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

**Committee of Experts on Transnational Criminal Justice**  
**(PC-TJ)**

**CODE OF MINIMUM STANDARDS  
OF PROTECTION TO INDIVIDUALS INVOLVED  
IN TRANSNATIONAL PROCEEDINGS**

**Report  
by**

**Ms Danai AZARIA  
Expert (Greece)**

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## CHAPTER I

### *EXTRADITION*

#### *I.1 RIGHTS OF THE INDIVIDUAL DURING EXTRADITION*

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

Extradition is not, *per se*, among the matters covered by the European Convention of Fundamental Rights and Freedoms<sup>1</sup> and according to the Court it is not possible to complain of a violation of the provisions of a treaty on extradition or of a violation of the conditions under which extradition may be granted<sup>2</sup>. Nevertheless, the provisions of Convention on Extradition have to be interpreted in the light of the European Convention on Human Rights article 5 paragraphs 1, 2 and 4, as it will be further analysed. Moreover, decisions regarding the entry, residence and deportation of aliens do not concern the determination of an applicant's civil rights or obligations or of a criminal charge against him, within the meaning of article 6 paragraph 1 of the Convention<sup>3</sup>. Therefore, article 6 of the European Convention will not be taken into consideration in the analysis of the present section.

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

The European Convention on Extradition<sup>4</sup> and its Additional Protocols<sup>5</sup> unify the legislation of the contracting states as far as extradition is concerned, but they do not adopt any provision especially centred to the rights of the individual involved. To this end, the Committee of Ministers has adopted a package of principles to guide the Member States in the practical application of the European Convention on Extradition, which in fact endorses the multidimensional form of the right to defence that the present project supports<sup>6</sup>.

Consequently, this section will mainly examine the way that the guarantees and procedures of extradition are articulated in the context of the European Convention on Human Rights. Firstly, the five rights will be analysed in the way they have been interpreted and applied by the organs of the Council of Europe. Secondly, the implementation of the

<sup>1</sup> *European Convention on Human Rights and Fundamental Freedoms*, 4-11-1950, U.N.T.S, vol. 213

<sup>2</sup> *X. v. Belgium*, 10-12-1976, D.R 8, p. 161; *E.G.M. v. Luxembourg*, 20-50-1994, D.R. 77-B, p. 144

<sup>3</sup> *Mamatkulov and Askarov v. Turkey*, 4-2-2005, para.82; *Maaouia v. France*, 2000, para. 40

<sup>4</sup> *European Convention on Extradition*, Paris, 13-7-1957, E.T.S. No. 24

<sup>5</sup> *Additional Protocol to the European Convention on Extradition*, Strasbourg, 15-10-1975, E.T.S. No. 86; *Second Additional Protocol to the European Convention on Extradition*, Strasbourg, 17-3-1978, E.T.S. No. 98

<sup>6</sup> *Recommendation No. R (80) 7 of the Committee of Ministers to Member States Concerning the Practical Application of the European Convention on Extradition*, 27-6-1980, 321<sup>st</sup> meeting of the Ministers, Deputies

comprehensive application of these rights will be considered through a jurisprudence example, in order to highlight the inter-relation and overlap between them.

## I.2 ACCESS TO THE FILE

Article 5 paragraph 2 of the European Convention of Human Rights stipulates:

Everyone who is arrested shall be informed promptly, in a language, which he understands, of the reasons for his arrest and of any charge against him.

Paragraph 2 applies to all the cases mentioned in the first paragraph of this article<sup>7</sup>. It constitutes a minimum guarantee against arbitrariness<sup>8</sup>. Article 5 paragraph 2 may not require the communication of the whole file to the detainee, but certainly the competent authorities have to provide him with a minimum standard of information. This minimum standard corresponds to “*sufficient information, which will permit him to exercise the remedy of article 5 paragraph 4*”<sup>9</sup>. Whether the content of the information delivered is sufficient depends on the special features of the case<sup>10</sup>. Therefore, a violation of article 5 paragraph 2 may give rise to a violation of paragraph 4 of the article.

In cases of arrest for the purpose of bringing a person to trial as provided in article 5 paragraph 1c of the Convention, it is not necessary to provide the detainee with a complete list of the charges against him<sup>11</sup>. When a person is arrested with a view to extradition (article 5 paragraph 1f), the information required under article 5 paragraph 2 may be oral and even less complete than in case of arrest to bring a person to trial (5 paragraph 1c)<sup>12</sup>. In a recent judgement, the Court ruled that it was sufficient –and, therefore, compatible with the requirements of 5 paragraph 2- that the applicant had been *told* in the course of his arrest *that he was wanted* by the authorities of the requesting state<sup>13</sup>. Although the provision of the second paragraph refers in principle to the first arrest, in the case of continued detention it also applies if the ground of the detention changes or new relevant facts present themselves<sup>14</sup>.

Therefore, when a person is detained on grounds of having committed a criminal offence to be brought to trial and a request for extradition is granted by the detaining state, he/she has to be informed of the extradition decision by the authorities<sup>15</sup>. The fact that the detainee heard of the decision of his extradition by rumors or by journalists, because of the interest of the media in the case, is not sufficient under article 5 paragraph 2<sup>16</sup>. It should not be forgotten that there is a time limit of expediency concerning the furnishing of information to the individual. An interval of four days, under specific circumstances, may be considered incompatible with the promptness requirement set in article 5 paragraph 2<sup>17</sup>.

<sup>7</sup> *X v. the United Kingdom*, 6-7-1980, B 41, p. 33

<sup>8</sup> *Chamaiev et autres c. Georgie et Russie*, 12-4-2005, para. 413

<sup>9</sup> *Chamaiev et autres c. Georgie et Russie*, 12-4-2005, para. 427

<sup>10</sup> *Fox, Campbell and Hartley v. the United Kingdom*, 30-8-1990, A182, p.19

<sup>11</sup> *X v. Germany*, 13-12-1978, DR 16, p. 111

<sup>12</sup> *K v. Belgium*, Commission decision 5-7-1984, DR 38, p. 230

<sup>13</sup> *Bordovskiy v. Russia*, 8-2-2005, para. 56-57

<sup>14</sup> *X v. the United Kingdom*, 16-7-1982, B 41, p. 34

<sup>15</sup> *Chamaiev et autres c. Georgie et Russie*, 12-4-2005, para. 415

<sup>16</sup> *Chamaiev et autres c. Georgie et Russie*, 12-4-2005, para. 416

<sup>17</sup> *Chamaiev et autres c. Georgie et Russie*, 12-4-2005, para. 416; *Murray v. the United Kingdom*, 28-10-1994, para. 78

Furthermore, the denial of access to the file by the lawyers of the detainee gives rise to a violation of article 5 paragraph 2. The authorities may not prohibit the lawyer's access on grounds of the authorities' need to examine in detail the documents provided by the requesting state<sup>18</sup>. According to the Court, the fact that the European Convention on Human Rights does not guarantee "the right not to be extradited" does not mean that the authorities should not give access to the applicants to their file<sup>19</sup>; especially in view of the close relation of the access to the file to the exercise of the remedy of article 5 paragraph 4 and article 13 in combination with articles 2, 3, 6, 8 of the Convention<sup>20</sup>.

Recommendation No. (80) 7 of the Committee of Ministers specifies this protection in pre-extradition proceedings. It, therefore, introduces in the interpretation of the European Convention on Extradition these specific guarantees. It suggests that the person to be extradited should be promptly informed and in a language which he understands, of the extradition request and the facts, on which it is based, of the conditions and the procedure of extradition, and, where applicable, of the reasons of his arrest<sup>21</sup>.

The right to access to the file and to be informed has also been established by other international organisations dealing with criminal matters. According to the E.U. Arrest Warrant, when an individual is arrested, he/she must be made aware of the contents of the arrest warrant. Article 55 paragraph 2a of the Rome Statute of the International Criminal Court stipulates the right of the suspect to be informed, prior to being questioned –either by the Prosecutor or by the national authorities pursuant to a request by the Court to cooperate<sup>22</sup>– that there are grounds to believe that he/she has committed a crime within the jurisdiction of the Court.

### *I.3 ACCESS TO A LAWYER*

According to article 6 of the European Convention everyone charged with a criminal offence has the right to be defended by counsel. However, decisions regarding the entry, residence and deportation of aliens do not concern the determination of an applicant's civil rights or obligations or of a criminal charge against him, within the meaning of article 6 paragraph 1 of the Convention. Nevertheless, this can not be used as a legal basis for denying a detainee pending extradition an access to a lawyer; it would effectively affect the fulfillment of paragraph 4 of article 5, which grants the right to a remedy against detention, and of article 13 combined with other articles of the Convention. These articles presuppose the right to a counsel, as part of the fair trial guaranteed in article 6.

The Committee of Ministers has adopted the same view. The person concerned should have the possibility to be assisted in the extradition procedure. In case that he does not have the sufficient financial means for the assistance, he should be given it free<sup>23</sup>.

<sup>18</sup> *Chamaiev et autres c. Georgie et Russie*, 12-4-2005, para. 427

<sup>19</sup> *Chamaiev et autres c. Georgie et Russie*, 12-4-2005, para. 427

<sup>20</sup> *Chamaiev et autres c. Georgie et Russie*, 12-4-2005, para. 460-461

<sup>21</sup> Paragraph I, Concerning the extradition procedure, c, *Recommendation No. R (80) 7 of the Committee of Ministers to Member States Concerning the Practical Application of the European Convention on Extradition*, 27-6-1980, 321<sup>st</sup> meeting of the Ministers, Deputies

<sup>22</sup> Rome Statute of the International Criminal Court, UN Doc. A/CONF. 183/9, articles 86-102

<sup>23</sup> Paragraph I, Concerning the extradition procedure, c, *Recommendation No. R (80) 7 of the Committee of Ministers to Member States Concerning the Practical Application of the European Convention on Extradition*, I, Concerning the extradition procedure, 27-6-1980, 321<sup>st</sup> meeting of the Ministers, Deputies

In the European Arrest Warrant framework the person concerned is also entitled to the services of a lawyer and an interpreter. The Rome Statute of the ICC also guarantees the same right<sup>24</sup>, before surrender of the suspect to the Court.

#### I.4 ACCESS TO AN INTERPRETER

Article 5 paragraph 2 of the European Convention of Human Rights stipulates:

Everyone who is arrested shall be informed promptly, in a language, which he understands, of the reasons for his arrest and of any charge against him.

The provision “in a language, which he understands” includes the interpretation in a language that is different from the language of the detaining authorities and the giving of information in a simple, non-technical language<sup>25</sup>. It seems that the Court even in this regard implicitly introduces the access to a counsel, as he would be the one to understand the technical legal language and the file’s content in order to appeal.

It is not relevant whether the person authorised as interpreter by the authorities should have shown devotion in the framework of his service. What is critical is if this agent, empowered by the state hierarchy to accomplish a certain mission efficiently informed the person concerned that he is being detained on the basis of an extradition request<sup>26</sup>. It may be daunting for the competent authority to evaluate the due translation of his information given to the detainee concerning the reasons of his detention. However, in view of the serious interference that the question of extradition could raise for the detainee, the competent authority should be meticulous and precise in the application of article 5 paragraph 2<sup>27</sup>.

Recommendation No. R (80) 7 of the Committee of Ministers specifically requires that the person be informed in a language which he understands, of the extradition request and the facts, on which it is based, of the conditions and the procedure of extradition, and, where applicable, of the reasons of his arrest<sup>28</sup>.

#### I. 5. RIGHT TO AN EXPEDIENT PROCEDURE

Article 5 paragraph 1f of the Convention does not require domestic law to provide a time limit for detention pending extradition proceedings. However, if the proceedings are not conducted with the requisite diligence, the detention may cease to be justifiable under that provision. Within these limits the Court may have cause to consider the length of time spent in detention pending extradition<sup>29</sup>. Four months custody in view of extradition and in view of the fact that there was no reason for the Court to believe that the authorities acted without due diligence, were not considered as an excessive long period<sup>30</sup>.

<sup>24</sup> Rome Statute of the International Criminal Court, UN Doc. A/CONF. 183/9, article 55, para. 2 c,d.

