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

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

# Special session to celebrate the 60th anniversary of the European Convention on Extradition

**20 June 2018**

**Presentations and summaries of the panel discussions**

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## Programme

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| **09:30 - 10:45** | **Opening of the special session**<br>By:<br>Mr. Erik Verbert (Belgium), Chairman of the PC-OC<br>Mr. Jörg Polakiewicz, Director, Directorate of Legal Advice and Public International Law<br><br>**Introductory speech on the 60th anniversary of the European Convention on extradition :Lessons learnt and challenges for the future**<br>By: Mr Vincent Glerum, Counsellor at the Tribunal of Amsterdam<br>**Questions from the PC-OC** |
| **10:45 - 11:00** | Break |
| **11:00 – 13:00** | **Recent trends in the case law of the ECHR of relevance to extradition proceedings**<br>By: Mr Miroslav Kubicek (Czech Republic)<br>**Discussion with the Registry of the European Court on Human Rights**<br>Mr Kresimir Kamber and Mr Vasily Lukashevich, Registry of the ECtHR |
| **13:00** | Ceremony to award the Pro Merito Medal of the Council of Europe posthumously to Mr Eugenio Selvaggi (Italy), by Ms Gabriela Battaini, Deputy Secretary General of the Council of Europe<br><br>Cocktail<br><br>Lunch break |
| **14:30 – 15:45** | **The need for diplomatic assurances and consequences on the length of extradition proceedings**<br>Presentation by Mr Erwin Jenni (Switzerland)<br>**Panel discussion**<br>Moderator: Mr Erik Verbert (Belgium)<br>Rapporteur: Ms Gabriela Blahova (Czech Republic)<br>Other panel members: Mr Kresimir Kamber and Mr Vasily Lukashevich Registry of the ECtHR , Mr. Jason Carter (USA), Mr. Aviad Eliya (Israël)<br>**Questions from the PC-OC** |
| **15:45 – 16:00** | Break |
| **16:00 – 17:15** | **The drafting and the monitoring of assurances**<br>Presentation by Mr Jan Van Gaever, Advocate General, Prosecutor General's Office for Brussels (Belgium)<br>**Panel discussion**<br>Moderator: Mr Erik Verbert<br>Rapporteur: Joana Ferreira (Portugal)<br>Other panel members: Ms Barbara Goeth-Flemmich (Austria) , Mr Kresimir Kamber and Mr Vasily Lukashevich Registry of the ECtHR , Mr Erwin Jenni (Switzerland)<br>**Questions from the PC-OC** |
| **17:15 – 17:30** | Break |
| **17:30 – 18.00** | **Conclusions by the Rapporteurs, and Erik Verbert, Chair of the PC-OC** |

## Opening of the special session
## Mr Erik Verbert (Belgium), Chairman of the PC-OC

### 1. Introduction

On December 13, 2017 the European Convention on Extradition turned 60. No less than four Additional Protocols have since then amended and completed our "Mother Convention" as we, the PC-OC, like to call *our Convention*.

The PC-OC has decided to dedicate a full day Special Session to the anniversary of the Mother Convention. Since extradition, today more than ever, entails such a wide variety of issues and sub-issues, we were forced to make a choice. In this case, any choice is a loss of so many other issues and problems we may discuss. But alas, since time is limited, we are obliged to "kill our darlings" and give our attention to just one albeit rather broad subject. In general we have chosen to set up a one day programme around the influence of human rights to extradition and more specifically, the need for assurances regarding human rights matters in extradition cases. By making this choice, we do not take the easy path, quite on the contrary: recent developments in the field of human rights and extradition bring extradition to some extent back to traditional claims of sovereignty and non-inquiry.

Before exploring the subject and hopefully raising questions that nourish the discussions during the Special Session on Wednesday June, 20, I must mention the immense loss of Eugenio Selvaggi (1946-2018), our senior member and former chair of the PC-OC and of the CDPC.

### 2. Eugenio

It was October 2008. In the then brand new Agora Building during a coffee break. I was then a 'new kid on the block' and happy to be there. In the PC-OC. Eugenio came up to me, a bit reluctant perhaps, and he asked me a question which I will never forget. "Erik", he said, "you should be the new chair". At first I was convinced that this was some kind of a practical joke, a prank "they", the seasoned and longtime members of the PC-OC, played on the freshmen or -women of the Committee. I did know for sure at that time, even when wet behind the ears, that Eugenio was both very well-seasoned and a member of the committee for a very, very long time. By the way, next year in 2019, Eugenio would have celebrated his 25th anniversary as a PC-OC member. However, the question was a serious question. That occurred to me soon after the coffee break. I had been 'tapped' as they say. It took me a while to comprehend the full weight of the responsibilities that were to be bestowed upon me. I also realized the full extent of the confidence Eugenio, the Kingmaker (he once used the term himself during the search for a later potential Chair) and all the members of the PC-OC had in me. That was and remains a great honour to me. Especially since the PC-OC is not just a Committee. The PC-OC is both a group of experts *and* a group of friends.

A group of experts: There was not a shadow of a doubt in my mind right after a mere couple of minutes, right after the start of the 4th PC-OC Mod of 3-4 May 2007, the first ever meeting of the

PC-OC that I participated in[1]. The PC-OC is the illustration par excellence of the expression “the Right People at the Right Spot”. A group of friends: the PC-OC is also the best illustration of the expression “Great Minds Think Alike”. The Committee serves as a platform for professionals that know daily practice and practice every day, let’s call it *the joys of work*. And by some strange coincidence, we seem to like the same joys of life: a good conversation, a nice dinner, art (including dance!) and last but not least, a nice beer, which is widely available in the wonderful city of Strasbourg. This is why the PC-OC is to me, and I am certain I can speak here today for many other members and participants, not just a place and group of people.

Unfortunately we were unexpectedly forced to dedicate this special session to the *memory* of a very special person who will remain in our hearts and minds. We should have dedicated this special session to Eugenio, here present in this very room.

It is an honour to welcome Eugenio’s son, professor Nicola Selvaggi of the “l'università degli studi mediterranea di reggio Calabria”, indeed our honored special guest during this special session.

## 3. The Mother Convention: a Very Brief History and a Blink of an Eye into the Future

When freewheeling about an appropriate title for this very special session about our Mother Convention, a very famous song crossed my mind – remember: PC-OC-members do like the arts in all its variations – the title of the song is “Where Do You Go To (My Lovely)”[2]. The title is fitting since we do love our mother Convention, especially when she turns 60 and is still very vital today and for many years to come. However the title is a question, so there must be answer. Surely “our lovely” will not go Juan-les-Pins or St Moritz like the “lovely” from the song.

In order to try to know and to understand where our beloved Convention will go, we need to look at its past, yet I start with a recent finding or rather a recent *confirmation* of a much earlier finding.

When our Committee decided to draft the 4th Additional Protocol, that ultimately changed some of the provisions of the Mother Convention, the one thing I recall first and foremost from all our intense discussions, is that changing even one word of one single paragraph of one of the articles is highly complicated. Time and time again we came to the conclusion that that word was perfectly chosen and perfectly located. Take that word away and the paragraph or even the whole article collapses. This is, I think, because of the *brilliant simplicity* of the Mother Convention. 32 articles, in all not even 4 000 words, is all it took 60 years ago to ensure effective cooperation in criminal matters. And it is all it still takes to assure that cooperation. The latter statement is a bit disrespectful to the four Protocols, but probably not far from the truth. Goethe’s idiom “The art is

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[1] See PC-OC Mod (2007) 06 for the report of that meeting. Under n° 31, the report indicates that “(…) the First Conference of European Prosecutors – i.e. Consultative Council of European Prosecutors (CCPE) - will take place on 4-5 June 2007 in Warsaw on the theme “International Co-operation in the Penal Field” and noted that Mr. Eugenio SELVAGGI (Italy) would represent the CDPC and the PC-OC at the Conference.”

[2] By the British singer-songwriter Peter Sarstedt (1941-2017), released in 1969. The 50th anniversary is next year.

knowing how to set limits" applies perhaps to its fullest extent to the authors of the Convention. The concision of the Convention is in stark contrast with every single instrument in the same field adopted afterwards. Recent tendencies in instrument-drafting amount to downright overregulation, which in its turn leads – and I hope I am wrong – to an overreliance on international courts to solve increasing interpretation and therefore application problems. I assume you all know what I mean.

A very brief history of the Convention cannot go by the Convention's birth certificate. It all started with the initial proposal of the Consultative Assembly, later renamed *Parliamentary Assembly* of 1951 and the preliminary memorandum of the Secretary General - doc S.G. / R (51) 17 rev. - dated 6 December 1951. These two documents lead to *Recommendation 16 (1951)* of the Consultative Assembly. In March 1952 the Committee of Ministers, by Resolution (52) 12, requested the (then) member States' position on the need for an extradition convention. Despite the divergence of the answers of the member States, the Committee of Ministers decided to establish a *committee of experts* chaired by William Fay (Ireland). That was in 1953. The experts concluded their work in 1956, by that time under the chairmanship of M. Mamopoulos (Greece)[3]. Mr. Fay and Mr. Mamopoulos and all the members of that first expert group are the *fathers* of our Mother Convention.

Trying to capture the past and the future in a concise way is a challenge. Yet one phrase may just do that: *Extradition is legal assistance in criminal matters*. Two inseparable characteristics of extradition are herein contained and can be distinguished[4].

Extradition is Legal *assistance*. This is extradition in its 19th century essence and today still the core of extradition and many other forms of international cooperation in criminal matters. By extraditing a fugitive suspect or sentenced person to the requesting state, the requesting state is merely helping, providing assistance to the sovereign execution of the requesting state's jurisdiction over the offence or the sentence. In this perspective, the concept of sovereignty is central, just like the concept of reciprocity. As a consequence, the requested state should and does not look "behind the extradition request" of another other sovereign state. The rule of non-inquiry is paramount in this paradigm of fairly *remote cooperation*. However old and traditional, the essence of this view lives on today. Consistent case law of the ECtHR and most likely any other national and international court, maintains that the right to a fair trial – Article 6 of the ECHR - and all its subordinate or derivative rights do not apply to the extradition proceedings themselves. Extradition proceedings are not meant to determine the criminal charge(s) against the person sought, that is and remains the exclusive competence of the proper judicial authorities of the requesting state.

However extradition is also or has rather evolved into *legal* assistance. The assistance must (also) be

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[3] I refer to the Explanatory Report, n° 1-7: www.conventions.coe.int. For a far more detailed account of the legal history of the structure and functioning of the Council of Europe's committees and other institutions until 1980 and the history of the creation of the Extradition Convention and all other Conventions and Protocols in the field, there is arguably no better source than the PhD thesis of the late professor Françoise Thomas (1945-2010) of the Brussels Royal Military Academy: *De Europese Rechtshulpverdragen* [The European Conventions on International Cooperation in Criminal Matters], Ghent, E. Story Scientia, 1980, 536 p., in particular p. 175-270 on the Extradition Convention. The book is extensively and intensively based upon CoE documents from the fifties until 1979.

[4] I am fully indebted to the visionary introduction of A. H. J. Swart and K. Helder, *Nederlands uitleveringsrecht* [Dutch Extradition Law], Zwolle, Tjeenk Willink, 1986, esp. p. 18-30.

legal and provided in a legal way. The latter concept is not limited to "in accordance with the applicable extradition convention and the domestic legislation on extradition", but entails also compatibility with the fundamental rights *of the person sought*.

Under the "assistance perspective", extradition is a matter between states whereby the person sought is barely more than the *object* of the assistance. The evolution of fundamental rights after the Second World War, have turned the person sought into a legal subject. Extradition inevitably does affect the person sought and his or her family. Extradition does lead to the detention of the person sought, while there may be risks attached to the ultimate surrender.

The Special Session is exactly about the tension between "legal" and "assistance". Chronologically the order should be reversed, yet since both views are interconnected, the exact order does thus not really matter.

**4. Tension(s) and Fluctuations in Time**

Today and probably tomorrow, the tension(s) between effective cooperation and the protection of the rights of the individual that is a subject, subjected to that cooperation, are rising. The protection of human rights is perceived as interference in the assistance process. At the same time and linked to the increasing influence of human rights, other proceedings interfere to a larger extent with extradition proceedings. Most importantly, asylum proceedings are to be mentioned here, yet also the need for cooperation with other States, other than the requesting and the requested state may complicate the traditional relations between just two States. In that respect, the CJEU's *Petruhhin* judgment creates a new avenue for interference in the traditional extradition process, this time by the EU-member State of the nationality of the person sought.

