia* (2015, §§ 87-88) the Court held that the requirement that an individual tried *in absentia*, who had not had knowledge of his prosecution and of the charges against him or sought to evade trial or unequivocally waived his right to appear in court, had to appear before the domestic authorities and provide an address of residence during the criminal proceedings in order to be able to request a retrial, was disproportionate. This was particularly so because once the defendant is under the jurisdiction of the domestic authorities, he would be deprived of liberty on the basis of the conviction *in absentia*. In this regard, the Court stressed that there can be no question of an accused being obliged to surrender to custody in order to secure the right to be retried in conditions that comply with Article 6 of the Convention. It explained, however, that this did not call into question whether, in the fresh proceedings, the applicant's presence at the trial would have to be secured by ordering his detention on remand or by the application of other measures envisaged under the relevant domestic law. Such measures, if applicable, would need to have a different legal basis – that of a reasonable suspicion of the applicant having committed the crime at issue and the existence of "relevant and sufficient reasons" for his detention (see, by contrast, *Chong Coronado v. Andorra*, 2020, §§ 38-40, where the detention was not mandatory in the context of a retrial).

Lastly, an issue with regard to the requirement of presence at the hearing arises when an accused is prevented from taking part in his trial on the grounds of his improper behaviour (*Idalov v. Russia* [GC], 2012, § 175; *Marguš v. Croatia* [GC], 2014, § 90; *Ananyev v. Russia*, 2009, § 43; *Suslov and Batikyan v. Ukraine*, 2022, §§ 135-141; *Chkhartishvili v. Georgia*, 2023, §§ 32-38).

In this context, the Court has held that it is essential for the proper administration of justice that dignity, order and decorum be observed in the courtroom as the hallmarks of judicial proceedings. The flagrant disregard by a defendant of elementary standards of proper conduct neither can, nor should, be tolerated. However, when an applicant's behaviour might be of such a nature as to justify his removal and the continuation of his trial in his absence, it is incumbent on the presiding judge to establish that the applicant could have reasonably foreseen what the consequences of his ongoing conduct would be prior to the decision to order his removal from the courtroom (*Idalov v. Russia* [GC], 2012, §§ 176-177). Moreover, the relevant consideration is whether the applicant's lawyer was able to exercise the rights of the defence in the applicant's absence (*Marguš v. Croatia* [GC], 2014, § 90) and whether the matter was addressed and if appropriate remedied in the appeal proceedings (*Idalov v. Russia* [GC], 2012, § 179).