<sup>25</sup> *Fox, Campbell and Hartley v. the United Kingdom*, 30-8-1990, A182, p.19

<sup>26</sup> *Chamaiev et autres c. Georgie et Russie*, 12-4- 2005, para. 425

<sup>27</sup> *Chamaiev et autres c. Georgie et Russie*, 12-4- 2005, para. 425

<sup>28</sup> Paragraph I, Concerning the extradition procedure, c, *Recommendation No. R (80) 7 of the Committee of Ministers to Member States Concerning the Practical Application of the European Convention on Extradition*, 27-6-1980, 321<sup>st</sup> meeting of the Ministers, Deputies

<sup>29</sup> *Chahal v. the United Kingdom*, 15-11-1996, para. 113; *Bordovskiy v. Russia*, 8-2-2005, para. 50

<sup>30</sup> *Bordovskiy v. Russia*, 8-2-2005, para. 50

The beginning time for the application of article 5 paragraph 1f is on the date that the competent authority of the requesting state proceeds to the valid extradition request and the person is arrested by the authorities of the requested state<sup>31</sup>. When the requested state stays the extradition then the time concerning pre-extradition proceedings stops. Moreover, the European Convention on Extradition requires the release of the individual after 18 and at most 30 days from the appointed date of surrender between the two states<sup>32</sup>.

In the framework of the European Convention on Extradition there is a possibility to request the provisional arrest of the person sought in cases of urgency, which means that request for extradition is not submitted yet<sup>33</sup>. The Convention itself limits the period of such an arrest to 40 days, while the person may be released 18 days from the arrest, if the requested state has not received the extradition request and the necessary documents<sup>34</sup>. It should be noted that the Committee of Ministers has interpreted the respective article in a restrictive manner rendering the 18 days limit applicable only in cases of necessity<sup>35</sup>. Furthermore, the Committee recommended the summary extradition procedure in order to minimise as possible the provisional arrest provided that the person concerned consents to it.

However, detention with a view to extradition is not carried out in a diligent manner, when minimising the time requirement to such an extent as to render the rest of the rights granted by the European Convention of Human Rights void and ineffective; especially the right to appeal against a detention pending extradition. In the *Chamaiev* case, the authorities proceeded to the enforcement of extradition two days after deciding it. The Court resolved that when authorities wish to hasten up the extradition procedure they have to act with more celerity and diligence, in order to permit the detainee, on the one hand, to submit his arguments founded on articles 2 and 3 of the Convention in an independent and rigorous examination, and on the other hand, to permit him to suspend the execution of the disputed measure according to article 13<sup>36</sup>.

The Committee of Ministers has recommended that the time spent in custody pending extradition should be deducted from the sentence in the same way as time spent in custody pending trial. In addition, the person that suffered unjustified detention pending extradition should be able to claim compensation under the same conditions governing compensation for unjustified pre-trial detention<sup>37</sup>, as article 5 paragraph 5 of the European Convention on Human Rights stipulates.

In the integrated context of the European Union, the European Arrest Warrant stipulates the right to the expedient procedure. The executing judicial authority must take a final decision on execution of the European arrest warrant no later than 60 days after the arrest.

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<sup>31</sup> *Chamaiev et autres c. Georgie et Russie*, 12-4-2005. Para. 403-406; *Bordovskiy v. Russia*, 8-2-2005, para. 50

<sup>32</sup> Article 18, para. 4, *European Convention on Extradition*, Paris, 13-7-1957, E.T.S. No. 24

<sup>33</sup> Article 16, *European Convention on Extradition*, Paris, 13-7-1957, E.T.S. No. 24

<sup>34</sup> Article 12, para. 2a, *European Convention on Extradition*, Paris, 13-7-1957, E.T.S. No. 24

<sup>35</sup> Paragraph I, *Recommendation No. R (80) 7 of the Committee of Ministers to Member States Concerning the Practical Application of the European Convention on Extradition*, 27-6-1980, 321<sup>st</sup> meeting of the Ministers, Deputies, p.2

<sup>36</sup> *Chamaiev et autres c. Georgie et Russie*, 12-4-2005. Para. 460-461

<sup>37</sup> Paragraph I, *Recommendation No. R (86) 13 of the Committee of Ministers to Member States Concerning the Practical Application of the European Convention on Extradition*

## I.6 RIGHT TO APPEAL – RIGHT TO BE HEARD

Article 5 paragraph 4 of the European Convention on Human Rights grants to everyone, who is deprived of his liberty by arrest or detention, the right to take proceedings, by which the lawfulness of such deprivation of liberty will be reviewed speedily by a court and his release ordered, if the latter decides that the detention is unlawful. This remedy constitutes a *lex specialis* in relation to the more general requirements of Article 13<sup>38</sup> and it introduces into committal proceedings many of the procedural protections of article 6 paragraph 3 of the Convention<sup>39</sup>. It is an independent provision, even though its application presupposes the unfettered enjoyment of the above mentioned forms of the right to defense<sup>40</sup>.

Judicial review of the proceedings must be available in law and in fact<sup>41</sup>. This means that Contracting States must at least foresee and adopt provisions of judicial review, when establishing interstate treaties concerning extradition<sup>42</sup>.

The Court has established that the notion of “lawfulness” under paragraph 4 of Article 5 has the same meaning as under paragraph 1, so that the detained person is entitled to a review of his detention in the light not only of the requirements of domestic law, but also of those in the text of the Convention, the general principles embodied therein and the aim of the restrictions permitted by Article 5 paragraph 1. Article 5 paragraph 4 does not guarantee a right to a judicial review of such breadth as to empower the court, on all aspects of the case including questions of pure expediency, to substitute its own discretion for that of the decision-making authority. The review should, however, be wide enough to bear on those conditions, which are essential for the “lawful” detention of a person according to Article 5 paragraph 1<sup>43</sup>.

Therefore, article 5 paragraph 4 includes the review of the lawfulness of the detention itself and not of the extradition. The lawfulness of the extradition issue appears in the framework of the European Convention on Extradition. More specifically, the Committee of Ministers recommended on the right to be heard on one’s extradition. This has been included in the guidelines of the Committee of Ministers. “*The person concerned should be heard on the arguments, which he invokes against his extradition*”<sup>44</sup>. Even in case of a summary extradition procedure, the person concerned should consent to it<sup>45</sup>. The position of the Committee of Ministers is consistent with the Court’s conclusion that the submissions concerning the lawfulness of the extradition itself, as far it may constitute a violation of other material rights ensured in the Convention, is examined in the field of article 13 of the

<sup>38</sup> *Nikolova v. Bulgaria*, 1999, para. 69

<sup>39</sup> C. Nicolls, C. Montgomery, J. B. Knowles, *The Law of Extradition and Mutual Assistance, International Criminal Law: Practice and Procedure*, Cameron May, 2002, p. 251.

<sup>40</sup> *Chamaiev et autres c. Georgie et Russie*, 12-4-2005, para. 427

<sup>41</sup> *Dougoz v. Greece*, 6-3-2001, para. 63

<sup>42</sup> *Bordovskiy v. Russia*, 8-2-2005, paras. 65-66

<sup>43</sup> *Chahal v. the United Kingdom*, 15-11-1996, para. 127; *Dougoz v. Greece*, 6-3-2001, para. 61

<sup>44</sup> Paragraph I, Concerning the extradition procedure, b, *Recommendation No. R (80) 7 of the Committee of Ministers to Member States Concerning the Practical Application of the European Convention on Extradition*, 27-6-1980, 321<sup>st</sup> meeting of the Ministers, Deputies

<sup>45</sup> Paragraph I, Concerning summary extradition, *Recommendation No. R (80) 7 of the Committee of Ministers to Member States Concerning the Practical Application of the European Convention on Extradition*, 27-6-1980, 321<sup>st</sup> meeting of the Ministers, Deputies



Convention<sup>46</sup>. Let us note that also in the integrated field of the EU Arrest Warrant mechanism, pending a decision, the executing authority hears the person concerned.

### *I.7 COMPREHENSIVE APPLICATION OF THE RIGHTS*

The Court has repeatedly found it necessary to examine the comprehensive notion of the right to defense enshrined in article 5 of the Convention in relation to other provisions therein. According to our point of view it is essential to go through some typical examples of the Court's case law, in order to explain the way that the Court interprets the comprehensive notion of the article in circumstances of transnational criminal justice. Thus, an example of a recent judgment of the Court will be examined.

According to the Court, it is inadmissible that a person learns that he is going to be extradited just before he is driven to the airport, while he wanted to escape from the requesting State because of sound fear concerning articles 2 and 3 of the Convention<sup>47</sup>.

Diligent action of the extraditing authorities is required by article 3 of the European Convention on Human Rights. Which is this diligent action? Competent authorities are obliged to act in accordance with the procedural guarantees provided by articles 5 paragraph 2, 5 paragraph 4 and 13 of the Convention in the framework of an extradition procedure<sup>48</sup>. The detained individual should not be kept in ignorance as far as his/her future is concerned. According to the Court's wording, it is inconceivable that a detainee is put before a "*fait accompli*" and that he/she does not realise that will actually be transferred to another state; at least not until he/she is asked to leave his/her cell. Last but not least, the detainee should not be subjected to anxiety and uncertainty without a sound reason. In a contrary situation the combined violation of the provisions raises issues in the framework of article 3 of the Convention<sup>49</sup>.

## CHAPTER II

### *PROCEDURAL ASPECTS OF EXTRADITION*

Contracting States have the right, afforded by international law and subject to their treaty obligations, including the European Convention on Human Rights, to control the entry, residence and expulsion of aliens<sup>50</sup>. Thus, the European Convention on Human Rights permits cooperation between States, within the framework of extradition treaties or in matters of deportation, for the purpose of bringing fugitive offenders to justice, *provided that this cooperation does not interfere with any specific rights recognised in the Convention*<sup>51</sup>. This state right, which stems from the notion of sovereignty<sup>52</sup>, has to be exercised in conformity with the international obligations of the European Convention and, more specifically, with

<sup>46</sup> *Chamaiev et autres c. Georgie et Russie*, 12-4-2005, para. 460-461

<sup>47</sup> *Chamaiev et autres c. Georgie et Russie*, 12-4-2005, para. 460

<sup>48</sup> *Chamaiev et autres c. Georgie et Russie*, 12-4-2005, para. 381, 428, 432, 457-461

<sup>49</sup> *Chamaiev et autres c. Georgie et Russie*, 12-4-2005, para. 381

<sup>50</sup> *Vilvarajah and Others v. U.K.*, 30-10-1991, para. 102-103; *Mamatkulov and Askarov v. Turkey*, 4-2-2005, para. 66; *Mamatkulov and Abdurasulovic v. Turkey*, 6-2-2003, para. 65; *Chamaiev et autres c. Georgie et Russie*, 12-4-2005, para. 334.

<sup>51</sup> *Ocalan v. Turkey*, 12-5-2005, para. 86.

<sup>52</sup> Patrick Dailler et Alain Pellet, *Droit International Public*, L.G.D.J., 7<sup>e</sup> edition, 2002, p.462-463; Malcom N. Shaw, *International Law*, 5th edition, Cambridge University Press, 2003, p. 574-577.

the provisions set in Article 5<sup>53</sup>. The compatibility of this sovereign discretion with other rights prescribed in the Convention will be examined in the section concerning the limitations, which are set throughout the extradition procedure and are relevant to human rights. Even though article 5 provides human rights protection, it is closer related to the procedure of extradition and for this reason it is included in this section.

The European Convention on Human Rights does not contain any provision concerning the circumstances in which extradition may be granted, or the procedure to be followed before extradition may be granted. It only provides a special protection with respect to detention pending extradition under the mantle of article 5, which refers back to national law and lays down the obligation to conform to the substantive and procedural rules thereof. It requires, in addition, that any deprivation of liberty should be consistent with the purpose of article 5, meaning to protect the individuals from arbitrariness<sup>54</sup>.

Article 5 stipulates:

1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

f. the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.

Article 5 paragraph 1f lays down a threefold requirement for the conditions of detention; first, proceedings against the detainee are being taken with a view to extradition or deportation. Secondly, the basis upon which he/she is being detained must be lawful. Thirdly, the procedures prescribed by domestic law must not be imposed arbitrarily<sup>55</sup>.