Like any form of cooperation in criminal matters, extradition is based upon a minimum level of trust between States. The negotiation of extradition treaties, conventions or other types of international instruments relies on trust. Without trust there is no convention. The level of trust is not frozen in time, yet evolves for better and / or for the worst and back again. Even if the mutual trust between States is considered of such a level that borders legally disappear, mutual trust can be challenged. Even today in the European Union shadows of doubt are cast upon Member States. Again, we see the increasing reliance on an international jurisdiction to (help to) solve the sensitive issues.

A perceived or real lack of trust – usually in rather well-defined (sub)areas of the Rule of Law – are met with additional warrants to restore the questions raised over such issues as sub-standard prison conditions, the treatment of suspects or sentenced persons in prisons, outside of prisons or in court, the standards of criminal procedures and practises – for example the use of a cage during the trial being a more 'practical' matter - yet even the way judges are being selected and nominated in general, can be put to the test.

These supplements to the extradition request are usually provided via diplomatic channels and are thus assurances of the requesting State and not just of the (central or other) authority that is directly

involved in the extradition case and / or the underlying prosecution or the execution of the sentence.

Roughly speaking the subject is divided into two main questions: Is there a need and if so *when* is there a need for such assurances? And linked to this first question: what is the negative or positive impact of such assurances on the extradition process? This is the subject that panel 1 will address.

Panel 2 deals with the follow issue. If assurances are deemed necessary and are requested and obtained, what should they contain? How to draft assurances? and furthermore: how should assurances be controlled afterwards, i.e. after the surrender?

Questions that may encourage the discussion within **panel 1** and amongst all the participants are for example:

- Can assurances be *overused*? If assurances regarding human rights, esp. regarding Articles 3 and / or 6 ECHR become a standard feature of every single extradition process, could such a 'daily' use not lead to the *erosion of assurances* and increasing challenges before both domestic and supranational courts? The latter challenges of the assurances, would these not also become 'standard' challenges?

- Are assurances always *diplomatic* in nature? Is that a requirement? Are diplomatic assurances of a higher status than non-diplomatic assurances? Is it possible to distinguish between assurances and their formal characteristics?

- Does the need for assurances stem from the "quality" or conversely, the lack thereof of the defence's arguments or is it a matter of principle based on the current state of the law and the interpretation of the ECtHR or any other applicable human rights convention? This means: should the requested state check the compatibility of the extradition with human rights ex-officio or only when the defence raises human rights issues?

- Should assurances be requested when the person sought *consents* to his or her extradition (simplified extradition)? Does waiver of speciality have an influence?

- The ECtHR, and possibly similar Courts or instances outside of Europe, apply an ex nunc evaluation of the alleged violation of the fundamental rights of the person sought. This means that the Court looks at the matter 'now', at the time the Court decides. The situation 'then', usually some years earlier at the time the decision to extradite was made (ex tunc) is not relevant. This approach may have considerable effects on the outcome of the Court's decision or judgment. Any case law in other matters that saw the light between the extradition decision and the Court's decision or judgment may well change the outcome. More "stringent" case law on Article 3 for example may have as an effect that the extradition order that was in line with earlier case law on the same subject, is no longer compatible with the current case law. A question is how the use of assurances can overcome the potential, future, evolution of the interpretation of fundamental rights?

**Panel 2** deals with the content and thus the drafting of assurances and also the control of the assurances afterwards. The following questions may arise:

- The 11 Othman factors. In its (chamber) judgment Othman v UK, appl. no. 8139/09 of 17 January 2012, the Court stated :

  "189. More usually, the Court will assess first, the quality of assurances given and, second, whether, in light of the receiving State's practices they can be relied upon. In doing so, the Court will have regard, *inter alia*, to the following factors:"

  (i) whether the terms of the assurances have been disclosed to the Court;

  (ii) whether the assurances are specific or are general and vague;

  (iii) who has given the assurances and whether that person can bind the receiving State;

  (iv) if the assurances have been issued by the central government of the receiving State, whether local authorities can be expected to abide by them;

  (v) whether the assurances concerns treatment which is legal or illegal in the receiving State;

  (vi) whether they have been given by a Contracting State;

  (vii) the length and strength of bilateral relations between the sending and receiving States, including the receiving State's record in abiding by similar assurances;

  (viii) whether compliance with the assurances can be objectively verified through diplomatic or other monitoring mechanisms, including providing unfettered access to the applicant's lawyers;

  (ix) whether there is an effective system of protection against torture in the receiving State, including whether it is willing to cooperate with international monitoring mechanisms (including international human rights NGOs), and whether it is willing to investigate allegations of torture and to punish those responsible;

  (x) whether the applicant has previously been ill-treated in the receiving State and

  (xi) whether the reliability of the assurances has been examined by the domestic courts of the sending/Contracting State.

  I left out the references to the case law for any of the 11 factors. The Court uses the wording

'inter alia' and 'factors' and not 'criteria', this means that the Court did not – and so far does not – *prescribe* a *fixed* or limitative set of 11 criteria that should be applied in (any) case where (diplomatic) assurances are deemed necessary and such assurances where requested and obtained.

One question that may arise is whether the Othman factors are or should be treated as a kind of guidance for requested and requesting states when providing assurances? The status of the Othman factors are not clear, esp. since later case law sometimes, certainly not always, simply refers to Othman, without a clear indication of the concrete application of these factors to the case at hand.

- Factor (vii) may be difficult to apply insofar as the length and strength of the bilateral relations (in terms of extradition) are (almost) non-existent and there is thus no record at all of previous assurances having been applied in practice. In such (rare) cases, the control of the assurances may be hampered.

- A traditional hurdle to organise some adequate form of post-surrender control is that the diplomatic and consular representation of the requested State does not, as a principle, assure any sort of assistance to non-nationals. States that do not extradite their nationals are usually confronted with this limit. How to address this issue?

- Also, even when such assistance would be possible for non-nationals, practical matters may render the control ineffective. Means are limited and a smaller country's embassy may not be able to visit a surrendered person in a remote location. One solution could be to require the requesting State to concentrate all extradition matters in one location, e.g. the capital, and pursue the matter after the surrender in that single location. Would this be a practical solution to post-surrender control issues of a practical nature?

- Aut dedere, aut judicare or aut dedere, aut exequie may serve as an alternative to extradition, perhaps also in cases whereby the assurances are not deemed sufficient and extradition is to be refused for that reason. "ADAJ" or "ADAE" is much easier said than done. A final Wild Card of a question (or probably the Joker): how can the alternative be a real alternative?

## Opening of the special session
## Mr Jörg Polakiewicz, Director, Directorate of Legal Advice and Public International Law

Dear colleagues and friends,

It is an honour and a real pleasure for me to join you in celebrating the 60th anniversary of the European Convention on Extradition.

Since 1981 your Committee - the Committee of Experts on the operation of European conventions on co-operation in criminal matters (PC-OC) - has followed the implementation of this Convention, discussing legal and practical aspects to facilitate its functioning, and proposing legal and practical solutions to obstacles encountered.

Your committee has produced deliverables of a very practical nature: guidelines, country information and an impressive compendium on the ECHR case law relating to extradition.

When necessary, your Committee proposed new legal instruments to improve or update the Convention taking into account developments in society: altogether four additional protocols (Additional Protocol in 1975, the Second Additional Protocol in 1978, the Third in 2010 and the Fourth Additional Protocol in 2012) as well as six Committee of Ministers' resolutions.

During my career at the Council of Europe, I have been dealing with the convention essentially from a treaty-law point of view.

Only during a brief period (October 2008-September 2010), I was directly responsible for criminal law cooperation. I have very good memories from this time, having always been impressed by the expertise and professionalism of your committee. I remember in particular a mission to Moscow together with Erik Verbert, where our meeting was hosted by Vladimir Zimin.

Today, the treaty office is part of my directorate and I'm happy that we could provide the original treaty for your meeting.

The Convention was the first in the field of mutual legal assistance in criminal matters. Its text reflects in many aspects the values of the Council of Europe: the fight against impunity based on the rule of law, and respecting our common fundamental values embodied in the European Convention on Human Rights.

I would like to share three reflections with you:

- on the European character of our treaties;
- on the legal nature of protocols;
- on human rights and extradition.

The convention we celebrate today is a "European Convention". Traditionally in the Council of

Europe we called our treaties “European”. It was only in 2004 that the then Secretary General, Walter Schwimmer, decided to change this to “Council of Europe treaties”. At the same time we changed the name of our treaty series from “European Treaty Series” (ETS) into “Council of Europe Treaty Series” (CETS).

The idea was to distinguish us from the EU, to underline our separate identity. Personally I was not convinced at the time, nor am I now that this change was really necessary.

The adjective “European” better embodies the idea of a common European legal space. What better convention to symbolise this common legal space than the Extradition Convention that potentially replaces 1081 bilateral treaties between the 47 member States. “European” does not mean that our treaties are restricted to Europe. The Extradition Convention is one of the 15 Council of Europe treaties which have been ratified by all member States. But it has also been ratified by Israel, the Republic of Korea and the Republic of South Africa.

Under Committee of Ministers procedures, a single member State party to a treaty can effectively veto accession by a third country, while the candidate country is not informed about the identity of the opposing state. This can become a frustrating experience for third countries.

On substance, I think a case-by-case approach is warranted. Extradition and mutual assistance require a certain level of trust. Candidates for accession should provide minimum guarantees in terms of human rights and respect for the rule of law.

But there are other conventions, for example our Convention on the Transfer of Sentenced Persons, which themselves contain sufficient guarantees against abuse. The transfer of a detained person requires the consent by all three parties involved: the requesting state, the requested state and the individual concerned. A poor human rights record of a country wishing to accede should a priori not be a reason to refuse accession.

My second point relates to the “hybrid” character of additional protocols to the Extradition Convention. Though called “additional”, some of these protocols actually changed provisions of the mother convention which is questionable from a treaty law point of view.

In that context, I would like to draw your attention of the revised version of final clauses to Council of Europe treaties which the Committee of Ministers adopted on 5 July 2017. The relevant document CM(2017)62 distinguishes final clauses for amending protocols from those for additional protocols.

The following explanation is given:
*“Two types of amending protocols exist within the Council of Europe’s treaty law practice. The first type consists of protocols which amend a convention upon entering into force and, the amending provisions having been absorbed by the convention, can no longer be signed or ratified by new Parties to the convention. The second type consists of protocols which amend some provisions of a convention while at the same time adding additional provisions to it and which can still be signed or*

*ratified by new Parties to the convention after their entry into force. Elaboration of these protocols with a dual aim should be avoided, as their different legal natures cannot be reflected in the modalities of their entry into force."*

Allow me a final remark on the fascinating topic of extradition and human rights. Already in *Soering*[5], the ECtHR highlighted the underlying tension between respect for individual human rights and effective international cooperation in the suppression of crime.

In its case law since *Soering*, the ECtHR has given much more precision to the requirements resulting from the various ECHR provisions that are relevant for extradition proceedings.

Consistent case law is essential, in particular in the area of extradition law where the interests of other nations that are not bound by the ECHR are directly affected. The ECtHR is well advised to exercise its powers prudently, taking into account the difficulties inherent in assessing the human rights situation in jurisdictions that are not part of the *"legal space of the Contracting States"*.

The ECtHR must confront new issues and arguments advanced by domestic courts and tribunals which may convince it to clarify and even modify its case law. Extradition cases are thus a very good example of cases where member States should make use of their right to intervene under Article 36 of the ECHR. The Copenhagen declaration (13 April 2018) stated in this respect:
*"An important way for the States Parties to engage in a dialogue with the Court is through third-party interventions … their views and positions, can provide a means for strengthening the authority and effectiveness of the Convention system."*

Any High Contracting Party can intervene under Article 36 (2) of the ECHR. May a government of non-contracting state also do so? Could the term *"any person"* be considered to cover a government or a person representing a government, e.g. secretary of state or a prosecutor general?

I was asked this question during a meeting of the Roma-Lyon Group, criminal and legal affairs subgroup in Berlin on 6 November 2015, where I presented ECHR case law relating to extradition cases.

I am not aware of any established ECHR case law on this issue. But why not? In many cases, such interventions explaining the law and practice of the requesting state may serve *"the interests of administration of justice".*

The fear that human rights would impede the effective enforcement of transnational criminal law is unwarranted. On the contrary, effective criminal justice is better served by an extradition law that respects individual rights.