Article 5 paragraph 1 primarily requires that any arrest or detention have a legal basis in domestic law<sup>56</sup>. However, these words do not merely refer back to domestic law; they also relate to the quality of the law, requiring it to be compatible with the rule of law, a concept inherent in all Articles of the Convention<sup>57</sup>. Quality in this sense means that where national law authorises deprivation of liberty, it must be sufficiently accessible and precise, in order to avoid all risk of arbitrariness<sup>58</sup>.

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<sup>53</sup> *Amuur v. France*, 25-6-1996, para.46.

<sup>54</sup> *Bozano v. France*, 1986, para. 54; *Quinn v. France*, 22-3-1995, para. 47; *Chahal v. the United Kingdom*, 15-11-1996, para. 118

<sup>55</sup> Ivor Stanbrook and Clive Stanbrook, *Extradition Law and Practice*, Second Edition, Oxford University Press, 2000, p.106-107

<sup>56</sup> *Denizci and Others v. Cyprus*, 23-5-2001, paras.390-393

<sup>57</sup> The notion of rule of law requires the government to act within legal frameworks and according to established processes. H.J. Steiner and Ph. Alston, *International Human Rights in Context*, Oxford University Press, 1995, pp. 111-112. Moreover, Article 3 of the Council of Europe's Statute stipulates the rule of law as a criterion for members' admission in its auspices. *Statute of the Council of Europe*, London, 5-5-1949, E.T.S. Nos. 1/6/7/8/11. see also Oscar M. Garibaldi, General Limitations on Human Rights: The Principle of Legality, *Harvard International Law Journal*, Vol. 17, No. 3, 1976, pp. 503-559; T. Meron and J.S. Sloan, Democracy, Rule of Law and Admission to the Council of Europe, *Israel Yearbook of International Law*, Martinus Nijhoff Publishers, 1996, pp. 137-157

<sup>58</sup> *Amuur v. France*, 25-6-1996, para. 50; *Dougoz v. Greece*, 6-3-2001, para. 55; *Raf v. Spain*, 17-6-2003

There is, therefore, a violation of article 5 paragraph 1, if it is shown that the poor “quality of the law” has tangibly prejudiced the applicant’s substantive Convention rights<sup>59</sup>. Arbitrariness may also be detected when the authorities use the domestic law in a way contradicting the purpose of article 5<sup>60</sup>, which constitutes a misuse of power. For example, the Court censured France in the *Bozano* case<sup>61</sup> for deporting the applicant to Switzerland, where it had been arranged to be transferred to Italy, as the French courts had refused his extradition to Italy, because he had been tried *in absentia*<sup>62</sup>.

There has to be clarified that there is a distinction between the lawfulness of the detention with the view to extradition and the lawfulness of the extradition itself. Evidently, there may be cases where the reviewing of the lawfulness of the detention will be dependent on the lawfulness of the deportation according to national law. According to the Court, the fact that a domestic court has already found the deportation procedure to be illegal does not deprive the applicant of his claim to be a victim of the violation of the Convention by reason of his arrest<sup>63</sup>. In the *Chamaiev* case the Court accepted that the arguments concerning extradition being barred because of material human rights guarantees, are covered by the right to a remedy enshrined in article 13 of the European Convention on Human Rights<sup>64</sup>, which in this respect functions in combination with the alleged violated articles.

### *II.1. FLAWS DURING THE EXTRADITION PROCESS – A TRANSNATIONAL PERSPECTIVE*

The complexity and inter-relation of the procedures in the states involved in an extradition realisation raises issues of continuity and legality of the proceedings. The flaws, which will be examined in the present section, focus on the extraterritorial or irregular seizure of a person. Extraterritorial seizures of individuals are generally classified in two categories; irregular rendition and abduction. The first one refers to the informal surrender of a person by agents of one country to agents of another without formal or legal proceedings. The second one refers to a person’s seizure and removal without the knowledge and consent of the state in which the seizure occurs<sup>65</sup>.

This section analyses the issue in three phases; the case of simple cooperation without an extradition treaty between the states, one of which is a Contracting Party of the European Convention on Human Rights; the case of one contracting and one non-contracting state bound by an extradition treaty; and the case of two Contracting Parties to the Convention irrespective of an extradition instrument between them.

In cases of simple inter-state cooperation and in the absence of a treaty between two States the handing over of the individual does not in itself make the arrest unlawful or

<sup>59</sup> *Bordovskiy v. Russia*, 8-2-2005, paras.47-49

<sup>60</sup> *Chahal v. the United Kingdom*, 15-11-1996, para. 129.

<sup>61</sup> *Bozano v. France*, 2-12-1986.

<sup>62</sup> for further analysis of the case, see P. van Dijk and G.J.H. van Hoof, *Theory and Practice of the European Convention on Human Rights*, 3<sup>rd</sup> edition, Kluwer Law International, 1998

<sup>63</sup> P. van Dijk and G.J.H. van Hoof, *Theory and Practice of the European Convention on Human Rights*, 3<sup>rd</sup> edition, Kluwer Law International, 1998, p. 364

<sup>64</sup> *Chamaiev et autres c. Georgie et Russie*, 12-4-2005. Para. 460-461

<sup>65</sup> Jacques Semmelman, Due Process, International Law and Jurisdiction over Criminal Defendants Abducted Extraterritorially: The *Ker-Frisbie* Doctrine Reexamined, *Columbia Journal of Transnational Law*, 1992, Vol. 30, p. 520

subsequently give rise to problems under article 5<sup>66</sup>. However, for a *detention* in these circumstances to be lawful two requirements have to be met. First, the domestic substantial and procedural rules of the requesting state concerning the arrest should be complied with - according to the European Convention's article 5 paragraph 1, "*a procedure prescribed by law*" and the purpose of article 5, namely to protect from arbitrariness<sup>67</sup>. **And**, secondly, the requesting state's action has to be compatible the respect for the sovereignty of the requested state<sup>68</sup>.

Generally, an atypical extradition, which results from the cooperation of states, in the absence of a treaty, and has as a legal basis an arrest warrant issued by the competent authorities of the requesting state (article 5 paragraph 1, "*a procedure prescribed by law*") is not as such contrary to the Convention. In order for a violation to arise, there has to be proven in a form of concordant inferences that the requesting state violated the sovereignty of the requested state and, therefore, international law<sup>69</sup>.

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

The Court examined, first, whether the arrest of the applicant complied with Turkish law<sup>70</sup>, meaning the existence of valid arrest warrants; then, the compatibility with international law of the acts of the Turkish agents with regard to the applicant's interception by Kenyan agents, namely the respect of the sovereignty of Kenya<sup>71</sup>. The Court's reasoning, which concludes that a violation of the domestic law of Kenya would be considered only if the latter was a Contracting Party<sup>72</sup>, implies that in case of bribing the officials of the requested state by the requesting state there would be an unlawful conduct attributed to the latter<sup>73</sup>, without excluding the responsibility of the former<sup>74</sup>.

According to the established case law of the Court, the role played by the authorities of the non-contracting party of the European Convention on Human Rights has to be taken into

<sup>66</sup> *Freda v. Italy*, no. 8916/80, 7-10-1980, DR 21, p. 250; *Klaus Altmann (Barbie) v. France*, no. 10689/83, 4-7-1984, DR 37, p. 225; *Luc Reinette v. France*, no. 14009/88, Commission decision, 2-10-1989, DR 63, p. 189

<sup>67</sup> *Bozano v. France*, 18-12-1986, para. 54; *Wassink v. the Netherlands*, 27-9-1990, para. 24

<sup>68</sup> *Öcalan v. Turkey*, 12-5-2005, para. 90; *Stocké v. Germany*, 19-3-1991, para. 54

<sup>69</sup> *Ocalan v. Turkey*, 12-5-2005, para. 90; *Stocké v. Germany*, 19-3-1991, para. 54

<sup>70</sup> *mutatis mutandis Illich Ramirez Sanchez v. France*, where the Court required an arrest warrant to be issued by the authorities of the fugitive's State of origin in order for an atypical extradition (in the absence of a binding instrument between the concerned states) to be lawful under the Convention

<sup>71</sup> *Ocalan v. Turkey*, 12-5-2005, paras. 91-99

<sup>72</sup> *Ocalan v. Turkey*, 12-5-2005, para. 90

<sup>73</sup> International responsibility for the wrongful act would then be raised according to articles 8 or 17 of the Articles on State Responsibility adopted by the UN General Assembly. Commentary of the Articles on State Responsibility, *Yearbook of the International Law Commission*, 2001, Doc. A/56/10, pp. 103, footnote 157.

<sup>74</sup> Article 7, Articles on State Responsibility, *Yearbook of the International Law Commission*, 2001, Doc. A/56/10, pp. 103, footnote 157

consideration in such cases<sup>75</sup>. The endorsement of the extraterritorial act of the seizing state by the state, where the person was located, heals the violation of international law. Such approval may be express or may be inferred by the absence of protest. The fact that the Kenyan authorities did not lodge any complaints against the Turkish Government referring to a violation of its sovereignty for seizing *Öcalan*, or that they did not claim any redress from Turkey, such as the applicant's return or compensation, proves that they had decided *to at least facilitate the transfer of the individual to Turkey*<sup>76</sup>, notwithstanding the fact that Kenya rejected its involvement in the arrest of the applicant<sup>77</sup>. Therefore, Turkey did not violate Kenya's sovereignty for the arrest of the applicant and the detention of the applicant by the Turkish authorities was lawful.

The European Court while examining the facts concerning Kenya's involvement in the *Öcalan* case referred to the reparation that could be asked by Kenya, if it considered Turkey's involvement to be a violation of its sovereignty. It explicitly included the individual's return<sup>78</sup>. This means that in case of a violation of Kenya's sovereignty, the Court would consider a request of return as a means of redress a logic means. Therefore, the continuity of the inter-state proceedings in Turkey would be impaired; the proceedings would have been enforced against a person, which would not be lawfully under the jurisdiction of that State, especially in view of the fact that the return of the person is considered a means of reparation.

In this context, controversial remains whether this rule is self-executing. May the person involved invoke the violation of the sovereignty of the state, from where he/she was abducted, as a means to contest against the legality of his arrest and detention by he requesting state? The Court examined thoroughly in its substance the complaint of the applicant concerning a violation of his right under article 5 in connection with the breach of sovereignty. Moreover, according the Court's above-mentioned findings, in order for a breach of sovereignty to be found the state, where the person was located, must protest. These elements lead to the conclusion that the individual may invoke the breach of sovereignty of the state under certain conditions. He/she should do that in connection with the rights enshrined in the European Convention of Human Rights. And the state has to have protested against his/her removal or has demanded redress. In a sense, it is a "*conditionally self-executing*" rule. The breach of sovereignty may impair the arrest and detention of the individual, but the motion of the state, where he/she was previously located, proves the existence of a breach. It may be noted that in this way uncertainty is created in the exercise of the individual's right.

There have been certain commentators raising the "administration of justice" imperative, which may justify according to this submission an unlawful arrest of the accused. The administration of justice means the "effective enforcement of criminal laws against those

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<sup>75</sup> *Freda v. Italy*, no. 8916/80, Commission decision, 7-10-1980, DR 21, p. 250; *Klaus Altmann (Barbie) v. France*, no. 10689/83, Commission decision, 4-7-1984, DR 37, p. 225; *Luc Reinette v. France*, no. 14009/88, Commission decision, 2-10-1989, DR 63, p. 189

<sup>76</sup> *Ocalan v. Turkey*, 12-5-2005, paras. 95, 97

<sup>77</sup> *Ocalan v. Turkey*, 12-5-2005, para. 16

<sup>78</sup> *Ocalan v. Turkey*, 12-5-2005, para. 95. The same obligation of return was stressed by the Inter-American Juridical Committee in its Legal Opinion concerning the *Alvarez-Machain case*, which related to a Mexican citizen, who was abducted on Mexican soil by US agents and was subsequently tried in the US (*Legal Opinion on the Decision of the Supreme Court of the US of the Organization of American States, Permanent Council, Criminal Law Forum, Vol. 4, No. 1, 1993, p. 119*).

who violate them”<sup>79</sup>. It has to be underlined that these kind of submissions contradict the presumption of innocence, which constitutes a general principle of criminal law and is also stipulated in article 6 paragraph 2 of the European Convention on Human Rights.