I am happy to see that this idea is now generally accepted case law not only of our ECtHR, but also of

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[5] *Soering v. United Kingdom,* No. 14038/88, judgment of 7 July 1989.

the Court of Justice of the European Union. The *Aranyosi* and *Căldăraru* judgment of 5 April 2016[6] confirmed that execution of a European Arrest Warrant must be deferred if there was a real risk of inhuman or degrading treatment because of the conditions of detention of the person concerned in the EU member State where the warrant had been issued.

In earlier cases, the CJEU was less clear on this issue and I think we can only welcome the fact that the case law of both European courts is converging in the sense that national authorities have a duty to effectively ensure respect for basic human rights[7].

Thank you for your attention.

[6] CJEU Joined Cases C-404/15 and C-659/15 PPU, *Pál Aranyosi and Robert Căldăraru* (5 April 2016).

[7] See in addition to the already mentioned Aranyosi and Căldăraru judgment C-578/16 PPU *C.K. and Others v. Supreme Court of Republic Slovenia* (16 February 2017); ECHR *Avotins v Latvia*, Application no. 17502/07, Judgment of 23 May 2016

## Introductory speech on the 60th anniversary of the European Convention on extradition: Lessons learnt and challenges for the future

Mr Vincent Glerum, Counsellor at the Tribunal of Amsterdam

I am honoured to be here at the special session of the PC-OC, which is dedicated to the relationship between extradition and human rights. I have been asked to paint a broader picture of this interesting and relevant subject as an introduction to today's discussions. The overall theme of my speech is the tension between the aim of extradition, that is to prevent the risk of impunity and, on the other hand, the obligation to protect an individual's fundamental rights. Has Europe managed to reconcile these concepts and if so, how? In answering this question, we shall first take a look at the European Convention on Extradition and the European Convention on Human Rights and we shall examine what 60 years of Strasbourg case law on extradition has brought us. After that, we shall compare extradition to the European Arrest Warrant, the flagship instrument of judicial cooperation of the European Union.

**The European Convention on Extradition and human rights**

But let us first turn our attention to the birthday boy, the European Convention on Extradition. As is well known, the European Convention on Extradition (ECE) does not contain a *general* human rights based ground for refusal of extradition. The Explanatory Report proves that the drafters of the convention were aware of the tension between preventing the risk of impunity and protecting the rights of the requested person. During the drafting of the convention, two attitudes regarding extradition emerged: one attitude regarded extradition as a means to repress crime, which this instrument should facilitate; the other attitude introduced humanitarian conditions and tended to restrict the possibility of extradition. These attitudes proved impossible to reconcile, so says the Explanatory Report.[8] The convention, therefore, reflects a compromise between these two attitudes. In virtue of Art. 1 ECE the grounds for refusal are exhaustively listed in the convention,[9] but under Art. 26 ECE contracting States can make reservations to any of the provisions of the convention, thus providing the possibility to refuse extradition, if extradition would run contrary to the fundamental principles of a State's legal system.[10]

Even though the convention does not contain a general human rights based ground for refusal, some provisions of the convention already do evoke associations with what we now, 60 years later,

[8] *Explanatory Report to the European Convention on Extradition*, par. 9.

[9] Art. 1 ECE imposes the obligation to extradite ´subject to the provisions and conditions laid down in this Convention'.

[10] My own country, *e.g.*, has made use of this option by reserving the right not to grant extradition if the requested person was convicted *in absentia* without having been able to exercise his rights of defence as mentioned in Article 6(3)(c) ECHR or if extradition would cause particular hardship to the requested person.

consider to be well established human rights based obstacles to extradition. One notable example is the political offence exception (Art. 3 ECE). One of the rationales of this exception is the presumption that a political offender will not receive a fair trial in the requesting State. Another example concerns the death penalty (Art. 11). If the offence carries the death penalty according to the law of the requesting State and if the law of the requested State does not provide for the death penalty, the requested State may refuse extradition, unless it is sufficiently assured that the death penalty will not be carried out.[11]

Although these provisions contain elements which prefigure the human rights based obstacles to extradition which would eventually be developed by the European Court of Human Rights (ECtHR), there are some marked differences. As regards the political offence exception, the presumption that a political offender will not receive a fair trial in the requesting State is *not rebuttable*: the exception is mandatory. Assurances by the requesting State cannot prevent refusal of extradition on the basis of the political offence exception, whereas according to the case law of the European Court of Human rights assurances can, in principle, remove a real risk of a violation of fundamental rights. As regards the death penalty exception, this exception is *optional*. It is, therefore, the national law of the requested State which determines whether the risk of imposition of the death penalty will prevent extradition, whereas according to the case law of the ECtHR a real risk of imposition of the death penalty in the requesting State gives rise to a prohibition to extradite. The same holds true for reservations: under reservations, it is the national law of the requested State which is decisive. Moreover, at the time the exceptions were introduced – and the reservations were made – well before the Strasbourg organs introduced the extraterritorial effect of fundamental rights –, they were inspired by the desire to protect the sovereignty of the requested State rather than by the intrinsic value of protecting the human rights of requested persons. The exceptions were designed to prevent the requested State from being forced to cooperate with criminal proceedings or the enforcement of a sentence against its own principles.

**The Convention for the Protection of Human Rights and Fundamental Freedoms and extradition**

Let us now turn to the Convention for the Protection of Human Rights and Fundamental Freedoms. At the time this convention was being drafted, extradition was already for many years an accepted

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[11] Yet another example concerns *in absentia* convictions. Art. 3 of the Second Additional Protocol allows the requested State to refuse extradition in case of a conviction *in absentia*, if the minimum rights of the defence were not observed, unless the requesting State provides sufficient assurances that the requested person has the right to a retrial which safeguards the rights of defence.

instrument for cooperation between states for repressing crime. No provision of the convention[12] expressly imposes any restriction on extradition.[13] Moreover, when read literally, Art. 1 ECHR[14] seems to preclude any extraterritorial effect of the convention. A literal reading would mean that the requested State is not responsible under the convention for what happens to the requested person after extradition.

Against this background, the influence fundamental rights have on extradition today hardly seems self-evident. As is often the case, however, whenever states institute an independent body to interpret and apply the rules of a convention, the interpretation of these rules takes on a dynamic of its own.

**The case law of Strasbourg on extradition**

Already very early in the history of the human rights convention the European Commission of Human Rights had to deal with complaints that extradition from the territory of a contracting Party would be contrary to a right or a freedom guaranteed by the convention. Wisely, the European Commission did not rule out that 'in exceptional circumstances' extradition might 'give rise to the question whether there would be 'inhuman treatment' within the meaning of Art. 3'[15] or that extradition for the purposes of bringing the requested person before a 'court lacking even the most fundamental legal guarantees' might in 'exceptional circumstances' raise a problem under Art. 3 ECHR.[16] The threshold of 'exceptional circumstances' was exceptionally high: before the *Soering*-judgment, the European Commission had only declared such a complaint admissible in three cases, which for various reasons did not reach the ECtHR.[17]

In 1989 the ECtHR, in the landmark *Soering*-case, finally got a chance to rule on the extraterritorial effect of fundamental rights on extradition. The ECtHR held, firstly, that extradition may give rise to an issue under Art. 3 if the requested person faces a real risk of being subjected to ill-treatment in

[12] Or indeed any of the protocols to the convention.

[13] On the contrary, Art. 5(1)(f) ECHR illustrates that at the time of the drafting of this convention, extradition was seen as unproblematic from the point of view of fundamental rights. After all, detention with a view to extradition is expressly recognised as one of the permissible grounds for deprivation of liberty.

[14] Art. 1 ECHR imposes the obligation on contracting Parties to secure 'to everyone within their jurisdiction' the fundamental rights and freedoms of the convention.

[15] See, *e.g.*, *X. v. Germany* (dec.), no. 3040/67, 7 April 1967.

[16] *K. and F. v The Netherlands* (dec.), no. 12543/86, 2 December 1986. The European Commission's approach to a possible unfair trial was more restrictive than its approach to possible ill-treatment: as regards violations of Art. 6 ECHR, the European Commission held that extradition could in no way engage the responsibility of the requested State under that provision. It is important, however, that the complaint concerned extradition to another contracting Part.

[17] *Amekrane v. The United Kingdom* (dec.), no. 5961/72, 11 October 1973; *I.B. v. The Federal Republic of Germany* (dec.), no. 6242/73, 24 May 1974; *Altun v. Germany* (dec.), no. 10308/83, 3 May 1983.

the requesting country and, secondly, that it is not excluded that an issue might 'exceptionally' be raised under Art. 6, in circumstances where the person concerned 'has suffered or risks suffering a flagrant denial of a fair trial' – later to be called a 'flagrant denial of justice' – in the requesting state.[18]

It is evident that the ECtHR struggled with reconciling the object of preventing the risk of impunity with the obligation to protect the fundamental rights of anyone 'within the jurisdiction' of the requested State. The ECtHR did not wish to stretch that obligation to the point where a requested state would be prohibited from extraditing a requested person unless 'the conditions awaiting him in the country of destination are in *full* accord with *each* of the safeguards of the Convention'.[19] The *absolute* nature of Art. 3 ECHR, however, led the ECtHR to hold that the obligation not to extradite in case of a real risk of ill-treatment is inherent in Art. 3 ECHR.[20] Still, in deciding what amounts to inhuman or degrading treatment, the ECtHR did envisage balancing the 'demands of the general interest of the community' – *i.e.* that a suspected offender be brought to justice – and the 'requirements of the protection of the individual's fundamental rights', although later on the ECtHR would expressly disavow this part of *Soering*.[21] As to Art. 6 ECHR, this provision does not have an absolute nature, but the right to a fair trial does hold 'a prominent place in a democratic society'. In reaching the conclusion that a *flagrant denial* of a fair trial may – in exceptional circumstances – form an obstacle to extradition, the ECtHR obviously balanced the aim of preventing the risk of impunity and the individual's fundamental rights, by excluding a *mere* violation of the right to a fair trial as a ground for blocking extradition.

The *Soering*-judgment has proven to be a good conceptual framework for the further development of the court's case law on fundamental rights as an obstacle to extradition. On the basis of that framework in the years since *Soering* the ECtHR has established a hierarchy of fundamental rights:

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[18] *Soering v. The United Kingdom*, no. 14038/88, 7 July 1989.
[19] *Soering*, § 86.
[20] *Soering*, § 89.
[21] In *Chahal v. The United Kingdom* – an expulsion case – that possibility was roundly rejected: *Chahal v. The United Kingdom*, No. 22414/93, § 81, 15 November 1996. The ECtHR subsequently recognised that since *Soering* it had never undertaken an examination of the proportionality of a proposed *extradition* and that apparently it had, therefore, departed from the approach envisaged in *Soering*: *Babar Ahmad e.a. v. The United Kingdom*, nos. 24027/07, 11949/08, 36742/08, 66911/09 and 67354/09, § 173, 10 April 2012. However, in that same judgment the ECtHR also held that, because the convention does not purport to be a means of exporting convention standards, treatment which might violate Art. 3 ECHR in a territorial setting might not attain the minimum level of severity which is required in an extraterritorial setting (§ 177). As an example the ECtHR referred to cases concerning negligence in providing appropriate medical care. Perhaps excluding the relevance of the ECtHR's case law on medical care for extraterritorial cases is all that this part of the judgment is intended to do. I have found a reference to this part of the judgment in only one other extradition case, in which the applicant claimed that if extradited to Kazakhstan, she would not receive adequate medical care in detention: *Yefimova v. Russia*, no. 39786/09, § 211, 19 February 2013. But even so, it must be said that *Babar Ahmad* seems to leave some wiggle room for balancing the level of severity of the ill-treatment and the danger posed by the person concerned.

some fundamental rights can act as a bar to extradition, others only under certain conditions. For instance, a real risk of imposition of the death penalty will stand in the way of extradition, either under Art. 2, Art. 3 or Protocols 6 and 13.[22] As to *non*-absolute rights, the ECtHR introduces a high threshold in order to balance the interests of society and the individual's rights. One way of establishing a high threshold is by using the flagrancy-criterion. Thus, only a real risk of a *flagrant* breach of Art. 5 ECHR - for instance, if the requesting State arbitrarily detained the person concerned for many years without any intention of bringing him to trial - is *sufficiently* serious to block extradition.[23,24] In the case of Art. 8 ECHR, another non-absolute right, there is no need for imposing the condition that the breach of Art. 8 ECHR is flagrant. The proportionality test of Art. 8(2) ECHR[25] leaves enough room for balancing the interests of society in preventing the risk of impunity and the individual's right to family life. Only 'in exceptional circumstances' will the private or family life of the requested person outweigh the legitimate aim pursued by his extradition.[26]

If the requesting State is a contracting Party to the convention, one could argue that the standard in territorial cases fully applies, because, unlike in *Soering*, both States are bound by the convention. However, fully applying the territorial standard would not only upset the balance between preventing the risk of impunity and protecting the individual's rights which is reflected in the 'flagrancy' test, but would also tend to undermine the primary responsibility of the requesting state and its courts for protecting the individuals rights. It is, therefore, not surprising that the ECtHR has held that the 'flagrant denial of justice' standard also applies to extradition to a Party to the convention.[27]

This is, of course, not to say that the ECtHR ignores the fact that the requesting State is a contracting Party. When a non-absolute right is at stake, such as the right to a fair trial, the ECtHR seems to rely fairly heavily on the requesting State's obligation to respect the individual's fundamental rights and

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[22] *Husayn (Ali Zubaydah) v Poland*, no. 7511/13, § 453, 24 July 2014.