Apart from the flaws concerning the violation of international law based on sovereignty interference, there have been cases of inter-state cooperation, which involve the non compatibility with the standards set in the European Convention – or in customary international law<sup>80</sup> - in the requested state procedure and prior to the handing over of the person concerned. This issue appears both in abduction incidents and in irregular rendition cases. It is a very interesting point, which relates to the concept, which the European system has concerning the “continuity of the criminal procedure” and the nature and degree of coherence of transnational proceedings in the framework of the Council of Europe.

Is the deprivation of liberty of an individual in a case of extradition to be taken into account as a whole? In other words, does the fact that the requested state has not respected the procedural rights afforded to the individual during his/her detention pending extradition, namely, article 5 paragraphs 2 and 4 - which may even amount to a violation of article 3 depending on the circumstances of the case<sup>81</sup>, as it will be examined in a subsequent section – affect the lawfulness of the detention in the requesting state?

In certain cases involving a requesting contracting state and a requested non-contracting state, the Commission held that the requesting state was not deprived of a legal basis for the detention of the individual concerned. Irregularities were evident. For example, the person was notified of the arrest warrant only on his arrival to Italy<sup>82</sup>, or when handed over to the French authorities, who took him to France<sup>83</sup>, or when he was made to sign in the extraditing state documents, which were false<sup>84</sup>.

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

In the recent *Öcalan* judgment the Court did not refer to the fact that the procedure, even though not being a breach of the requested state’s sovereignty, did not respect the rights stipulated in the Convention prior and during the handing over. Furthermore, the Court stated that it would consider the issue of violation of the law of the state, from where the individual

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<sup>79</sup> Arthur E. Shin, On the Borders of Law Enforcement – The Use of Extraterritorial Abduction As a Means of Attaining Jurisdiction the International Criminal, *Whittier Law Review*, 1995-1996, Vol. 17, p. 327- 402

<sup>80</sup> UN Working Group on Arbitrary Detention concluded that the detention of Alvarez Machain in US is arbitrary, being in contravention with article 9 of the ICCPR, Report of the Working Group on Arbitrary Detention, UN Commission on Human Rights, 50<sup>th</sup> Session, UN Doc. E/CN/.4/1994/27, 1993, pp. 139-140; Reisman, Covert Action, *Yale Journal of International Law*, Vol. 20, 1995, pp. 422-424; Ruth Wedgood, The Argument Against International Abduction of Criminal Defendants, *American University Journal of International Law and Policy*, 1995-1996, Vol. 6, pp. 565

<sup>81</sup> *Chamaiev et autres c. Georgie et Russie*, 12-4-2005, para. 381

<sup>82</sup> *Freda v. Italy*, 7-10-1980.

<sup>83</sup> *Illich Ramirez Sanchez v. France*, 24-6-1996.

<sup>84</sup> *Luis Rodlan v. Spain*, 16-10-1996.

was removed, in case that this state was a contracting party to the European Convention on Human Rights<sup>85</sup>. Therefore, incompatibility of the detention in that state with the Convention's provisions would only be considered in case of membership.

The judiciary organs of the Council of Europe seem to accept that the breach of the international obligations of the member states concerning article 5 of the Convention has only an out-coming effect, meaning in cases of procedures with a non-member state, when the latter is the requesting state. "As the Convention does not require the Contracting Parties to impose its standards on third states or territories, France was not obliged to verify whether the proceedings which resulted in the conviction were compatible with all the requirements of article 6 of the Convention. To require such a review of the manner, in which a court not bound by the Convention had applied the principles enshrined in article 6, would also thwart the current trend towards strengthening international co-operation in the administration of justice, a trend which is in principle in the interests of the persons concerned"<sup>86</sup>. The priority of administration of justice over human rights respect may pose, as mentioned above, issues of incompatibility with article 6 paragraph 2 of the European Convention on Human Rights.

"The contracting States are, however, obliged to refuse their co-operation if it emerges that the conviction is the result of a flagrant denial of justice"<sup>87</sup>. The abuse of rights by the non-contracting requested state does not deprive the subsequent legality of the procedure in the requesting State Party<sup>88</sup>, except in cases of flagrant denial of justice in the requested state. The Commission, though, did not determine what is a flagrant denial of justice for the purpose of the specific facts. Couldn't, for example, torture or denial of the rights of article 5 of the Convention constitute under certain circumstances a flagrant denial of justice?

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

In the existence of an extradition treaty between a Contracting Party and a non-Contracting Party to the European Convention on Human Rights problems are raised with respect to the respect of the treaty procedures.

Rather interesting examples are the cases of *Alvarez-Machain*<sup>89</sup> and *Verdugo-Urquidez*<sup>90</sup> in the US. The Supreme Court concluded that the unilateral action of the US did

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<sup>85</sup> *Ocalan v. Turkey*, 12-5-2005, para. 90

<sup>86</sup> *Drozd and Janousek v. France and Spain*, 26-6-1992, para. 110

<sup>87</sup> *Drozd and Janousek v. France and Spain*, 26-6-1992, para. 110

<sup>88</sup> Opposite conclusions: Geoff Gilbert, *Transnational Fugitive Offenders in International Law, Extradition and Other Mechanisms*, Martinus Nijhoff Publishers, International Studies in Human Rights, 1998, p. 358-359; I.A. Shearer, *Extradition in International Law*, Manchester University Press, 1971, p. 72-76; *United States v. Toscanino*, 500 F.2d 267 (2<sup>nd</sup> Circuit 1974), where the defendant had been subject to cruel and inhuman treatment before getting in the jurisdiction of the state; *State. v. Ebrahim*, South Africa Supreme Court, Appellate Division, 1991, *International Legal Materials*, 1992, Vol. 31, p. 888, where the Court ordered the release of the defendant, who had been abducted by agents of the South African Government from Swaziland, without the protest of the latter. According to the judgement "society is the ultimate loser when, in order to convict a guilty, it uses methods that lead to decrease respect for the law".

<sup>89</sup> *US v. Alvarez-Machain*, 504 US 655, 112 S Ct. 2188, 15-6-1992

<sup>90</sup> *US v. Verdugo-Urquidez*, 110 S Ct. 1056, 1990

not violate the extradition treaty concluded between the two states (USA and Mexico), because it did not explicitly prohibit such a conduct. The Inter-American Juridical Committee based its Legal Opinion, which asserted the breach of the US international obligations, both on the violation of the territorial sovereignty of Mexico and the fact that the Supreme Court did not interpret the extradition treaty “*in conformity with its purposes and in relation to the applicable rules and principles of international law*”.

In the European arena, the House of Lords stated in the *Regina v. Horseferry Road Magistrates’ Court*<sup>91</sup> stated that when there is a legal process established through extradition, the courts would refuse to try a person if he/she had been forcibly brought within the jurisdiction in disregard of those procedures. In that case, there was no extradition treaty between the UK and South Africa, but there was a possibility under national law for such an agreement to be made.

When a binding instrument concerning extradition exists between the two states, the maxim “*nunquam decurritur ad extarordinarium sed ubi deficit ordinarium*” applies. It means that since there is a treaty, which provides the normal conduct of the bound states, under circumstances, which do not bar the application of the treaty obligation according to the Vienna Convention on the Law of Treaties<sup>92</sup> or other sources of international law, extradition should be realised through the obligation assumed with the bilateral treaty. The fact that the treaty does not prohibit explicitly the unilateral action of one of the contracting parties does not mean that this unilateral action is actually permitted.

The sense of this maxim stems from the “*principle of good faith*”<sup>93</sup>, which constitutes a general principle of law<sup>94</sup> binding the conduct of the states; it is an autonomic source of international law according to article 38 of the International Court of Justice Statute and article 21 of the Statute of the International Criminal Court. In the present case it means that since the states entered into an agreement, they will use it in the circumstances in cases that fall to the scope of the referred agreement<sup>95</sup>.

As regards to extradition treaties between States, when both are Parties to the European Convention on Human Rights, the issue of “continuity of the criminal procedure” is more acute. The Court recently dealt with a case, in which a violation of article 5 paragraphs 2 and 4 arose regarding the extraditing state<sup>96</sup>. However, it mentioned nothing relating to the issue of continuity in the sense of the maxim *male captus, male detentus*.

More specifically, in the *Chamaiev* judgment<sup>97</sup>, in which the Court had the chance to examine the responsibility of both the extraditing and the receiving states, it did not deal with this specific issue. One could infer by the Court’s silence, that the responsibility of the

<sup>91</sup> *Regina v. Horseferry Road Magistrates’ Court, ex Parte Bennett*, Appeals Court, 1994, vol. 1, p. 42

<sup>92</sup> *Vienna Convention on the Law of Treaties*, Vienna, 23 May 1969.

<sup>93</sup> J. F. O’ Connor, *Good Faith in International Law*, Dartmouth 1991, pp. 45-81; E. Zoller, *Bonne Foi en Droit International Public*, Paris, 1977; R. Kolb, *La Bonne Foi en Droit International Public*, Paris, 2002; G. Fitzmaurice, *The Law and Procedure of the International Court of Justice*, 1986, vol. I, p. 183 and vol. II, p. 609; Malkolm N. Shaw, *International Law*, Cambridge University Press, 2003, p. 97; Patrick Daillier and Allain Pellet, *Droit International Public*, 7e edition, L.G.D.J., 2002, p. 352

<sup>94</sup> Wolfgang Weiss, *Allgemeine Rechtsgrundsätze des Völkerrechts*, AVR, 2001, p. 394

<sup>95</sup> Roberto Zimmermann, *La Coopération Judiciaire Internationale en Matière Pénale*, 2<sup>e</sup> édition, Bruylant SA Bruxelles, 2004, p. 93

<sup>96</sup> *Bordovskiy v. Russia*, 8-2-2005; *Chamaiev et autres c. Georgie et Russie*, 12-4-2005.

<sup>97</sup> *Chamaiev et autres c. Georgie et Russie*, 12-4-2005



extraditing state arises under the respective articles<sup>98</sup>, but the establishment of jurisdiction over the person concerned by the receiving state remains flawless, lawful. Following this interpretation the *male captus, bene detentus*<sup>99</sup> seems to apply, but there are no straightforward arguments by the Court's reasoning to support that unequivocally.

To the contrary, the fact that the procedural rights stipulated in article 5 paragraphs 2 and 4 of the Convention are an integral part of the extradition procedure concerning the arrest and detention of the individual, even in the absence of a specific treaty between the States Parties, in case they are not respected by the requested state, they may thwart the lawfulness of the subsequent detention in the receiving state. It would constitute a violation of the law of extradition of the requested state and, therefore, an unlawful conduct of the commonly binding to both States Parties to the European Convention on Human Rights extradition procedure. A margin for this interpretation has been left opened by the Court in the *Ocalan* judgment, which stated that the question of violation of the requested state's legislation would be examined only if the latter was a contracting state<sup>100</sup>. There may, therefore, be a violation of article 5, if the lawful conditions of the arrest in the requested state are not complied with.

Moreover, the European Convention on Human Rights is not a common multilateral treaty; to the contrary, it creates a space of "*a European public order*"<sup>101</sup> and the obligations created therein are "*obligations erga omnes partes*"<sup>102</sup>. That means that they are owed not only to the individuals under the states' jurisdiction, but also to the community of the states that has signed the Convention. The right to inter-state petition itself stems from this particular nature of the Convention. Such a community of obligations would be endangered, if gaps were to be left in cases of cooperation between the States Parties; it would legitimise breaches of obligations, which are common and owed to all States Parties and at the same time it will undermine the inter-state petition system, in the sense that the receiving state would be estopped from using the inter-state petition scheme in view of its acceptance of an unlawful act of the extraditing state.

Additionally, the dictum "*ex inuria ius non oritur*", which is part of the principle of good faith<sup>103</sup> and refers to the rule of law, which is an inherent principle in the system of the Council of Europe<sup>104</sup>, reinforces the argument of illegality of the arrest and detention by the requesting state of a person in breach of international obligations; not only concerning

<sup>98</sup> *Chamaiev et autres c. Georgie et Russie*, 12-4-2005, p. 477-478

<sup>99</sup> Roberto Zimmermann, *La Coopération Judiciaire Internationale en Matière Pénale*, 2<sup>e</sup> édition, Bruylant SA Bruxelles, 2004, p. 96

<sup>100</sup> *Ocalan v. Turkey*, 12-5-2005, paras. 83, 86, 87, 90.