[23] Although in the expulsion case of *Tomic v. The United Kingdom* the ECtHR initially doubted whether Art. 5 ECHR could act as a bar to expulsion – according to the court the possible applicability of Art. 5 ECHR was even less clear than the possible applicability of Art. 6 ECHR –, in the case of *Othman (Abu Qatada) v. The United Kingdom*, the ECtHR cast aside those doubts and found that Art. 5 ECHR is applicable to expulsion. In the case at hand, a period of fifty days of detention before the person concerned was brought before a court, was not considered to amount to a flagrant breach.

[24] See also the expulsion case *Z. and T. v The United Kingdom* (dec.), no. 27034/05, 28 February 2006. In this case the applicants, who were Christians, claimed that their expulsion to Pakistan would violate Art. 9 ECHR, because they would be unable to live openly and freely as Christians. In effect, the ECtHR held that a violation of freedom of religion could only form a bar to expulsion to the extent that it constituted a violation of Art. 2 or 3 ECHR, a flagrant denial of a fair trial or a flagrant breach of Art. 5 ECHR. Although the ECtHR did not wish to rule out the possibility that expulsion might in exceptional circumstances engage the responsibility of the returning State under Art. 9 ECHR, it found it difficult to visualise a case 'in which a *sufficiently* flagrant violation of Art. 9 ECHR would not also involve treatment in violation of Art. 3 ECHR' (emphasis added).

[25] The interference with the exercise of that right must be 'necessary in a democratic society (…) for the prevention of (…) crime (…)'.

[26] *King v. United Kingdom* (dec.), no. 9742/07, § 29, 26 January 2010.

[27] *Stapleton v. Ireland* (dec.), no. 56588/07, § 29, 4 May 2010.

to provide an effective remedy against any violation of these rights as well as the possibility to lodge a complaint with the ECtHR against that State.[28]

For cases concerning the application of instruments of mutual recognition between Member States of the EU – which instruments require national courts to consider all the other Member States to be complying with the fundamental rights recognised by EU law – the ECtHR even presumes that EU law affords a level of protection that is equivalent to the protection afforded by the convention. This presumption can only be rebutted, if, in a given case, the protection of fundamental rights was 'manifestly deficient'. Again, this line of case law, which was developed in the *Bosphorus v. Ireland* and *Avotiņš v. Latvia*-judgments,[29] shows the court balancing the aim of preventing the risk of impunity within the area of Freedom, Security and Justice and the obligation to protect fundamental rights.

In the event of a finding that extradition would violate the ECHR, there is a real risk that the requested person will escape justice. After all, unless the circumstances which led to that finding change – for instance if the requesting State yet provides an adequate diplomatic assurance –, the person concerned will not stand trial or undergo his sentence in the requesting State.

There is evidence in the ECtHR's case law that prosecution – either in the requested State or in the State of which the requested person is a national – is an alternative to extradition and may, therefore, be relevant in deciding whether extradition would violate the ECHR. In the *Soering*-case, Germany, a country which had abolished the death penalty and which had jurisdiction to try its national Jens Soering, also requested his extradition. The ECtHR found the possibility of extradition to Germany relevant for the overall assessment under Art. 3 ECHR, because extradition to Germany 'would remove the danger of a fugitive criminal going unpunished as well as the risk of intense and protracted suffering on death row'.[30]

At any rate, for offences to which the principle *aut dedere aut judicare* applies, as a result of the refusal of extradition the requested State is obliged to consider the possibility of prosecution in the requested State.

Prosecution as an alternative to extradition is fraught with all kinds of problems. The evidence will most probably be in the requesting state, making any prosecution dependent on the cooperation of that state. Use of the evidence gathered by the requesting State may itself be in violation of the

[28] See, *e.g.*, *Cenaj v. Greece and Albania* (dec.), no. 12049/06, 4 October 2007; *Kaplan v. Germany* (dec.), no. 43212/05, 15 December 2009; *Stapleton v. Ireland* (dec.), no. 56588/07, § 29, 4 May 2010.

[29] *Bosphorus Hava Yollari Turizm ve Ticaret Anomi Şirketi v. Ireland* (GC), no. 45036/978, 30 June 2005; *Avotiņš v. Latvia* (GC), no. 17502/07, 23 May 2016. See also *Pirozzi v. Belgium*, no. 21055/11, 17 April 2018.

[30] *Soering*, § 110 and § 111. See also *King v. The United Kingdom* (dec.), no. 9742/07, §29, 26 January 2010. In that case, the UK provided convincing reasons as to why it was appropriate to prosecute in the requesting State, 'not least that the applicant's co-accused have all been tried there'.

ECHR, for instance, if incriminating statements of witnesses were obtained by ill-treatment.[31] And even if there is enough *untainted* evidence to warrant a trial, the requested person may no longer be in custody or even in the territory of the requested State. Some extradition proceedings, especially those in which a fundamental rights violation is argued, can take a long time and during that time it may become necessary to release the requested person to prevent a violation of Art. 5 ECHR.[32]

**The EAW and fundamental rights**

At this juncture, it may be useful to look at the EAW. The EAW is based on the principle of mutual recognition: according to this principle each Member State accepts the application of the criminal law in force in the other Member States, even though the implementation of its own national law might produce a different outcome. Mutual recognition in turn is founded on the mutual trust of Member States that their national legal systems are capable of providing equivalent and effective protection of the fundamental rights recognised at EU level. Those principles justify that the EAW-system operates between judicial authorities, has limited grounds for refusal and provides for short time limits for the decision on the EAW and for the actual surrender of the requested person. The swift execution of an EAW constitutes the rule, whereas the refusal to execute is intended to be a – strictly interpreted – exception.

Neither the ECE, nor the Framework Decision on the EAW contains a *general* human rights based ground for refusal. The grounds for refusal are *exhaustively* listed in the Framework Decision. Nor does the Framework Decision provide for the possibility of making execution of the EAW dependent on general assurances that human rights will be respected. The possible assurances are also *exhaustively* listed in the Framework Decision.[33]

Still, it should come as no great surprise that in the *Aranyosi and Căldăraru*-case the CoJ has acknowledged that a real risk of inhuman or degrading treatment prohibits surrendering the requested person to the issuing Member State. The preliminary references in that case were

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[31] See *El Haski v. Belgium*, no. 649/08, § 85, 25 September 2012.

[32] In an notable Dutch extradition case, Turkey sought the extradition of Nuriye Kesbir in 2002 for the purpose of prosecuting her for being a member of the PKK and taking part in armed attacks on the military. Eventually, in the course of long and tortuous extradition proceedings during which Kesbir had been released, the Court of Appeal of The Hague in 2005 ruled that extradition would be contrary to Art. 3 ECHR because of a real risk that Kesbir would be subjected to ill-treatment. When the Supreme Court upheld this judgment in 2006 (Dutch Supreme Court (*Hoge Raad der Nederlanden*), judgment of 15 September 2006, ECLI:NL:HR:2006:AV7387), The Netherlands were bound under Art. 7 of the European Convention on the Suppression of Terrorism to submit the case to the Public Prosecution Service for the purpose of prosecution. Although the refusal of extradition automatically meant that The Netherlands had jurisdiction, that jurisdiction could not be exercised, because Kesbir had left the country.

[33] See, e.g., CoJ, judgment of 5 April 2016, *Aranyosi and Căldăraru*, C-404/15 and C-659/15 PPU, ECLI:EU:C:2016:198, par. 80.

occasioned by judgments of the Strasbourg court in which it found violations of Art. 3 ECHR, because of prison overcrowding in Hungary and Romania.[34] Art. 4 of the Charter of fundamental rights of the European Union corresponds with Art. 3 ECHR and the former provision may, therefore, not afford less protection than the latter (Art. 52(3) Charter).

As the Strasbourg court did in *Soering*, the CoJ grappled with the issue of reconciling preventing the risk of impunity with protecting fundamental rights. In doing so, it came up with an interesting solution. Once the executing judicial authority has established that there is a real risk for the requested person, it may not refuse the execution of the EAW, but it must postpone its decision, until it obtains – within a reasonable time – information that allows it to discount the existence of such a risk. In the meantime the requested person may be held in custody, but only in so far the duration of his detention is not excessive. Only if the existence of a real risk cannot be discounted within a reasonable time, does the executing judicial authority have to decide whether the proceedings should be brought to an end.

Note that *refusal* is not allowed, because the grounds for refusal are exhaustively listed, and note also that what is needed from the issuing judicial authority is *information*, because the assurances are exhaustively listed. To some extent this is a matter of semantics: bringing the proceedings to an end has the same effect as a refusal; assurances about future prison conditions and information about future prison conditions aren't really all that different. Evidently, the CoJ did not wish to deviate from its previous insistence that the grounds for refusal and assurances are exhaustively listed.

But there is a deeper meaning. The CoJ's solution affords at least the same protection as the Strasbourg court's case law: as long as the real risk persists, the requested person will not be surrendered. At the same time, this solution tries to prevent the risk of impunity as much as possible, by postponing, but not abandoning, the execution of the EAW. What is more, the applicable standard is that of Union law; by referring in this regard to its *Melloni*-judgment,[35] the CoJ apparently wants to deter the national courts of the Member States from applying a *higher* national standard of protection, as this would compromise, *inter alia*, the effectiveness of the EAW.

But does it work in practice? *Aranyosi and Căldăraru* raises the question what standard of protection Union law entails. Ever since the *Muršic*-judgment of the ECtHR,[36] the District Court of Amsterdam,

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[34] See, *e.g.*, *Varga and Others v. Hungary*, nos. 14097/12, 45135/12, 73712/12, 34001/13, 44055/13 and 64586/13, 10 March 2015, and *Constantin Aurelian Burlacu v. Romania*, no. 51318/12, 10 June 2014.

[35] CoJ, judgment of 26 February 2013, *Melloni*, C-399/11, ECLI:EU:C:2013:107, par. 60.

[36] *Muršić v.Croatia*, no. 7334/13, 20 October 2016.

the Dutch executing judicial authority, has applied the principles set out in that judgment to situations of overcrowding in multi-occupancy cells. Problems arise when the information provided by the issuing judicial authority shows that the requested person will have less than 3 sq m of floor space. This gives rise to a strong presumption of a violation of Art. 3 ECHR, which can only be refuted if certain compensating factors are present.[37] In about 20 to 30 of these cases, mostly concerning Romanian EAW's, the District Court found a real risk of inhuman or degrading prison conditions and has postponed the decision on the EAW. In none of these cases have the issuing judicial authorities provided information which would exclude that real risk. Apparently, the problems with prison overcrowding in those Member States simply are too widespread and cannot be solved within a reasonable time. One Member State, however, has avoided the finding of a real risk by adopting a policy of designating prisons which do comply with Art. 3 ECHR for detaining persons who were surrendered to that Member State. Although this policy raises questions about equality, it does satisfy both the need to prevent the risk of impunity and the duty to protect fundamental rights.

In a small number of cases, the Dutch executing judicial authority brought the proceedings to an end, on average after a period of nine months after postponing the execution of the EAW. To my knowledge, prosecuting the requested person in the Netherlands or taking over the execution of the sentence, if at all possible, is not contemplated. Of course, once prison conditions are improved, a new EAW could be issued in these cases. However, the end result is that as long as the persons concerned remain in the Netherlands and as long as prison conditions are not improved, they will not face justice.