<sup>101</sup> *Loizidou v. Turkey*, 23-2-1995, para. 75

<sup>102</sup> Linos-Alexandre Sicilianos, The Classification of Obligations and the Multilateral Dimension of the Relations of International Responsibility, *European Journal of International Law*, Vol. 13, 2002, No. 5, pp. 1135-1137

<sup>103</sup> Roberto Zimmermann, *La Coopération Judiciaire Internationale en Matière Pénale*, 2<sup>e</sup> édition, Bruylant SA Bruxelles, 2004, p. 96

<sup>104</sup> Article 3, *Statute of the Council of Europe*, London, 5-5-1949, E.T.S. Nos. 1/6/7/8/11; T. Meron and J.S. Sloan, Democracy, Rule of Law and Admission to the Council of Europe, *Israel Yearbook of International Law*, Martinus Nijhoff Publishers, 1996, Vol. pp. 137-157; Report of the Secretary-General, *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*, U.N. S.C., 23-8-2004, S/2004/616, p. 4

sovereignty issues, but also international human rights commitments stemming from several sources. It, therefore, circumvents the maxim *male captus bene detentus*<sup>105</sup>.

## II. 2. THE EUROPEAN CONVENTION ON EXTRADITION

A unified extradition procedure has been adopted in the framework the Council of Europe; the European Convention on Extradition and its Additional Protocols, provide a system of procedural rules, which do not, however, refer especially to the procedural and substantive rights of the individual involved. Furthermore, the Committee of Ministers has adopted a package of guiding principles to assist member states in the application of the Convention<sup>106</sup>. These principles basically ensure the application of the guarantees afforded by article 5 of the European Convention of Human Rights in the framework of the extradition procedure.

One cannot understand the scope of the protection without regard to its procedural aspect. The procedure itself, indeed, grants protection to individuals. For example, it guarantees the execution of an extradition when the *competent authorities* of the requesting state proceed to the relevant request. Competent authorities are to be understood only the judiciary and the Office of the Public Prosecutor; not the police authorities<sup>107</sup>. Furthermore, such a request must be made in writing supported by documents of conviction or detention order or a warrant of arrest; statement of the offences for which extradition is requested; enactment or statement of the relevant law and information of identity and nationality of the person concerned<sup>108</sup>.

The relevance of the international co-operation in criminal matters, and especially extradition to human rights is rather interesting, in view of a *problematique* raised concerning the 'self-executing' character of the Convention. Does the Convention create domestically enforceable rights in individuals? The U.S. case-law seems to leave a margin of a positive answer<sup>109</sup>. The European Convention on Extradition does not seem to follow the same approach. However, an interpretation through the European Convention of Human Rights could lead to a standing relating to procedural aspects of the extradition itself, as they are going to be analysed in detail in the following chapters.

## II. 3 EXTRADITION OFFENCES

Moreover, it determines the offences, which are extraditable, leaving outside the political, military and fiscal offences (*Articles 3, 4, and 5 of the European Convention on Extradition*). The latter offences have acquired the extraditable status under the Second Additional Protocol to the European Convention on Extradition<sup>110</sup>.

<sup>105</sup> Roberto Zimmermann, *La Coopération Judiciaire Internationale en Matière Pénale*, 2<sup>e</sup> édition, Bruylant SA Bruxelles, 2004, p. 96

<sup>106</sup> Paragraph I, *Recommendation No. R (80) 7 of the Committee of Ministers to Member States Concerning the Practical Application of the European Convention on Extradition*, 27-6-1980, 321<sup>st</sup> meeting of the Ministers, Deputies

<sup>107</sup> Article 1, Explanatory report, *European Convention on Extradition*, E.T.S. No. 24, 13-7-1957

<sup>108</sup> Article 12, *European Convention on Extradition*, Paris, E.T.S. No. 24, 13-7-1957; *Chamaiev et autres c. Georgie et Russie*, 12-4-2005, para. 403

<sup>109</sup> Chris. L. Blakesley, *Ruminations on Extradition and Human Rights*, in Stefan Trechsel (ed.) *Strafrecht, Strafprozessrecht und Menschenrechte*, Schulthess, 2002, pp. 209-214

<sup>110</sup> *Second Additional Protocol to the European Convention on Extradition*, Strasbourg, 17-3-1978, E.T.S. No. 98

As far as the political offences are concerned the Convention prohibits the extradition over those, without defining them. Article 3 provides:

- 1 *Extradition shall not be granted if the offence in respect of which it is requested is regarded by the requested Party as a political offence or as an offence connected with a political offence.*
- 2 *The same rule shall apply if the requested Party has substantial grounds for believing that a request for extradition for an ordinary criminal offence has been made for the purpose of prosecuting or punishing a person on account of his race, religion, nationality or political opinion, or that that person's position may be prejudiced for any of these reasons.*
- 3 *The taking or attempted taking of the life of a Head of State or a member of his family shall not be deemed to be a political offence for the purposes of this Convention.*
- 4 *This article shall not affect any obligations which the Contracting Parties may have undertaken or may undertake under any other international convention of a multilateral character.*

The political offence exemption has been raised in a wide variety of circumstances and has had imprecise and inconsistent interpretation<sup>111</sup>. There is no concrete definition in the instruments of the Council of Europe, nor an internationally accepted definition. There are no concrete criteria either, but there have been attempts to list certain of them<sup>112</sup>.

However, exceptions to the exception of the political offence have been established in international law; the *clause d'attentat*, which is explicitly included in the European Convention on Extradition in article 3 paragraph 3; genocide<sup>113</sup> according to the 1948 Geneva Convention on the Prevention and Punishment of the Crime of Genocide<sup>114</sup> and war crimes<sup>115</sup>, according to the Four Geneva Conventions. and terrorism. According to Article 1 of the European Convention on the Suppression of Terrorism<sup>116</sup>:

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

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<sup>111</sup> Christine Van den Wijngaert, *The Political Offence Exception to Extradition, The delicate problem of balancing the rights of the individual and the international public order*, Kluwer, 1980, pp. 95-132; Geoff Gilbert, *Transnational Fugitive Offenders in International Law, Extradition and Other Mechanisms*, Martinus Nijhoff Publishers, International Studies in Human Rights, 1998, p. 203-268

<sup>112</sup> Ivor Stanbrook and Clive Stanbrook, *Extradition Law and Practice*, Second Edition, Oxford University Press, 2000, p. 68-70; Dominique Poncet and Paul Gully-Hart, *The European Approach – Legal Framework of Extradition in Europe*, in ed. Cherif Bassiouni, *International Criminal Law, Procedural and Enforcement Mechanisms*, 2<sup>nd</sup> ed., Transnational Publishers, 1999, p. 293

<sup>113</sup> *Additional Protocol to the European Convention on Extradition*, Strasbourg, 15-10-1975, E.T.S. No. 86, article 3

<sup>114</sup> see generally, W. Schabas, *Genocide in International Law*, Cambridge, 2000.

<sup>115</sup> *Additional Protocol to the European Convention on Extradition*, Strasbourg, 15-10-1975, E.T.S. No. 86, article 3

<sup>116</sup> *European Convention on the Suppression of Terrorism*, Strasbourg, 27-01-1977, E.T.S. No. 90

- a. an offence within the scope of the Convention for the Suppression of Unlawful Seizure of Aircraft, signed at The Hague on 16 December 1970;
- b. an offence within the scope of the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, signed at Montreal on 23 September 1971;
- c. a serious offence involving an attack against the life, physical integrity or liberty of internationally protected persons, including diplomatic agents;
- d. an offence involving kidnapping, the taking of a hostage or serious unlawful detention;
- e. an offence involving the use of a bomb, grenade, rocket, automatic firearm or letter or parcel bomb if this use endangers persons;
- f. an attempt to commit any of the foregoing offences or participation as an accomplice of a person who commits or attempts to commit such an offence.

Article 20 of the recent Council of Europe Convention on the Prevention of Terrorism<sup>117</sup> stipulates that:

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

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

In relation to extradition the word political equals non-criminal and it may result in immunity from prosecution and punishment of the offender, thus having an effect similar to excuses for the punishability of the offender in domestic criminal law<sup>118</sup>. Therefore, application of the principle *aut dedere, aut judicare*<sup>119</sup> provides no alternative to the political offence exception.

#### II. 4. DOUBLE CRIMINALITY

The principle of double criminality, *reciprocité d'incrimination*, founded in the long-standing international principle of legality, *nulla poena sine lege*, requires that a fugitive be

<sup>117</sup> Council of Europe Convention on the Prevention of Terrorism, Warsaw, 16-5-2005, ETS No. 196

<sup>118</sup> Christine Wan Den Wyngart, *The Political Offence Exception to Extradition, The delicate problem of balancing the rights of the individual and the international public order*, Kluwer, 1980, p. 368-428; Dominique Poncet and Paul Gully-Hart, *The European Approach – Legal Framework of Extradition in Europe*, in ed. Cherif Bassiouni, *International Criminal Law, Procedural and Enforcement, Mechanisms*, 2<sup>nd</sup> ed., Transnational Publishers, 1999, p. 293

<sup>119</sup> Generally see, M. Cherif Bassiouni and Edward M. Wise, *Aut Dedere Aut Judicare, The Duty to Extradite or Prosecute in International Law*, Martinus Nijhoff Publishers, 1995

extradited only for conduct that is criminal and punished to the prescribed level by the domestic law of both states and is enshrined in the Convention<sup>120</sup>. Traditionally it has been considered closely related to the notion of sovereignty and reciprocity<sup>121</sup>. However, it seems that in the era of transnational proceedings, which have in their center the individual, it seems that the principle has to find another basis. There are publicists that consider the principle stemming from human rights exceptions to extradition proceedings<sup>122</sup>. It ensures the lawfulness of detention of the deprivation of liberty according to the laws of the requesting state<sup>123</sup>.

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

An individual could invoke the double criminality principle linked to article 7 of the European Convention on Human Rights. Article 7 provides that no one shall be held guilty of any criminal offense on account of any act or omission, which did not constitute a criminal offense under national or international law at the time when it was committed. Nevertheless, it would be possible for the argument to get impeded through the same argumentation against article 6; extradition proceedings are not covered by “criminal charges” stipulated in article 6 of the Convention.

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

## II. 5. PRINCIPLE OF SPECIALITY

The principle of speciality<sup>124</sup> is one of the traditional tools in the extradition framework included in the European Convention on Extradition<sup>125</sup>. It guarantees that the individual concerned will not be transferred to be proceeded in a State for crimes other than for the ones extradition was granted. If the principle is found to have been violated, the person concerned must be released and allowed to leave the country, before he/she may be tried for offences committed before his extradition. Article 14 of the European Convention on Extradition stipulates:

<sup>120</sup> Article 2, *European Convention on Extradition*, E.T.S. No. 24, 13-7-1957

<sup>121</sup> Otto Lagodny, *Expert Opinion for the Council of Europe on Questions Concerning Double Criminality*, Committee on Experts on the Operation of European Conventions in the Penal Field (PC-OC), European Committee on Crime Problems (CDPC), 24-6-2004, p. 3

<sup>122</sup> Chris. L. Blakesley, *Ruminations on Extradition and Human Rights*, in Stefan Trechsel (ed.) *Strafrecht, Strafprozessrecht und Menschenrechte*, Schulthess, 2002, p. 191-204

<sup>123</sup> Dominique Poncet and Paul Gully-Hart, *The European Approach – Legal Framework of Extradition in Europe*, in ed. Cherif Bassiouni, *International Criminal Law, Procedural and Enforcement Mechanisms*, 2<sup>nd</sup> ed., Transnational Publishers, 1999, p. 292

<sup>124</sup> Anna Zairi, *Le Principe de la Spécialité de l'Extradition Au Regard des Droits des l'Homme*, L.G.D.J. , 1992

<sup>125</sup> Article 14 and 15, *European Convention on Extradition*, Paris, 13-7-1957, E.T.S. No. 24.

- 1 *A person who has been extradited shall not be proceeded against, sentenced or detained with a view to the carrying out of a sentence or detention order for any offence committed prior to his surrender other than that for which he was extradited, nor shall he be for any other reason restricted in his personal freedom, except in the following cases:*
  - a. *when the Party which surrendered him consents. A request for consent shall be submitted, accompanied by the documents mentioned in Article 12 and a legal record of any statement made by the extradited person in respect of the offence concerned. Consent shall be given when the offence for which it is requested is itself subject to extradition in accordance with the provisions of this Convention;*
  - b. *when that person, having had an opportunity to leave the territory of the Party to which he has been surrendered, has not done so within 45 days of his final discharge, or has returned to that territory after leaving it.*
- 2 *The requesting Party may, however, take any measures necessary to remove the person from its territory, or any measures necessary under its law, including proceedings by default, to prevent any legal effects of lapse of time.*
- 3 *When the description of the offence charged is altered in the course of proceedings, the extradited person shall only be proceeded against or sentenced in so far as the offence under its new description is shown by its constituent elements to be an offence which would allow extradition.*

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

However, it is not clear if the person is entitled to claim the protection of the principle of speciality as a right<sup>126</sup>, except if combined with a right provided in the European Convention on Human Rights.

The doctrine of speciality is related to the right enshrined in article 5 paragraph 2 and 4 and article 6 of the European Convention on Human Rights<sup>127</sup>. If the person detained to be extradited is not informed on the overall charges against him, on which is based the request of extradition, according to the precise content of the arrest warrant accompanying the

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<sup>126</sup> David Runtz, Notes, The Principle of Speciality: A Bifurcated Analysis of the Rights of the Rights of the Accused, *Columbia Journal of Transnational Law*, 1991, Vol. 29, p. 421, 437

<sup>127</sup> Anna Zairi, *Le Principe de la Spécialité de l'Extradition Au Regard des Droits des l'Homme*, L.G.D.J. , 1992, pp. 41-53, 126-153.

extradition request, then he will be deprived of the right guaranteed in the above mentioned paragraphs and article 13<sup>128</sup>.

According to the case law of the Court the time for the application of article 6 paragraph 1 begins for the requesting state at the day the authorities of the requested state arrest him<sup>129</sup>. In this respect the principle of speciality refers to the application of article 5 paragraph 3 in the requested state and 6 paragraph 3 in the requesting state. Therefore, the doctrine of speciality enshrined in the European Convention on Extradition completes the continuity and the harmonised application of the provisions of the European Convention on Human Rights.

It should be noted that the principle has also been included in the ICC Statute<sup>130</sup>. In that system the principle imposes a limit on the charges with which the Court may proceed after surrender, subject to possible waiver by the requested state.

## II.6. *NE BIS IN IDEM*

The *ne bis in idem* principle will be examined in a following section seen throughout all the transnational proceedings. It has to be bore in mind though that it constitutes too a procedural aspect of the co-operation proceedings included in the general *problematique* mentioned in the general part above.

## II.7. *NATIONALITY OF THE INDIVIDUAL*

The nationality of the individual is one of the defences against extradition in the European Convention on Extradition. The 1996 European Convention on Extradition has removed nationality as an obstacle to the surrender of the concerned individuals. Nationality restriction seems to be flexible today, since the European Convention on the Transfer of Sentenced Persons<sup>131</sup> gives the opportunity that a person sentenced in the requesting state serve the sentence within the state or nationality. In any case, if the state of nationality does not extradite on this ground it is required, at the request of the requesting state, to submit the case to its competent authorities in order for proceedings to be taken if they are considered appropriate<sup>132</sup>.

# CHAPTER III

## *AUT DEDERE AUT JUDICARE IN TRANSNATIONAL PROCEDURES*

According to international law, a state may not shield a person suspected of certain categories of crimes under the principle *aut dedere, aut judicare*. The state is required either to punish itself the offender exercising any form of jurisdiction over him/her or to extradite him/her to a state able and willing to do so. In the era of the establishment of International Criminal Tribunals the principle may be interpreted *lato sensu* to include the duty of the state

<sup>128</sup> Anna Zairi, *Le Principe de la Spécialité de l'Extradition Au Regard des Droits des l' Homme*, L.G.D.J. , 1992, pp. 129-130, 132

<sup>129</sup> *Gelli v. Italy*, 19-10-2000, para. 37

<sup>130</sup> *Rome Statute of the International Criminal Court*, UN Doc. A/CONF. 183/9, article 101.

<sup>131</sup> *European Convention on the Transfer Sentenced Persons*, 21-3-1983, Strasbourg, E.T.S. No. 112

<sup>132</sup> Article 6, para. 2, *European Convention on Extradition*, Paris, 13-12-1957, E.T.S. No. 24

to *transfer* the person to the jurisdiction of an international organ, such the International Criminal Court<sup>133</sup>.

The European Convention on Human Rights does not contain any reference concerning the *aut dedere, aut judicare* principle. The European Convention on Extradition imposes the duty to the Contracting States to surrender to each other according to the provisions and conditions of the Convention all persons wanted by the competent authorities of another Contracting Party<sup>134</sup>. At the same time it excludes from the duty to extradite certain offences, as they have been analysed in the respective chapter, and the nationals of the requested state, which is however under the duty to prosecute the person concerned at the request of the requesting state<sup>135</sup>.

Apart from the extradition procedures, the whole functioning of the European Convention on the Transfer of Proceedings in Criminal Matters<sup>136</sup> is based on a form of the *aut dedere, aut judicare* principle. It provides for the beginning of proceedings against an individual, who has committed a crime under the domestic law of the requesting state, in another Contracting state, which also would have considered it as an offence, if it had been committed in its territory. It, therefore, favours the proceedings in that state and not extradition.

It is interesting that in the framework of this Convention the requesting state bases its entitlement to proceed to the request on all the forms of jurisdictions; territorial jurisdiction, when the offence has been committed in its own territory; active personality principle, meaning that the offender, who acts outside the territory of the state, is a national of the state; passive personality, meaning the nationality link between the requesting state and the victim of the offence; and universal jurisdiction, which is based on the nature itself of the offence; every state has an equal concern. Article 6 leaves the margin for such an interpretation.

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

- 1 A Contracting State may request another Contracting State to take proceedings in any one or more of the following cases:
  - a *if the suspected person is ordinarily resident in the requested state;*
  - b *if the suspected person is a national of the requested State or if that State is his State of origin;*
  - c *if the suspected person is undergoing or is to undergo a sentence involving deprivation of liberty in the requested State;*
  - d *if proceedings for the same or other offences are being taken against the suspected person in the requested State;*
  - e *if it considers that transfer of the proceedings is warranted in the interests of arriving to truth and in particular that the most important items of evidence are located in the requested state;*
  - f *if it considers that the enforcement in the requested State of a sentence if one were passed is likely to improve the prospects for the social rehabilitation of the person sentenced;*

<sup>133</sup> Article, 17, *Rome Statute of the International Criminal Court*, 17-7-1998

<sup>134</sup> Article 1, *European Convention on Extradition*, Paris, 13-12-1957, E.T.S. No. 24

<sup>135</sup> Article 6, *European Convention on Extradition*, Paris, 13-12-1957, E.T.S. No. 24

<sup>136</sup> *European Convention on the Transfer of Proceedings in Criminal Matters*, 15-5-1972, E.T.S. No. 73



- g *if it considers that the presence of the suspected person cannot be ensured at the hearing of proceedings in the requesting State and that his presence in person at the hearing of proceedings in the requested state can be ensured;*
- e *if it considers that it could not itself enforce a sentence if one were passed, even by having recourse to extradition, and that the requested state could do so*

Moreover, the Convention on the Protection of the Environment through Criminal Law<sup>137</sup> provides for the principle in article 5:

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

Articles 6 and 7 of the European Convention on Terrorism strengthen the *aut dedere, aut judicare* principle and article 14 of the recently adopted Council of Europe Convention on the Prevention of Terrorism<sup>138</sup> requires that each state party take such measures as may be necessary to establish its jurisdiction over the offences set forth in the Convention in the case where the offender is present in its territory and it does not extradite him/her to a Party whose jurisdiction is based on a rule of jurisdiction existing equally in the law of the requested Party.

Also, the Council of Europe Convention on Action Against Trafficking in Human Beings<sup>139</sup> has included the principle in article 31:

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

No reservation is permitted with regard to the obligation to establish jurisdiction in cases falling under the principle of *aut dedere aut judicare*. According to the explanatory report of the Convention<sup>140</sup>:

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

<sup>137</sup> *Convention on the Protection of the Environment Through Criminal Law*, Strasbourg, 4-6-1998, E.T.S. No. 172

<sup>138</sup> *Council of Europe Convention on the Prevention of Terrorism*, Warsaw, 6-5-2005, E.T.S. No. 196

<sup>139</sup> *Council of Europe Convention on Action Against Trafficking in Human Beings*, Warsaw, 16-5-2005, E.T.S. No.197

<sup>140</sup> Article 31, Explanatory Report, para. 333, *Council of Europe Convention on Action Against Trafficking in Human Beings*, Warsaw, 16-5-2005, E.T.S. No.197

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

It is of critical importance that in the European system of human rights protection the *aut dedere, aut judicare* rule provides a solution to cases where the individual concerned runs a risk to be subjected to a violation of his/her rights stemming from the European Convention on Human Rights. Where, a Contracting State considers that the individual will run a risk of flagrant denial of justice or prejudice in the requesting state, the rule fills the gap for the administration of justice. In this way, the principle completes the notion of the rule of law in the European system of transnational proceedings.

However, one should not forget the precedent of the International Court of Justice *Lockerbie* judgment. Provisional measures were not ruled for Libya against the US and UK, in view of the Security Council Resolution, which -by using the power conferred to its decisions by article 103 of the UN Charter- altered the obligations deriving from the existing extradition treaty of the parties involved, since it proved unworkable. This practice may give an argument that Libya failed at that time to demonstrate convincingly that it was capable of fulfilling its obligations under the Montreal Convention, that is to make a good faith effort to prosecute the crimes itself<sup>141</sup>. This thinking appears also in the complementarity system of the I.C.C., which asserts jurisdiction, when the state is unwilling or unable genuinely to carry out the investigation or prosecution<sup>142</sup>.

## CHAPTER IV

### ***MATERIAL HUMAN RIGHTS GUARANTEES AS LIMITATIONS TO EXTRADITION***

The European Convention on Human Rights obliges the Contracting Parties to “secure to everyone within their jurisdiction” the rights and freedoms stipulated therein<sup>143</sup>. The meaning of everyone “*within their jurisdiction*” has repeatedly been interpreted by the Court as to permit the extra-territorial application of the Convention in various respects and

<sup>141</sup> M. Plachta, *The Lockerbie Affair: When Extradition Fails are the United Nations’ Sanctions a Solution?*, *Annual Report for 1999 and Resource Material Series*, No. 57, UNAFEI, Japan, September 2001, p. 93-107

<sup>142</sup> Article 17, para. 1 (a), *Rome Statute of the International Criminal Court*, 17-7-1998; Olivia Swak-Goldman, *Recent Developments in International Criminal Law: Trying to Stay Afloat Between Scylla and Charybdis*, *International and Comparative Law Quarterly*, Vol 54, 2005, pp. 691-704

<sup>143</sup> Article 1, *European Convention of Fundamental Rights and Freedoms*, 4-11-1950, U.N.T.S. vol. 213

occasions<sup>144</sup>. The issue of the “extra-territoriality” of the Convention in the framework of extradition concerns the duty -and therefore the responsibility in case of breach – of the Contracting Parties not to expose anyone, who is under their jurisdiction, to an irremediable situation of objective danger, even outside their jurisdiction<sup>145</sup>. In such cases, responsibility of the Contracting State is raised because of its having acted in a way that has as a direct consequence the exposure of an individual to proscribed ill treatment<sup>146</sup>.

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

#### IV.1. RISK OF CAPITAL PUNISHMENT OR ILLEGAL EXECUTION

Protocols 6 and 13 Additional to the European Convention abolish the capital punishment in the jurisdiction of the Contracting Parties. The European Convention itself does not exclude the application of the death penalty, but it restricts it in special conditions, according to article 2. Therefore, a Contracting Party of the European Convention on Human Rights that has not ratified the 6<sup>th</sup> Protocol or the 13<sup>th</sup> Protocol to the European Convention may apply the capital punishment under the conditions laid down in paragraph 2 of article 2 of the Convention<sup>147</sup>. It may also extradite the person concerned, only if receives credible guarantees by the requesting state that it will enforce the punishment accordance with article 2 of the European Convention; this would not exclude, though, the possibility of a violation under article 3 of the Convention, as it will be examined at a latter stage.