Soon, the CoJ will have another occasion to answer questions about prison conditions and the EAW. Two German courts have recently put preliminary references before the CoJ, asking it in essence to clarify how the existence of a real risk for the requested person should be assessed.[38] Is, for instance, the fact that the national law of the issuing Member State provides for an effective remedy against unsuitable prison conditions enough to exclude a real risk? The reference here is to the decision of the Strasbourg court in *Domján v. Hungary*, in which it declared a complaint about prison overcrowding and other poor prison conditions inadmissible, having regard to a new domestic preventive and compensatory remedy.[39] If such a remedy does not exclude the need for an assessment of a real risk, should the executing judicial authority only examine prison conditions in

[37] The reductions in personal space must be short, occasional and minor, such reductions must be accompanied by sufficient freedom of movement outside the cell and adequate out-of-cell activities and the applicant must be confined in what is, when viewed generally, an appropriate detention facility.
[38] Case C-128/18 and case C-220/18 PPU.
[39] *Domján v. Hungary* (dec.), no. 5433/17, 14 November 2017.

the prison in which the person *probably* will be detained or should it examine every prison in which he might *possibly* be placed? And is a *general* assurance that the fundamental rights of the requested person will be respected, sufficient to ward off any real risk for the requested person? The answer to these questions will be directly relevant for the EAW, but may also influence extradition from a Council of Europe State to a EU Member State and *vice versa*.

The same holds true for another preliminary reference to the CoJ: this highly sensitive reference concerns the rule of law in Poland. For the first time, the European Commission has issued a Reasoned Proposal under Art.7(1) TEU, asking the European Council to determine that there is a clear risk of a serious breach by a Member State of the rule of law, one of the values on which the Union is based and which are common to the Member States (Art. 2 TEU). Basing itself on the findings of the European Commission with regard to legislative changes to the judicial system, the Irish High Court has found that Poland has indeed breached that common value and it has asked the CoJ whether such a finding in itself justifies refusing to execute an EAW for the purpose of prosecution or whether an assessment of the requested person's risk of a flagrant denial of justice is still necessary.[40] If the CoJ should find that a breach of the rule of law dispenses with the need to enquire whether the requested person runs a real risk of a flagrant denial of justice, this would mean that Polish EAW's for the purpose of prosecution could no longer be executed. It would probably also have an impact on extradition by a Council of Europe State to Poland. Finally, as far as the Strasbourg court is concerned, this would probably mean that the presumption of equivalent protection no longer applies to Poland. I shall not comment on this delicate issue any further, except to say that the District Court of Amsterdam, given the fundamental nature of the issue, has decided to adjourn cases concerning Polish EAW's for the purpose of prosecution in order to await the CoJ's decision.

As is evident from the *Petruhhin*- and *Pisciotti*-judgments,[41] EU law also influences extradition law in two more direct ways, for instance, if the requested person is a citizen of another Member State than the requested State and has exercised his fundamental right of freedom of movement (Art. 21 TFEU). This is another example of the dynamics involved, whenever the task of interpreting a treaty is attributed to an international court.

First of all, although extradition falls within the competence of the Member States, EU law and, therefore, the Charter of Fundamental Rights is applicable to extradition by a EU Member State to a non EU Member State, if the requested person is a citizen of another Member State and has

[40] Case C-216/18 PPU (*Minister for Justice and Equality (Défaillances du système judiciaire)*).

[41] CoJ EU, judgment of September 2016, *Petruhhin*, C-182/15, EU:C:2016:630; CoJ EU, judgment of 10 April 2018, *Pisciotti*, C-191/16, ECL:EU:C:2018:222.

exercised his right of freedom of movement. Art. 19(2) Charter, which incorporates the relevant case law from the ECtHR regarding Art. 3 ECHR, in no uncertain terms prohibits extradition to a State where there is a serious risk that the requested person would be subjected to the death penalty[42] or to ill-treatment.

Secondly, if the requested EU Member State does not extradite its own nationals, but does extradite nationals of other Member States, this unequal treatment gives rise to a restriction of the freedom of movement of EU citizens. Because generally a State does have jurisdiction to prosecute its own nationals for offences committed abroad, but does not have jurisdiction to prosecute nationals of another Member State for offences committed abroad, extradition for the purpose of prosecution is, in principle, an appropriate measure to achieve the legitimate aim of preventing the risk of impunity, unless there is an alternative which would be *less prejudicial* to the exercise of the fundamental right of freedom of movement and *equally effective* in achieving the aim of preventing impunity. If the Member State of nationality has jurisdiction, that alternative consists of affording that Member State the opportunity to issue an EAW for the purpose of prosecution. The requested State is obliged to execute the EAW, should the Member State of nationality issue one, *provided* that the Member State of nationality has jurisdiction and *provided* that the EAW relates to at least the same offences as the extradition request.

Interestingly, the CoJ's alternative to extradition – surrender to the Member State of nationality – is rooted in extradition law. The alternative seems to be inspired by the traditional nationality exception, which was abolished within the EU. Apparently, the CoJ has reasoned that if the Member State of nationality does not extradite its own nationals, it will probably have extraterritorial jurisdiction and it will probably want to prevent that its nationals are extradited by another Member State. There is also a parallel with the case law of the Strasbourg court: after all, in the *Soering*-case the possibility of extraditing the requested person to his state of nationality and prosecuting him there was considered to be a relevant factor in deciding whether extradition was in violation of the convention.

The *Petruhhin*- and *Pisciotti*-judgments have met with strong opposition from the Member States. One of the arguments against the court's reasoning, is that surrendering the requested person to his Member State of nationality and prosecuting him there, does not adequately prevent the risk of impunity. As we have seen before, this argument is difficult to refute. According to a EU document, in those cases in which *Petruhhin* was applied, the Member States concerned 'have not been in the position to issue an EAW'.[43]

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[42] See, CoJ, order of 6 September 2017, *Schotthöfer § Steiner*, C-473/15, ECLI:EU:C:2017:633.

[43] Council document 15207/17, p. 4.

If extradition is sought for the purpose of executing a sentence, as in the pending *Raugevicius*-case,[44] there is an even stronger need for preventing impunity. In that case, prosecution in the Member State of nationality seems even less appropriate to prevent impunity.

**Conclusion**

It may be some consolation that the EU – with all its focus on the high level of mutual trust between the Member States – faces much the same challenges as the Council of Europe in reconciling preventing the risk of impunity with protecting the fundamental rights of the requested person. Indeed, in view of the rule of law preliminary reference procedure and Brexit, some of the challenges of the EU are even greater than those facing the Council of Europe. It makes one wonder whether the EAW will ever reach the venerable age of 60.

It is clear that prosecuting the requested person is a problematic alternative to extraditing him or her. All of this highlights the importance of diplomatic assurances to ward off violations of the convention. Today's discussions will no doubt be an important contribution to making assurances more effective and more reliable.

In closing, I extend my congratulations to the PC-OC on the 60th anniversary of the European Convention on Extradition. Thank you very much for your attention and I look forward to answering any questions you may have and to listening to the other presentations.

[44] Case C-247/17 (Raugevicius).

## Recent trends in the case law of the ECHR of relevance to extradition proceedings
## Mr Miroslav Kubicek (Czech Republic)

- First of all, I would like to thank this illustrious committee for inviting me to Strasbourg – it is always an honour and, indeed, a very great pleasure to be here – and for giving me the opportunity to continue working on updating the case summaries, that is to continue in the work instigated, I believe, by our late friend and mentor Eugenio Selvaggi.

- In this presentation, which focuses on the developments of the last 5 years or so, I have divided relevant case law by topics. I will start with the very broad topic of grounds for refusal of extradition.

- The first sub-topic concerns extradition sought in relation to an offence carrying a **life sentence** or a very long sentence that is equal to a life sentence.

- The Court has dealt with the issue of a life sentence both in a purely domestic context and specifically in an extradition context. However, the purely domestic cases are also relevant for extradition.

- The key case is the 2008 ***Kafkaris*** Grand Chamber judgment. The Court found that for such a sentence to be admissible without invoking Article 3 of the European Convention on Human Rights, it must be reducible not only *de iure* but also *de facto*. The *de facto* reducibility may be difficult to prove in practice. For example, such offences may be so rare in the requesting State, that no persuasive statistics exist.

- In the 2014 ***Trabelsi*** (v. Belgium) judgment, which involved extradition to the United States of America, the Court stated that a review mechanism must require "the national authorities to ascertain, on the basis of objective, pre-established criteria of which the prisoner had precise cognisance <u>at the time of imposition</u> of the life sentence, whether, while serving his sentence, the prisoner has changed and progressed to such an extent that continued detention can no longer be justified on legitimate penological grounds" *[emphasis added]*. Knowledge "at the time of imposition" may be difficult to prove especially in case of foreigners.

- Of the recent cases, the Court found <u>no violation in a domestic context</u>:
  - in the 2011 ***Törköly*** decision (the review mechanism being Presidential clemency),
  - in the 2014 ***Bodein*** judgment (in which sentencing judge had the power to review the sentence),
  - in the 2014 ***Harakchiev and Tolumov*** judgment (violation was found not in the Presidential clemency regime but in the prison conditions) and
  - in the 2017 ***Hutchinson*** Grand Chamber judgment (review by the Secretary of State with judicial review).

- The Court found <u>violation in a domestic context</u>:
  - in the 2014 ***László Magyar*** judgment (legislation did not guarantee proper consideration of the changes and progress to rehabilitation),
  - in the 2015 ***Kaytan*** judgment (no review mechanism provided for in the domestic legislation) and
  - in the 2016 ***T. P. and A. T.*** judgment (new legislation did not oblige the President to assess justification of custody on legitimate penological grounds & provided no time- frame for decision & no obligation to give reasons for refusal).

- In an extradition context, the Court dealt with the life sentence issue:
  - in the 2016 ***Findikoglu*** decision (maximum sentence of 247.5 years was not obligatory – no violation),
  - in the 2017 ***Harkins*** Grand Chamber decision (burden of proof on the applicant; Article 6 of the Convention cannot be applied to the life sentence itself, only to the fairness of the trial, which was not doubted) and
  - in the 2017 ***López Elorza*** judgment (the Court found that "the applicant has not demonstrated that the maximum penalty would be imposed by a US court without due consideration of all the relevant mitigating and aggravating factors" and in light of the guarantees provided by the US authorities that "the "risk" of the applicant being sentenced to life imprisonment is so slight and hypothetical, that it cannot be said that the applicant has demonstrated that his extradition to the United States would expose him to a real risk of treatment reaching the Article 3 threshold as a result of any possible conviction and sentence in the US criminal proceedings").

- The trend appears to be towards a more and more detailed and demanding examination of *de facto* reducibility where life sentence without parole is mandatory.

- Another important sub-topic is the issue of a **fair trial in the requesting State** in light of Article 6 of the European Convention on Human Rights. According to the Court's case law, extradition would not be possible if there were a real risk of a flagrant denial of justice.

- The key cases in which the Court addressed this issue are:
  - the 2001 ***Einhorn*** decision (in an extradition context, the applicant is required to prove the "flagrant" nature of the denial of justice he/she fears) and
  - the 2007 ***Al-Moayad*** decision (in which the Court provides examples of what would constitute a "flagrant" denial of justice) – also in the 2012 ***Othman (Abu Qatada)*** judgment.

- Of the recent cases, the Court again provided some examples of what could constitute a "flagrant" denial of justice in the already mentioned ***Harkins*** Grand Chamber decision (denial of legal representation, disregard to the rights of defence, use of evidence obtained by torture, etc.).

- The Court's case law in this regard appears to be stable – as far as I know, no extradition has been found to violate Article 6 of the European Convention on Human Rights so far.

- The major sub-topic, which could be considered both substantive and procedural, is the question of **assurances**, which are especially useful to address the issues under Articles 3 and 6 of the European Convention on Human Rights.

- The key past case is, of course, the already mentioned ***Othman (Abu Qatada)*** judgment, in which the Court provides clear guidelines on the quality of assurances. The list of requirements that assurances are to meet is rather long and, as Erik Verbert has recently pointed out to me, has not been used in quite the same detail by the Court ever again, which is, I agree, interesting.

- Of the (not so) recent cases, the Court addressed the issue of assurance:
  - in the 2012 ***Makhmudzan Ergashev*** judgment (in which it expressed doubts "whether the local authorities there *[i. e. in the requesting State]* can be expected to abide by them in practice" and found monitoring by the Special Representative of the President of the requested State to be unspecific and with undocumented effectivity),

- in the 2013 ***Nizomkhon Dzhurayev*** judgment (diplomatic staff of the embassy of the requested State found not sufficiently qualified to monitor implementation of the assurances in practice),
- in the 2014 ***Zarmayev*** judgment (assurances found sufficiently precise) and
- in the 2014 ***Gayratbek Saliyev*** judgment (similar to the *Nizomkhon Dzhurayev* case; in addition, the Court noted that there was no guarantee that the person would be able to speak with the diplomats of the requested State without presence of third persons).

▪ Assurances are extremely important for the whole system to work and it is only natural that this Special Session focuses exactly on this issue.

▪ Although it is clear that the Court is increasingly demanding with regard to the wording of the assurances and quality of the monitoring mechanism, it has not declared assurances unusable – although there is substantial pressure from NGOs to do so.

▪ The Court requires respondent States to prove that assurances are not taken as a mere formality – neither by the requesting State nor by the requested State. In this regard, it may be counterproductive to try to draft any "universal" wording of assurances – it might actually backfire and serve as proof of their formality. Assurances should be tailor-made for each specific case.

▪ Follow-up is necessary – if for nothing else than to collect statistical data that could be presented to the Court in other cases to prove that the monitoring mechanisms do work.

▪ Practitioners also need to be aware and need to be ready. Be in touch with your diplomat colleagues– be aware of their capabilities, their training and qualification & of their limitations, too. For example, small States with small embassies may face additional practical difficulties – not enough staff and often non-resident embassies (possibility, especially in case of the EU Member States, to use services of a resident embassy of another State or of delegation of the European Union?).

▪ Even though it is not one of the major grounds for refusal, the issue of nationals might be of interest, especially since it is not addressed by the Court very frequently.

▪ The 2015 ***Vlas and Others*** decision deals with alleged discrimination in the case in which some of the co-perpetrators had been extradited and another had not because she was a national of the requested State. The Court put some emphasis on the reasoning of the extradition decision with regard to the refusal to prosecute the applicant in the requested State instead of extraditing her: authorities in the requesting State were found in better position to examine the evidence and hear numerous witnesses. Again, the Court considered the case on its specific merits and did not rely only on the formality of the applicant's nationality.

▪ The 2017 ***K2*** decision is a very specific one – it concerns an expulsion (or rather exclusion) case in which the applicant had been deprived of his nationality but was not rendered stateless and his family was no longer living in the respondent State.

▪ The Court also addressed these more or less "minor" issues:
▪ **Sentencing differences**: In the 2014 ***Čalovskis*** judgment the Court found that comparison of penalties applicable in the requesting State and in the requested State was not in itself sufficient to prove "gross disproportionality".
▪ **Health**:

- In the already mentioned ***Vlas and Others*** decision, the Court found no violation in extradition of a pregnant woman as inadequacy of medical care was not proved.
- In the 2015 ***M. T.*** judgment, the Court found no violation as dialysis was available in the State to which the person was expelled.
- In the 2015 ***Tatar*** judgment, the Court considered that mere fact that the circumstances concerning treatment for long-term illness would be less favourable was not decisive.
- The Court did find violation in the 2016 ***Paposhvili*** Grand Chamber judgment by reason of inadequate assessment of health documentation.
- Again, it follows that assessing the state of health is not a formality and that truly individual assessment is necessary.

- **Blood feuds** – the 2017 ***D. L.*** judgment takes an interesting look at this issue as it concludes that the applicant's imprisonment in Kosovo would actually shield him in Kosovo from a blood feud.

- The Court also addressed some issues specific to certain States:
  - With regard to **Kazakhstan**, the Court found, in the 2014 ***Oshlakov*** judgment, that the situation, although problematic, does not warrant a total ban on extradition.
  - In the 2014 ***Zarmayev*** judgment, the Court found that former Chechen combatants were not in general risk in **Russia**.
  - The Court did reiterate the existence of a total ban on extradition to Turkmenistan in the 2017 ***Allanazarova*** judgment, as <u>any</u> person detained there for criminal charges runs a real risk of being subjected to treatment contrary to Article 3 of the European Convention on Human Rights.
  - In the already mentioned ***Čalovskis*** judgment, the Court concluded that a treaty requirement that an extradition request includes "such <u>information</u> as would provide a reasonable basis to believe that the person sought committed the offence" *[emphasis added]* was not a formality and could make custody unlawful. This conclusion might be similarly applicable to, for example, the requirement in some older treaties that extradition requests include actual copies of evidence.

- As for the procedural side of extradition, the Court has addressed a number of specific issues.

- **Fair trial in the requested State and the general conduct of extradition proceedings** were the subject of the 2013 ***Ketchum*** decision, the already mentioned ***Vlas and Others*** decision and the also already mentioned ***Findikoglu*** decision – in all these decisions, the Court found Article 6 of the European Convention on Human Rights to be inapplicable as the extradition procedure does not involve a challenge to the applicant's rights nor does it relate to the merits of the criminal case. However, in the already mentioned ***Čalovskis*** judgment, the Court did find a violation in the extradition procedure, although not of Article 6 but of Article 3 of the European Convention on Human Rights by reason of security arrangements in the courtroom.

- **Standard of evidence** when proving existence of a real risk of ill-treatment has been addressed by the Court in the 2014 ***Ismailov*** judgment. According to the Court, the applicant was not required to provide "indisputable" evidence but only to prove a "high likelihood".

- The Court has also dealt with the issue of **wording of extradition decisions** – in the 2015 ***Eshonkulov*** judgment, the Court recommended that authorities of the requested State should avoid language representing the charges as established facts (at least if extradition is sought for the purposes of prosecution).

- A very important issue from a practical perspective is the question of **delays caused by the Court's own interim measures**. In the 2013 ***Ermakov*** judgment, the Court found delay of about

6 months not unreasonable. The same conclusion was reached by the Court in the 2013 ***Kasymakhunov*** judgment with regard to a delay of about 5 months. However, in case of a substantially longer delay, the Court could still decide otherwise.

- In the already mentioned ***Eshonkulov*** judgment, the Court also dealt with an attempt to **circumvent the maximum length of extradition custody** provided for in the domestic law of the requested State by changing the type of custody to expulsion custody. Not surprisingly, the Court found this approach not to be in good faith.

- Another issue concerning custody was the question of applicability of Article 5 of the European Convention on Human Rights to **house arrest**. In the already mentioned ***Ermakov*** judgment, the Court found house arrest to be detention within the meaning of Article 5.

- In the 2014 ***M. G.*** judgment, the Court addressed the issue of **asylum**. While the Court reiterated that it is not its role of to decide whether asylum in a third country prevents extradition (asylum not being a right under the European Convention on Human Rights), it found that the third country's asylum decision was nevertheless an important indication and a starting point for the requested State's analysis of the applicant's current situation. However, this could lead to another set of practical problems when the asylum State is unwilling to provide a copy of its decision and/or share its information upon which the asylum was granted.

- Two cases concerned **temporary surrender**:
  - In the 2014 ***Tershiyev*** judgment, which concerned an alleged real risk of ill-treatment in the requesting State during the temporary surrender, the Court found that the obligation to return the temporarily surrendered person is a factor actually reducing risk of ill-treatment in the requesting State.
  - The not yet final 2018 ***Paci*** judgment concerns the question of the length of temporary surrender. The Court noted that the obligation to return the temporary surrendered person is activated at the latest by the finality of the judgment in the requesting State. However, the return may take time, as it requires the cooperation of the requested State. Therefore, no violation was found in the case of the person who had been held in the requesting State for some 2 years after the judgment. One might also add that as follows from the Court's case law on the transfer of sentenced persons, a sentenced person has no automatic right to serve the sentence in his/her own home State or any other State of his/her own choosing.

- To **conclude**: Implementing the Court's case law in extradition cases certainly represents a challenge, which appears to be more and more difficult. However, it should be possible to meet most of the requirements of the Court's case law as long as practitioners remain aware of them and approach their cases truly individually and proactively in order to avoid formalistic solutions. I believe that your deliberations later today will provide you with a lot of food for thought and fresh ideas to meet these challenges.

- The case law summaries available at the PC-OC's website, I trust, are a useful tool, helping with quick orientation when practitioners need to research a specific issue or practical question. However, the document is not and cannot be complete. It will always be a work in progress and will depend on continuous updating.

- I am very happy for the opportunity to prepare the updates for 2018 but this year seems to be rather slim – so far, I have been able to identify and have prepared summaries of only 8 cases. Therefore, I would like to invite you to inform the Chair or the Secretariat about any cases you

find interesting and useful, that are not already included in the summaries, as well as to point out any errors or deficiencies in the already existing summaries.

*NOTE : See hereafter the PowerPoint version of this presentation*

# Case Law of the European Court of Human Rights Relevant for Extradition - Recent Trends and Developments

PC-OC Special Session on Extradition 2018

# Grounds for Refusal: Life Sentence

- Article 3 of the ECHR
- reducibility *de iure* X *de facto*
- key past cases: Kafkaris (2008), Trabelsi (2014)
- domestic context:
  - no violation: Törköly (2011), Bodein (2014), Harakchiev and Tolumov (2014), Hutchinson (2017)
  - violation: László Magyar (2014), Kaytan (2015), T.P. and A.T. (2016)
- extradition context – no violation: Findikoglu (2016), Harkins (2017), López Elorza (2017)

# Grounds for Refusal: Fair Trial (in the Requesting State)

- Article 6 of the ECHR
- real risk of *flagrant* denial of justice
- key past cases: Einhorn, Al-Moayad, Abu Qatada
- recent case: Harkins – no violation – application based solely on the mandatory nature of the sentence of life imprisonment without parole

# Grounds for Refusal: Assurances

- Articles 3 and 6 of the ECHR
- key past case: Abu Qatada
- recent cases: Makhmudzhan Ergashev, Nizomkhon Dzhurayev, Zarmayev, Gayratbek Saliyev
- increasing demands of the Court on the wording of the assurances and quality of monitoring mechanism

# Grounds for Refusal: Nationals

- Extradition of non-nationals vs. non-extradition of nationals – Vlas and Others
- Possibility to deprive a person of their nationality – K2

## Grounds for Refusal

- Sentencing differences – Čalovskis
- Health – Vlas and Others, M.T., Tatar, Paposhvili
- Blood feuds – D.L.

# Specific Issues Concerning Certain States

- Kazakhstan – Oshlakov
- Russia – Zarmayev
- Turkmenistan – Allanazarova
- USA – Čalovskis

# Extradition Proceedings

- Fair trial (in the requested State) – Ketchum, Čalovskis, Vlas and Others, Findikoglu
- Standard of evidence – Ismailov
- Wording of extradition decisions – Eshonkulov
- Delays caused by the ECtHR's interim measures – Ermakov, Kasymakhunov
- Time limits of extradition custody – Eshonkulov
- House arrest in lieu of extradition custody – Ermakov
- Asylum – M.G.
- Temporary Surrender – Tershiyev, *Paci**

**) not final*

Thank you for your attention!

## The need for diplomatic assurances and consequences on the length of extradition proceedings
## Mr Erwin Jenni (Switzerland)

Preliminary remark:
I'd like to point out that this presentation is made rather with the aim of showing a practical picture than of making an academic paper. As I have been dealing with almost all extraditions concerning Switzerland for more than three decades now and as my Office is the competent authority not only for running the extradition proceedings as a first deciding instance but also granting – or denying – extraditions to other countries this picture englobes the experience concerning far more than 100 guarantee-based cases. Of course, I will certainly not be able to show that picture without a Swiss touch.

**Definition, possible contents and use**

Diplomatic assurances (guarantees) are mainly used in the framework of extraditions or of the execution of requests for mutual legal assistance. However, they might also be used to a certain extent in similar ways in the framework of expulsions/deportations (not so far in Swiss practice) or even in the context of transfer of proceedings or transfer of prisoners. As we are talking here mainly about extradition, I will concentrate on the use of guarantees in this context.

Guarantees are formal commitments by the requesting State to the requested State. They may be submitted in a spontaneous way together with the formal request for extradition or the requested State may ask for such guarantees as a condition for the cooperation in specific cases. Guarantees usually should make sure that the person will be treated after surrender to the requesting State according to international human rights standards. This may include specific guarantees that should make sure, that the respect of given guarantees (concerning human rights) may be monitored (monitoring guarantees). However, guarantees may also concern rather "technical" issues such as the respect of the rule of specialty.