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

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<sup>144</sup> *Ocalan v. Turkey*, 12-5-2005; *Mamatkulov and Askarov v. Turkey*, 4-2-2005; *Mamatkulov and Abdurasulovic v. Turkey*, 6-2-2003; *Xhavara et quinze autres c. Italie et Albanie*, 11-1-2001; *Cyprus v. Turkey*, 10-5-2001; *Issa and others v. Turkey*, 30-5-2000; *Ilascu, Lesco, Ivantoc and Petrov-Popa v. Moldova and the Russian Federation*, 4-6-2001; *Bankovic and Others v. Belgium and 16 Other Contracting States*, 19-12-2001; *Soering v. the United Kingdom*, 7-7-1989; Rick Lawson, *The Concept of Jurisdiction and Extraterritorial Acts of State*, in Gerald Kreijen (ed. in chief), *State, Sovereignty, and International Governance*, Oxford University Press, 2002, 281-297; in the field of the ICCPR see *Sergio Euben Lopez Burgos v. Uruguay*, Communication No. R. 12/52, 6-6-1979, UN Doc. Supp. No. 40 (A/36/40), 12.1-12.3; *Francesco Cavallaro on behalf of Lilian Celiberti de Casariego v. Uruguay*, Communication No. 056/1979, 29-7-1981; *Delia Salidas de Lopez v. Uruguay*, Communication No. 52/979, 29-7-1981, UN Doc. CCPR/C/OP/1; in general see *The Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, I.C.J., 9-6-2004, <http://www.icj-cij.org/igwww/idocket/imw/frame.htm>, para. 109; Report of the Human Rights Committee, UN GAOR, 46<sup>th</sup> Sess., Supp. No. 40, para. 652. UN Commission on Human Rights’ Special Rapporteur on Human Rights in Kuwait under Iraqi Occupation, Walter Kalin, *Report on the Situation of Human Rights in Kuwait under Iraqi Occupation*, UN Doc. E/CN.4/1992/26, para. 55-59; *Legal Opinion of the Attorney General, Lord Goldsmith on the Occupation of Iraq*, 26-3-2003, [www.informationcleaninghouse.info/article3505.htm](http://www.informationcleaninghouse.info/article3505.htm), para. 5.

<sup>145</sup> *Kirkwood v. the United Kingdom*, 12-3-1984, DR 37, p. 158

<sup>146</sup> *Soering v. the United Kingdom*, 7-7-1989, paras. 89-91

<sup>147</sup> *Chamaiev et autres c. Georgie et Russie*, 12-4-2005, para. 333

In fact, the Committee of Ministers in the framework of the fight against terrorism adopted the “*Guidelines on human rights and the fight against terrorism*”<sup>148</sup>. Article 8 paragraph 2 of the Guidelines stipulates that:

*The extradition of a person to a country where he risks being sentenced to death penalty may not be granted. A requested state may however grant an extradition if it has obtained adequate guarantees that:*

- i) the person whose extradition has been requested will not be sentenced to death,*
- ii) in the event that such a sentence being imposed, it will not be carried out.*

The credibility of these guarantees has to be evaluated by the requested state when deciding to extradite. Guarantees given by the General Prosecutor, who under the national law is invested with the power to control the action of every prosecutor of the state, is characterised as sufficiently credible<sup>149</sup>.

In any case, as it will be examined in the following chapter, it has to be borne in mind that the manner in which such a punishment is executed may give rise to issues under article 3 of the Convention, which prohibits torture. Of course, the Court has explicitly established that article 3 should not be interpreted in a way as to prohibit in principle the death penalty, because in such a case it would render article 2 paragraph 1 null<sup>150</sup>. Moreover, States are obliged to abstain from extraditing a person to a state, where he/she runs a real risk of being illegally executed<sup>151</sup>. A simple possibility of such a risk would not be in itself a violation of article 2<sup>152</sup>. For example, the fact that individuals of Chechnyan origin, would be extradited to Russia, while the conflict in the Republic of Chechnya was considered of extreme violence, creates certain fear for a risk of their lives, but it does not in itself render their extradition contrary to article 2. The risk has to be precise and the evidence serious and confirmed<sup>153</sup>.

#### *IV.2. PROHIBITION OF TORTURE AND RISK OF BEING SUBJECTED TO TORTURE OR TO INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT*

Diligent action of the extraditing authorities during extradition proceedings is demanded by article 3 of the European Convention on Human Rights. Which is this diligent action? Competent authorities are obliged to act in accordance with the procedural guarantees provided by articles 5 paragraph 2, 5 paragraph 4 and 13 of the Convention in the framework of an extradition procedure<sup>154</sup>. The detained individual should not be kept in ignorance as far as his/her future is concerned. According to the Court’s wording, it is inconceivable that a detainee is put before a “*fait accompli*” and that he/she does not realise that will actually be transferred to another state; at least not until he/she is asked to leave

<sup>148</sup> *Guidelines on human rights and the fight against terrorism*, 11-7-2002, 804<sup>th</sup> meeting of the Ministers’ Deputies

<sup>149</sup> *Chamaiev et autres c. Georgie et Russie*, 12-4-2005, para. 344; *Mamatkulov and Abdurasulovic v. Turkey*, 6-2-2003, para.75-77

<sup>150</sup> *Soering v. the United Kingdom*, 7-7-1989, para. 103

<sup>151</sup> *Chamaiev et autres c. Georgie et Russie*, 12-4-2005, para. 372

<sup>152</sup> *Vilvarajah and others v. the United Kingdom*, 30-10-1991, para. 111

<sup>153</sup> *Chamaiev et autres c. Georgie et Russie*, 12-4-2005, para. 372

<sup>154</sup> *Chamaiev et autres c. Georgie et Russie*, 12-4-2005, para. 381, 428, 432, 457-461

his/her cell. Last but not least, the detainee should not be subjected to anxiety and uncertainty without a sound reason. All these factors combined raise by themselves a problem in the framework of article 3 of the Convention<sup>155</sup>. Therefore, the combined exclusion of the exercise of the above-mentioned provisions may result to a violation of article 3 of the Convention.

Furthermore, the use of *necessary and proportionate physical violence* and direct medical care of the injured is required in any case of liberty deprivation<sup>156</sup>. For example, the blindfolding of the applicant during his transfer as a measure of precaution and even his being photographed while blindfold under certain circumstances may not be contrary to article 3<sup>157</sup>.

In an extraterritorial perspective, States Parties are obliged not to expel or extradite a person –including political asylum seekers<sup>158</sup>– to a country where substantial grounds have been shown for believing that the person would, if extradited, run a real risk of being subjected to a treatment contrary to article 3 of the Convention<sup>159</sup>. This bar from deportation applies to the full range of the separate maltreatment practices as defined in article 3 and as interpreted by the established case law of the Council of Europe’s organs<sup>160</sup>.

Articles 2 and 3 of the Convention provide an absolute protection, in the sense that they are not subject to any restrictions or to any derogation according to article 15 of the Convention<sup>161</sup>. Therefore, despite the daunting circumstances, which the states have to face nowadays in order to adequately respond to terrorism, the fundamental standards of protection provided by these two articles cannot be overlooked<sup>162</sup>.

The Committee of Ministers has reached the same conclusion; article 8 paragraph 3(i) of the Guidelines stipulates that:

*Extradition may not be granted if there are serious reasons to believe that:*  
*i) the person whose extradition has been requested will be subjected to torture or to inhuman or degrading treatment or punishment*

The establishment of such responsibility requires an assessment of conditions in the requesting state against the standards of article 3 of the Convention. Nonetheless, international responsibility of the non-contracting requesting state does not have to be

<sup>155</sup> *Chamaiev et autres c. Georgie et Russie*, 12-4-2005, para. 381

<sup>156</sup> *Chamaiev et autres c. Georgie et Russie*, 12-4-2005, para. 375, 382-385; *Tekin v. Turkey*, 1998, para. 52-53; *Labita v. Italy*, 1999, para. 120 ; *Algur v. Turkey*, 2002, para. 44

<sup>157</sup> *Ocalan v. Turkey*, 12-5-2005, para. 86

<sup>158</sup> Neither the Convention nor the Protocols afford the right to political asylum. (*Vilvarajah and Others v. U.K.*, 30-10-1991, para. 102-103; *Mamatkulov and Askarov v. Turkey*, 4-2-2005, para. 66; *Mamatkulov and Abdurasulovic v. Turkey*, 6-2-2003, para. 65; *Chamaiev et autres c. Georgie et Russie*, 12-4-2005, para. 334)

<sup>159</sup> *Mamatkulov and Askarov v. Turkey*, 4-2-2005, para. 67

<sup>160</sup> *Soering v. the United Kingdom*, 7-7-1989, para.92; *D. v. the United Kingdom*, 21-4-1997, para. 53.

<sup>161</sup> L. Pettiti, E. Decaux, P. Imbert , *La Convention Européenne des Droits de l' Homme, Commentaire Article Par Article*, Ed. Economica, 2<sup>e</sup> édition, 1999, pp. 143-153, 155-157

<sup>162</sup> *Chamaiev et autres c. Georgie et Russie*, 12-4-2005, para. 335; *Ireland v. UK*, 1978, para. 163; *Tomasi*, 1992, para. 115; *Ocalan v. Turkey*, 12-5-2005, para. 179

established, in order for the contracting extraditing state to be held responsible in such cases<sup>163</sup>.

In determining whether substantial grounds have been shown for believing that a real risk of treatment contrary to article 3 exists the Court examines the facts in a whole, through a twofold procedure. Priority is given to the facts, which the Contacting State *knew or should have known at the moment of the extradition or expulsion*. However, this does not preclude the Court to take into consideration information that came to light following that critical time. *Information following extradition* serves to confirm or refute the way that the State Party to the Convention estimated the well-foundedness of the fear of the applicant before deciding to extradite him<sup>164</sup>. Even if the action and evaluation of the extraditing state at the moment of the extradition are not doubted, they have to be evaluated in the light of the information and the evidence obtained after the extradition<sup>165</sup>. The awareness and due action of the extraditing state concerning a reasonable risk may be proven by its request for guarantees to protect the applicant after his extradition in the receiving state from the execution of a capital punishment or of torture, or any other violation of his/her rights under the Convention<sup>166</sup>. This detailed and in-depth examination of the facts by the Court renders the decision-taking by a requested state a serious task obliging it to take all precautions throughout its decision to extradite or not.

Certainly, a general situation of violence or political unrest founding a simple possibility of maltreatment is not sufficient to trigger a violation of article 3 by the requested state<sup>167</sup>. One should not however forget the standards established in other international instruments relating to crossing international borders, such as the 1951 Refugee Convention, which avails its protection in view of such a general well-founded fear against the persons concerned.

Guarantees may also be obtained by the requesting state against maltreatment of the person in question in order to ensure that there is no substantial ground to believe that the applicants will face such a risk in the requesting state<sup>168</sup>. As mentioned above these guarantees must be characterised of credibility.

#### IV.3. SPECIAL EXAMPLES OF ARTICLE 3 VIOLATIONS

The Court has established that the “death row” phenomenon preceding the execution of a capital punishment amounts to a violation of article 3. The manner, in which the penalty is pronounced or carried out, the personality and the young age of the person in question and the disproportionality in relation with the gravity of the offence, as well as the conditions of the detention pending the execution are taken into consideration in order to determine whether an execution of capital punishment would amount to a violation of article 3<sup>169</sup>. The

<sup>163</sup> *Mamatkulov and Askarov v. Turkey*, 4-2-2005, para. 67; *Chamaiev et autres c. Georgie et Russie*, 12-4-2005, para. 337

<sup>164</sup> *Chamaiev et autres c. Georgie et Russie*, 12-4-2005, para. 337; *Mamatkulov and Askarov v. Turkey*, 4-2-2005, para. 69; *Mamatkulov and Abdurasulovic v. Turkey*, 6-2-2003, para. 68; *Cruz Varas and Others v. Sweden*, 20-3-1991, para. 76

<sup>165</sup> *Chamaiev et autres c. Georgie et Russie*, 12-4-2005, para. 345

<sup>166</sup> *Chamaiev et autres c. Georgie et Russie*, 12-4-2005, para. 341

<sup>167</sup> *Chamaiev et autres c. Georgie et Russie*, 12-4-2005, para. 350, 352, 360, 371, 372; *Mamatkulov and Askarov v. Turkey*, 4-2-2005, para. 73; *Mamatkulov and Abdurasulovic v. Turkey*, 6-2-2003, para. 71-72

<sup>168</sup> *Mamatkulov and Askarov v. Turkey*, 4-2-2005, paras. 76-77

<sup>169</sup> *Soering v. the United Kingdom*, 7-7-1989, A 161, para. 104

Court has also underlined that it cannot be excluded that the extradition of a person to a State where he runs the risk to be sentenced to life imprisonment without any possibility of early release may raise issue under article 3 of the Convention<sup>170</sup>.