As guarantees are also named diplomatic assurances, such commitments are usually submitted in the form of a diplomatic note. Basically, they should be binding for all domestic authorities of the requesting State. It is, however, common that with the diplomatic note itself a statement of a domestic authority is submitted. This authority must be in fact competent to firstly express the necessary commitments and secondly to make sure that the guarantees will be respected by all authorities in the requesting State after surrender. Such authority may be the Ministry of Justice, the General Prosecutor or another authority. In cases where the request for extradition itself is sent directly by the Ministry of Justice or the General Prosecutors - as foreseen with many members of the European Convention on Extradition - the guarantees must not necessarily be submitted by diplomatic channels of course.

**Possible situations where guarantees may be needed**

In practice the most common situation is certainly the risk of violations of fundamental human rights in case of a surrender of a fugitive to the requesting State. Some States do consider that guarantees may basically not be requested in case of the existence of a treaty obligation to extradite. In such situation however, some States might use guarantees only when the extradition treaty itself contains the possibility to ask for a specific guarantee. Other States, such as Switzerland, consider guarantees as a useful tool to be able to extradite where – without guarantees – extradition would

have to be refused on the basis of a situation where the surrender might have the effect that the fugitive would be exposed to a concrete danger of a violation of international human rights.

From my point of view, it is widely recognized today that international human rights should be considered in any extradition case. The existence of an extradition treaty may be an important element concerning the assessment of a concrete case. But this should not have the effect that international human rights (that are not mentioned explicitly in such a treaty) would not have to be paid attention to. In the example of Switzerland, the extradition treaty is always applicable together with the principles of international human rights instruments. These are namely the European Convention on Human Rights (ECHR) and the International Covenant on Civil and Political Rights (OHCHR). This is true even in cases where the requesting State is not a party to any of these two Human Rights Conventions or any other human rights instruments.

There are mainly two different types of risk of a violation of fundamental rights

a) The general situation with regard to human rights standards in the requesting State is not satisfactory. This may concern issues with regard to the fairness of the criminal proceedings (independence of the judiciary, etc.) or for instance the poor conditions in jail or lack of necessary medical treatment. It is to be recalled that according to Art. 3 ECHR and Art. 7 as well as Art. 10 OHCHR no person may be extradited to another State if he or she would be subject to torture or any other kind of cruel or inhuman treatment or punishment.

b) The personal situation of a fugitive itself – possibly together with the general situation – creates a risk for a violation of basic human rights. This may be, for instance, the case if the fugitive belongs to a specific group of persons being especially at danger.

Before asking the requesting State to submit guarantees, it has to be assessed in each case if a concrete danger of violation of basic human rights exists and if it would be necessary and possible to use guarantees.

Three different types of situations may be named (according to Swiss practice; see leading case in EuGRZ 2008/304; 1C_205/2007):

a) The requesting State is commonly considered to apply the rule of law properly (Etat de droit) where basically no risk of violations of Art 3 ECHR exists (States of Western Europe). In cases concerning these States generally no guarantees are requested.

b) In cases where concrete risks for a violation of human rights may exist but where the requesting State is in position to submit guarantees that are eliminating this risk in a sufficient way or at least reducing such risk to a pure theoretical level. The Swiss Supreme Court argues that a theoretical risk for a violation of human rights basically exists everywhere and may therefore not be a possible reason to deny extradition. Otherwise, extradition would no longer be possible and fugitives might simply go unpunished by crossing borders.

c) Cases where the risk of a violation of human rights may not be eliminated or reduced to a sufficient level.

In practice, quite often fugitives claim that their fundamental rights would be violated when surrendered to the requesting State. In many cases, maybe even in the majority of the cases, their arguments do not really show such concrete danger. It is to be underlined here that the assessment

of this question is may be the most complex and difficult task we have to solve during extradition proceedings. During recent years, the number of such cases has increased. In addition, the interest in such problematic cases has clearly been growing in the last decades and public opinion has become more sensitive – at least with people having an interest in the field of protection of human rights. For all these reasons, in specific cases where a concrete risk for a violation of human rights seems not really to be established but where it is at the same time quite difficult to exclude such risk, guarantees have been asked from the requesting State just to be "on the safe side". This new "fashion" started – as far as I can see – about 20 years ago.

It is quite clear that in cases where during extradition proceedings no danger of a violation of human right is established, but nonetheless guarantees are asked for, we are not talking about a situation, where guarantees fulfill the task of eliminating or considerably reducing an existing risk but rather that these guarantees give extra protection. We are talking about a case where guarantees should in fact not be requested. Useless to mention that defendants don't see it this way. However, as a possible extra protection does not harm, competent authorities are going to use guarantees in such cases in a more or less regular way. This practice has the advantage for the deciding authorities that there is no need to go too much into detail with regard to the assessment of the real existing risks. Maybe it makes it also easier to motivate the requesting States to submit guarantees. In fact, one may say, that guarantees are needed because of specific claims of the defendant's lawyer and not because the requesting State would not properly apply the rule of law…

The Swiss Supreme Court has enumerated cases with different States where extraditions have been granted with the help of guarantees (concretely Russia, Turkey, Kazakhstan, Tunisia, Georgia, Serbia, Montenegro, former Yugoslavia, Albania, Mexico and India). Of course, our Office grants extraditions to some more States with the help of guarantees. And I have to add, that Switzerland also had to give guarantees in specific cases in order to get extraditions from other States. For instance, it happened several times that Germany or Austria asked for guarantees that a fugitive having been convicted in absentia will have the right for a retrial after surrender.

**Is it just a possibility or is it even an obligation to ask for guarantees when appropriate?**

First of all it has to be said that the principle to use guarantees in the wide sense is established in different domestic legal systems and international treaties. The European Convention on Extradition stipulates in Art. 11 concerning death penalty that the "… extradition may be refused unless the requesting Party gives such assurance as the requested Party considers sufficient that the death penalty will not be carried out". This wording was certainly very modern in 1957. It was a way to make sure that extradition would still be possible for very important crimes and where the requested Party had abolished the death penalty. Therefore, the fugitive would not go unpunished and the requested Party would avoid any responsibility for the execution of a possible death penalty. In addition, it gives the requested Party the role to assess the value of the assurances. Therefore, we have exactly what is still applied today in guarantee-based extraditions. It was of course also a modern concept as many Parties to the Convention abolished the death penalty only decades later…

Another example is Art. 3 of the Second Additional Protocol of 1978 concerning the judgments in absentia. "However, extradition shall be granted if the requesting Party gives an assurance considered sufficient to guarantee to the person claimed the right to a retrial which safeguards the rights of defence." This wording is very similar to Art. 11 of the Convention. In my view, however, it is very interesting to see that the first part of this article talks about the situation where "..the proceedings leading to the judgement did not satisfy the minimum rights of defence…".

With regard to the domestic level, Switzerland has enacted explicit wording concerning the use and proceedings in the framework of guarantees (Federal Act on International Mutual Legal Assistance of 20. March 1981; IMAC; SR 0.351.1). Art. 37 IMAC contains provisions concerning judgements in absentia and death penalty. Art. 80 IMAC is quite explicit and seems to me worth citing (unofficial translation):

> *"Conditions subject to acceptance*
>
> *1 The executing and the appellate authority as well as the Federal Office may make the granting of mutual assistance wholly or partly subject to certain conditions.*
>
> *2 The Federal Office shall communicate the conditions to the requesting State when the ruling on the granting and the extent of the mutual assistance is final and shall give it an appropriate deadline by which to accept or refuse. If the deadline given is not respected, mutual assistance may be granted on the points that are not subject to conditions.*
>
> *3 The Federal Office shall examine if the response of the requesting State satisfies the conditions set.*
>
> *4 The ruling of the Federal Office is subject to appeal to the Appeals Chamber of the Federal Criminal Court within ten days of its notice being given in writing. The decision of the Appeals Chamber is final."*

It has to be mentioned that this provision, stipulated in the part of the IMAC concerning mutual legal assistance, is applicable *per analogiam* in extradition cases.

It is quite clear that there is no provision in the Convention or in the Additional Protocols that talks about an obligation for requested Parties to make use of guarantees in certain situations. However, it seems to me that it is a part of the aim of the Convention and of its Protocols to make international cooperation possible as far as this is feasible. The laws and the practice of Swiss competent authorities lead in the same direction. If the law says that guarantees *may* be used this means for the practice that such guarantees *should* be used if there is a chance to succeed – to enable cooperation. We talk about a principle to favour cooperation (favoriser l'entraide; Rechtshilfefreundlichkeit). This leads us close to an obligation to try to grant extradition with guarantees whenever we see a chance to succeed.

Of course, if cooperation is possible without guarantees this would be preferable and it is an obligation to avoid it. To give an example: in 2013 our Office decided to grant an extradition to Italy without guarantees. The Federal Criminal Court admitted the appeal of the fugitive and decided that Italy would have to give assurances with regard to the problem of overcrowded prisons. Our Office filed an appeal to the Supreme Court. The appeal has been admitted and surrender could take place without guarantees (1C_176/2014).

**Critical voices**

Although the European Court of Human Rights has ruled on different occasions that extraditions (and/or expulsions) may be possible with sufficient guarantees (Chahal, CourEDH 1996-V S. 1831 and many others), this practice has also generated some critical voices.

In 2005 three NGO's (Amnesty International, Human Rights Watch and the International Commission of Jurists) made a critical call on Council of Europe member States concerning the use of diplomatic

assurances against the risk of torture and other ill-treatment. During the same period, there were numerous other critical voices such as the UN High Commissioner for Human Rights or law professors.

The Committee Against Torture (CAT) recalled in a recent session (6. November – 6 December 2017) that "The principle of "non-refoulement" of persons to another State where there are substantial grounds for believing that they would be in danger of being subjected to torture is … absolute". And that "… diplomatic assurances … should not be used as a loophole to undermine the principle of non-refoulement …" (from advance unedited version, 9. February 2018).

Today, it seems to me that critical voices are a little less audible. Nevertheless, we have to be cautious. This is certainly the best way to avoid that critical voices have a reason to be heard.

**Problematic Swiss cases**

A) In a recent extradition case, the CAT decided on 9 August 2017, that a Turkish national should not be surrendered to Turkey. It concluded that in the circumstances of this case diplomatic assurances cannot dispel the prevailing substantial grounds for believing that the complainant's extradition would expose him to a danger of being subject to torture.

   The fugitive had been convicted by a Turkish court in 1989 for having killed a person (blood revenge). In 2011, Turkey has submitted a request for extradition to Switzerland. In 2012, our Office has ordered the arrest of the fugitive and released him later on for a longer period. The Courts upon appeal by the fugitive quashed a first decision granting extradition. Simultaneously, his claim for getting asylum was not admitted by the competent Office and Court. After a second decision made by our Office granting extradition and again ordering the arrest, which this time had been confirmed by the Federal Criminal Court, the Supreme Court did not hear the last appeal of the fugitive. Upon that decision, Switzerland granted extradition to Turkey on 6 May 2016. Upon the successful appeal by the fugitive to the CAT surrender was stopped by our Office almost the same day.After the decision of the CAT, the fugitive was released immediately and Turkey was informed that surrender will no longer be possible.

B) Although Switzerland has been extraditing fugitives using guarantees in more than 100 cases over the last decades without considerable problems, one case has to be mentioned, where some guarantees given by India were not respected after surrender. In this case the two Turkish nationals surrendered in 1998 (fraud case) were detained for nearly 10 years after surrender in India and were not allowed to leave the country afterwards. In addition, no criminal verdict is known today. For this reason, Switzerland considered that there was no fair trial in India in this case. India had given guarantees that the principles of the ECHR would be respected.

   However, this situation has been considered by Switzerland as not being in conformity with the ECHR. All interventions from Switzerland towards the government of India turned out not to be fruitful and did not remedy this situation. For this reason, no further extraditions have been granted to India after this case.

**Consequences on the length of extradition proceedings**

It is quite clear that the assessment of the risk of torture or any other ill-treatment after surrender is taking time. It is also time consuming to assess if the requesting State would be able to give diplomatic assurances that might allow extradition to be granted. In addition, the drafting of matching guarantees, asking for these guarantees from the requesting State and assessing the guarantees given takes time. As, in the case of Switzerland, a decision of our Office concerning the validity of such guarantees may be subject to appeal to the Federal Criminal Court, this may take extra time. I would say that in the worst case all this takes several months.

For this reason, it is recommended to try to assess the need for guarantees as early as possible and to combine the proceedings concerning the question of valid and sufficient guarantees with the extradition proceeding itself. This is especially true for cases where the fugitive will have to be detained pending extradition. Ideally, the need for guarantees is determined even before a fugitive learns about the existence of the extradition request. For instance, a fugitive having his or her residence in the requested State would be arrested only after the necessary assurances have been produced by the requesting State. By acting that way, it is possible not to lose any additional time in such cases.

Finally, it has to be mentioned that guarantee-based extradition may take time after surrender too. The monitoring of the situation after surrender needs time (and money).

**Conclusions**

- Guarantees are a very useful tool in order to allow cooperation to go as far as possible. In more than 100 Swiss cases no torture has been observed after surrender. Other violations are extremely rare.
- Guarantees need a proper assessment of human rights in general and/or of risks in specific cases
- Guarantees should ideally only be applied when really needed
- The use of guarantees may cause a more complex and time-consuming proceeding in specific cases. Such effects may however be limited or entirely avoided in some cases.

## Panel discussion on the need for diplomatic assurances and consequences on the length of extradition proceedings
## Rapporteur: Ms Gabriela Blahova (Czech Republic)

The PC-OC have heard from experienced practitioner, Mr Erwin Jenni, Head of the Extradition Unit, Federal Office of Justice of Switzerland, about the definition of assurances, possible contents and use of assurances, possible situations where assurances may be needed, and also the consequences on the length of extradition proceedings.

**Conclusions of presentation**

- Assurances are a useful tool to allow cooperation to go as far as possible. The principle of favouring cooperation (favoriser l'entraide) was emphasised.
- Assurances should ideally only be applied when really needed. Before asking the requesting State to submit assurances, authorities of the requested State have to assess in each case whether a concrete danger (real risk) of violation of basic human rights exists and if it would be feasible to use guarantees to lessen, or even avoid it.
- The use of assurances may lead to an increase in the complexity and length of proceedings in specific cases. Such effects may, however, be limited or entirely avoided. It was recommended to try to assess the need for assurances as early as possible and to combine the proceedings concerning the question of valid and sufficient assurances with the extradition proceeding itself, especially if the person is in custody pending extradition.

**Conclusions of the panel discussion**

- It is important to grant international cooperation in as many cases as (practically and legally) possible. During discussions, the principle to favor cooperation (favoriser l'entraide) was emphasised.
- Assurances should be individualised and sufficiently precise. It is important to always carefully examine individual circumstances of the specific case, as the case law of the European Court of Human Rights is increasingly demanding with regard to the wording of assurances.
- Assurances are not a magical tool to solve every problem. Assurances must be viewed in the context in which they are given.
- Assurances cannot be overused.
- The requested State should ask to be provided with assurances in the early stages of the extradition proceedings; assurances may be included in the extradition request.

## The drafting and the monitoring of assurances
## Mr Jan Van Gaever, Advocate General, Prosecutor General's Office for Brussels (Belgium)

Workgroup II: Drafting and monitoring of assurances: preliminary remarks and questions

1) If interpreted correctly, the Zarmayev/Belgium judgement of the ECHR of 27/02/2014 shows us that assurances must not only assure; they must be real, tangible and effective

2) A first series of questions arises immediately: who – what – why? (Who gives the assurances, what assurances must be given, why do assurances need to be given – topic for the first workgroup). Quid when the need for assurances is clear: is it that clear and how should we proceed?

A first remark in that regard: what about the control of given assurances? Is this a judiciary control or a control by the government or by governmental or non-governmental institutions? Extradition proceedings in Belgium contain, to keep it very simple, 2 major parts: first a judiciary part (provisional arrest, exequatur of the foreign arrest warrant and lastly advice on extradition to the government) followed by an administrative part (government decides to extradite or not, appeal before an administrative court is possible). The impact of the judiciary is very low: only a final decision of refusal of exequatur will cause the extradition procedure to end. If exequatur is allowed, the government and only the government decides on extradition. This is normal as extradition is a matter between States not between judicial bodies.

Having said this, what control could the judiciary hence have regarding requesting/insisting on assurances or control on execution/respect of the given assurances? What is the competency of the judiciary (courts/public prosecutor/…)? An important topic as I tend to see the ECHR evolve towards a judiciary control of assurances.

3) Regarding the Othman criteria or factors, however you want to call them, some reflections: some criteria are easy, others are not. No death sentence, no life imprisonment without possibility of review assurances are "easy" to give and easy to control. Diplomatic control of abiding to given assurances might prove to be more difficult as diplomats as a rule only look after own nationals. Some criteria/factors are more vague: eg. VII: the length and strength of bilateral relations between the sending and receiving States, including the receiving State's record in abiding by similar assurances: knowing is trusting?? IX: whether there is an effective system of protection against torture in the receiving State (…) and whether it is willing to investigate allegations of torture and to punish those responsible: what is a real (and personal) risk of torture?? (evolving concept, not 1 definition applicable in all cases; Saadi judgment: when are you part of a group, can you define the prisoners in whole as a group?), what about the period between examination by the ECHR of the complaints of ill-treatment and the date that those alleged acts of torture were committed: who is to be believed, on what grounds (witnesses, independent expert reports, "crime scene" investigations, …), what proof (even a State is to be considered not guilty unless proven otherwise – beyond any reasonable doubt), quid about surpassing reasonable delay and its consequences?

4) Assurances about detention conditions: are we asking for assurances or for information? = A huge difference in interpreting concepts/questions.

In the surrender case involving the Catalan ex-ministers, Belgian authorities asked Spain questions about detention conditions. Why? Because there was an assumption/a suspicion that Spanish detention conditions would be contrary to Article 3 of the Convention? No. With the aim to accelerate the proceedings and to avoid all future discussions with defence council and the court(s), information was asked for in an extremely sensitive case about the to be expected detention regime.

The questions were made up taking into consideration the recommendations of the latest report of FRA (Fundamental Rights Agency).

Questions were:

- In what prison would the persons sought be detained?
- Are the detention conditions in that prison in compliance with the Convention, the jurisprudence of the ECHR and the provisions of eg. the European Prison Rules or other standards set out by international bodies like the CPT?
- What is the surface area of the cell?
- Is the person sought detained alone in that cell or with others? If so, what is the individual living space?
- How about access to showers, toilets, hygiene … and access to medical care?
- How about the food (quantity, quality)?
- Are there enough meaningful and recreational activities?
- Are there any restrictions on family visits, undisturbed (private) visit of the spouse/partner or consultation with a lawyer?
- Is there any violence in that prison and if so what remedies exist to prevent the person sought coming into contact with those acts of violence or their consequences?
- Is there any overpopulation in that prison and if so what measures will be taken to prevent the person sought suffering from negative conditions arising from a situation of overpopulation?

5) When should assurances be asked for? At the beginning of the extradition proceedings, at the end, in the middle?

And in conjunction with this: 6th item:

6) What is the duration of the assurances: how long must they remain valid? Prison conditions change every day. What if the person sought consents to his extradition (should have been a topic of the first workgroup)? What if the person sought explicitly, and aware of all possible consequences, asks for a transfer to another prison for personal reasons (eg. to be closer to an airport so that a family visit would be easier and more frequent), a prison known to have detention conditions contrary to Article 3 of the Convention? Can you deny the request of the person himself; is that allowed by the Convention?

7) What about the amplitude of assurances? There is no such thing as international or European standards: existing concepts/definitions alter as time goes by, as society evolves. Perceptions alter in the light of events taking place. Let's be honest: an accurate question when it involves asking for assurances is: how severe are you? And how is your mood? (Monday-Friday, yesterday was a good or a bad day, …). We should come to an understanding of the minimum concept of an assurance/a guarantee.

8) In absentia convictions: difference between the Framework Decision on the European Arrest Warrant (see Article 4bis and the latest jurisprudence of the Court of Justice) and the Convention. The PC-OC could reflect on conditions NOT to refuse an extradition based on an in absentia conviction (note: the speaker was not aware that discussions had already been held on this topic). The answer to the question of the retrial should be that the possibility of a retrial suffices (see Dworzecki judgement of the COJ) not that the retrial should be held regardless if the person sought wants this or not (see eg. the Argentinian point of view: no automatic retrial = no extradition)

9) Why not include assurances in the request for extradition? This morning it was said that this would be counterproductive as assurances would be considered to be vague or be too general. Allow me to disagree. If countries know that assurances will be asked for relating eg. to detention conditions, why not immediately provide for such an assurance in the extradition request (and make sure that the duration of the assurance is solid enough to be credible). Why not anticipate? It might also shorten the detention period of the person sought – less information to be asked for is lesser time in extradition detention – hence resulting in a positive effect and being in full compliance with the Convention and most of all with OTHER jurisprudence of the ECHR namely keeping extradition detention short.

Let the discussions begin and thank you for your attention.

## Panel discussion on the drafting and the monitoring of assurances
## Rapporteur: Joana Ferreira (Portugal)

The second part of the afternoon session was introduced by **Jan van Gaever**, avocat general of the Prosecutor General of Brussels. His intervention, presented as a list of questions or issues raised by the subject and not answered by the *speaker,* was then commented by the members of the round table, Barbara Goeth Flemmich (Austria), Kresimir Kamber and Vasily Lukashevich (ECHR) and Erwin Jenni (Switzerland). This report will enumerate the questions raised followed by the appropriate comments made by the members of the round table.

**Jan Gaever** raised the following issues:

1. In substance the assurances must be real and tangible. Is there a current situation of abuse of assurances? **Barbara Goeth-Flemmich** confirms that in Austria Courts started asking for assurances as an application of the ECHR case law. They use standard forms that seem not useful.
2. Who must give assurances? The government or the judiciary, having in mind that extradition is a procedure between States? The **members of the panel** underlined the difference between assurances and information to conclude that due to the nature of the extradition procedure there should be an intervention of the executive, when providing for assurances.
3. Who controls the execution of the assurances? The Government, the judiciary or other institutions? The representative of the **ECHR** considered the judicial control as a preferable solution compared to an administrative one; this actually seems to be a trend across Europe. **Barbara Goeth-Flemmich** mentioned that in Austria it is up to the Courts to decide on extradition, therefore assurances to prevent a violation of the EH Convention will be judicially observed. **Erwin Jenni** underlines the fact that if assurances are given, the requested State, besides the person him or herself, can monitor a situation of a possible violation of HR standards. Only when assurances are given can the requested State denounce a situation of violation; this supports and strengthens the position of the person who was extradited via assurances.
4. There are 11 factors or criteria to be followed when drafting assurances, some of which can be easily followed, given or controlled, others less.
5. What is the definition of a real risk? Since there is no clear definition across Europe how severe must one be, how can a balanced result be met? The representative of the **ECHR** intervened to demystify the concept; the risk to be considered must be imminent and individual and be preventable through the procedure of assurances.
6. On a concrete case, questions to be raised during the procedure of execution of a European Arrest Warrant (fair trial; prison conditions) were anticipated; the Prosecutor analysed the last report of the Fundamental Rights Agency on the requesting State's prison situation focusing on several issues (general conditions, square meters, prisoners incarcerated alone or not, food conditions, violence, family visits, hygiene, etc…) in order to get arguments to be used during the execution procedure and following arguments presented by the defense. The representative of the **ECHR** intervened again to clarify that there are standards of human rights across Europe, they are however dynamic and may change. Also the moderator underlined that when States have frequent

cooperation that raises questions that justify giving assurances, some forward planning concerning the assurances to be provided can be useful.

7. On monitoring of the assurances, who does monitor them? For how long? Can States be forced to reconsider the decision? The representative of the **ECHR** stated that when an appropriate assessment of the assurances is done, later violations of human rights are the requested State's responsibility. **Barbara Goeth-Flemmich** mentioned that according to the experience of the Austrian Ministry of Justice diplomats are not prepared to spot cases of hidden torture and sometimes are not independent. Also there are some doubts on the efficiency of assurances concerning ill treatment to alleviate that risk. **Erwin Jenni** agreed with Barbara's statement but mentioned that diplomats can compensate for their own difficulties by calling for the intervention of experts or lawyers. Also he mentioned the practice of the Swiss Ministry of Justice; after the extradition takes place a first visit is done. If things seem to be well the Embassy will wait for a claim from the person; if there seems to be a problem additional visits will be made as well as requests for explanation.
8. The concept of in absentia judgement: is there a common definition? Should the PC-OC develop some criteria to assist authorities when considering grounds for refusal? The representative of the **ECHR** stated that the case law of the ECHR is consistent on the need to offer an effective possibility to re-open the case in situations of in absentia. **Barbara Goeth-Flemmich** recalled the work of the PC-OC on this subject, concerning guidance on this issue having in mind possible violations of Article 6.