Another example that has been included in the cases falling in the prohibition of article 3 is the expulsion of a person, who is an HIV patient in the advanced stages of this terminal and incurable illness, to a state where he cannot receive the proper medical and moral support<sup>171</sup>. Even though, this extraterritorial effect of the Convention applies in contexts where risk to the individual of being subjected to any of the proscribed forms of treatment emanates from acts of the public authorities in the receiving state or from acts of non-state actors in that state in case that the authorities do not protect him/her adequately, the Court shows flexibility in the application of article 3. It may therefore hold a violation of this article, if the source of the risk in the receiving state stems from factors, which cannot engage either directly or indirectly the responsibility of the public authorities of that state or do not in themselves infringe the standards of the article. In such cases, though, the Court has subjected all the circumstances surrounding the case to a rigorous scrutiny, especially the applicant's personal situation in the expelling state<sup>172</sup>. It must be noted that the threshold set by article 3 is even higher, in cases, which do not concern the direct responsibility of the Contracting State for the infliction of harm, than in the cases they do<sup>173</sup>.

#### IV.4 .RISK OF BEING SUBJECTED TO FLAGRANT DENIAL OF JUSTICE

As the right to a fair trial holds a prominent place in a democratic society, there may be raised issues of its violation on the extradition hearing itself in the requested state and an issue, where the person involved in the criminal proceedings has suffered or risks suffering a *flagrant denial of justice*<sup>174</sup> in the requesting state.

As far as the first aspect of article's 6 involvement in the extradition procedure is concerned, the jurisprudence of the European Commission on the matter is unclear<sup>175</sup>. There are cases where it considered that extradition hearings are not open to a review under article 6 paragraph 1 of the Convention, as it does not fall in the meaning of a "criminal charge"<sup>176</sup>.

However, the recent jurisprudence of the Court has refused the inclusion of extradition hearings to the meaning of article 6. Decision regarding the entry, residence and deportation of aliens do not concern the determination of an applicant's civil rights or obligations or of a criminal charge against him, within the meaning of article 6 paragraph 1 of the Convention<sup>177</sup>.

<sup>170</sup> *Weeks v. the United Kingdom*, 2-3-1987; *Sawoniuk v. the United Kingdom*, 29-5-2001

<sup>171</sup> *D. v. the United Kingdom*, 21-4-1997, paras. 49-53

<sup>172</sup> *D. v. the United Kingdom*, 21-4-1997, para. 49

<sup>173</sup> *Bensaid v. the United Kingdom*, 6-2-2001, para. 40

<sup>174</sup> *Soering v. the United Kingdom*, 7-7-1989, para. 113

<sup>175</sup> Geoff Gilbert, *Transnational Fugitive Offenders In International Law, Extradition and Other Mechanisms*, International Studies in Human Rights, Martinus Nijhoff Publishers, 1998, p. 171-172; Dominique Poncet and Paul Gully-Hart, *The European Approach – Legal Framework of Extradition in Europe*, in ed. Cherif Bassiouni, *International Criminal Law, Procedural and Enforcement, Mechanisms*, 2<sup>nd</sup> ed., Transnational Publishers, 1999, p. 303

<sup>176</sup> 6 EHRR 581, 1984 ; 6 EHRR 146, 1984; 5 EHRR 594, 1983; 6 EHRR 373, 1984.

<sup>177</sup> *Mamatkulov and Askarov v. Turkey*, 4-2-2005, para.82; *Maaouia v. France*, 2000, para. 40

As far as the second –extraterritorial- aspect of application of the fair trial standards is concerned, the Court has held that as the Convention does not require the Contracting Parties to impose its standards on third States or territories, a Contracting State is not obliged to verify whether the proceedings, which resulted in the conviction, are compatible with all the requirements of Article 6 of the Convention. To require such a review of the manner, in which a court not bound by the Convention had applied the principles enshrined in Article 6 would also thwart the current trend towards strengthening international co-operation in the administration of justice, a trend, which is in principle in the interests of the persons concerned. The Contracting States are, however, obliged to refuse their co-operation if it emerges that the conviction is the result of a *flagrant* denial of justice<sup>178</sup>. It did not, however, determine the notion “flagrant”.

The risk of a flagrant denial of justice in the requesting state has to be assessed by reference to the facts, which the requested state knew or ought to have known when it extradited the person in question<sup>179</sup>. The liability test concerning the requested state, which has been adopted in the framework of article 3 and 2, as have been analysed in the previous section, applies also in the case of the a potential violation of article 6 by the requesting party.

#### IV.5. EXAMPLES OF FLAGRANT DENIAL OF JUSTICE

According to the cases before the judicial organs of the Council, a situation of flagrant denial of justice is raised when a person convicted *in absentia* is unable subsequently to obtain form a court which has heard him a fresh determination of the merits of the charge, in respect of both law and fact, where it has not been unequivocally established that he has waived his right to appear and to defend himself<sup>180</sup>. The duty to guarantee the right of a criminal defendant to be present in the courtroom – either during the original proceedings or in a retrial after he/she emerges – ranks as one of the essential requirements of article 6 and is deeply entrenched in the provision<sup>181</sup>. It is of capital importance that he/she should appear, both because of his/her right to a hearing and because of the need to verify the accuracy of his/hr statements and compare them with the victim’s – whose interests need to be protected – and of the witnesses<sup>182</sup>.

#### IV.6. INFRINGEMENT OF THE RIGHT TO RESPECT OF PRIVATE LIFE

There have been several cases before the Court arguing on a violation of Article 8 of the European Convention on Human Rights, which ensures the right to private life, concerning expulsion measures against aliens<sup>183</sup>. The Court’s case law has established four criteria, in order to affirm the consistency of the state action with the standards of article 8.

The first criterion is the existence of family life. The applicant must establish that he or she in fact has family life in the state concerned. According to the Court the family link

<sup>178</sup> *Drozd and Janousek v. France and Spain*, 26-6-1992, para. 110; in general about the denial of justice, Alwyn Freeman, *The International Responsibility of States for Denial of Justice*, Longmans, 1938.

<sup>179</sup> *Mamatkulov and Askarov v. Turkey*, 4-2-2005, para. 90

<sup>180</sup> *Einhorn v. France*, 16-10-2001, para. 33

<sup>181</sup> *Stoichkov v. Bulgaria*, 24-3-2005, para. 56

<sup>182</sup> *Poitrimol v. France*, 23-11-1993, para. 35

<sup>183</sup> Elspeth Guild and Paul Minderhoud (eds.), *Security of Residence and Expulsion, Protection of Aliens in Europe*, Immigration Law and Asylum Policy in Europe, Kluwer Law International, 2001



between the parent and his/her child always exists<sup>184</sup> irrespective of the age of the children and of whether they live together or not<sup>185</sup>.

Secondly, there has to be an interference with the right to private life; expulsion measures have been considered by the Court as interference to the right<sup>186</sup>. The same would apply to extradition or any kind of deportation, which would cause family ties to rupture.

Thirdly, the requirement of the rule of law is essential; is the interference in accordance with the law? In any case, national law has to be sufficiently accessible and precise in order to avoid arbitrariness<sup>187</sup>.

Lastly, the element measure of interference has to pass the test of proportionality; is the measure founded on a legitimate aim and necessary in a democratic society? Article 8 paragraph 2 articulates the legitimate purpose pursued by the measure; the interests of national security, public safety, or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others.

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

In that respect the Committee of Ministers recommended to States Parties to the Convention on Extradition, when deciding on extradition requests to bear in mind the hardship, which might be caused by the extradition procedure to the person concerned and his family, in cases where the procedure is manifestly disproportionate to the seriousness of the offence and when the penalty likely to be passed will not significantly exceed the minimum period of one year detention or will not involve deprivation of liberty. It seems that this recommendation was influenced by the right to respect for family life<sup>188</sup>.

#### IV.7. RISK OF BEING PREJUDICED

<sup>184</sup> *Berrehab v. the Netherlands*, 21-6-1988, para. 23; *Keegan v. Ireland*, 26-5-1994, para. 50; *Irlen v. Germany*, application no. 12246/86, Commission decision, 13-7-1987, Decisions and Reports 53, p. 225

<sup>185</sup> *Moustaquim v. Belgium*, 18-2-1991, para. 36; *El Boujaidi v. France*, 26-3-1992, para.33-42

<sup>186</sup> *Amrollahi v. Denmark*, 11-7-2002; *Ciliz v. the Netherlands*, 11-7-2000, para.62; *Berrehab v. the Netherlands*, 21-6-1988, para.23

<sup>187</sup> *Amuur v. France*, 25-6-1996, para. 50; *Dougoz v. Greece*, 6-3-2001, para. 55

<sup>188</sup> Paragraph I, *Recommendation No. R (80) 7 of the Committee of Ministers to Member States Concerning the Practical Application of the European Convention on Extradition*, 27-6-1980, 321<sup>st</sup> meeting of the Ministers, Deputies, p. 1

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

*Nothing in this Convention shall be interpreted as imposing an obligation to extradite if the requested state has substantial grounds for believing that the request for extradition for an offence mentioned in Article 1 or 2 has been made for the purpose of prosecuting or punishing on account of his/her race, religion, nationality or political opinions or that that person's position risks being prejudiced for any of these reasons.*

The explanatory report of the European Convention for the Suppression of Terrorism<sup>189</sup> relates this prohibition to the derogation of rights to defense of the person in the receiving state.

According to the Committee of Ministers "*Guidelines on human rights and the fight against terrorism*"<sup>190</sup>

*Extradition may not be granted if there are serious reasons to believe that:*  
 ii) *the extradition request has been made for the purpose of prosecuting or punishing on account of his/her race, religion, nationality or political opinions or that that person's position risks being prejudiced for any of these reasons.*

It constitutes a continuation of the Committee's general recommendation towards the Contracting Parties not to extradite a person to a state not Party to the Convention, where there are substantial grounds for believing that the request has been made for the purpose of the above-mentioned criteria<sup>191</sup>.

This protective approach concerning the avoidance of prejudice in the requesting state is *not* founded on the non-discrimination provision of article 14 of the European Convention, which has a special dependent function<sup>192</sup>.

#### *IV.8. RIGHT TO EFFECTIVELY ADDRESS THE EUROPEAN COURT OF HUMAN RIGHTS – INTERIM MEASURES REQUIRED BY THE EUROPEAN COURT OF HUMAN RIGHTS*

The European system of protection as it operates today - after its modification by Protocol 11 - ensures the right of individual petition independent of any declaration by the Contracting Parties. Individuals enjoy at the international level a real right of action to assert the rights to which they are directly entitled under the Convention. This new form of the system makes it necessary to examine the effective protection of this independent right, which at the end guarantees the effective protection of all the rights stipulated in the Convention.

<sup>189</sup> *European Convention for the Suppression of Terrorism*, E.T.S. No. 90, 27-1-1977

<sup>190</sup> Article 8, para. 3, ii, *Guidelines on human rights and the fight against terrorism*, 11-7-2002, 804<sup>th</sup> meeting of the Ministers' Deputies

<sup>191</sup> Para. 1, *Recommendation No. R (80) 9 of the Committee of Ministers to Member States concerning Extradition to States not Party to the European Convention on Human Rights*, 27-7-1980, 321<sup>st</sup> meeting of the Ministers' Deputies

<sup>192</sup> L. Pettiti, E. Decaux, P. Imbert, *La Convention Européenne des Droits de l' Homme, Commentaire Article Par Article*, Ed. Economica, 2<sup>e</sup> édition, 1999, p. 475-487

Article 34 stipulates the obligation of the States Parties not to interfere with the exercise of the right of the individuals to present and pursue their complaint before the Court effectively. Provisional measures indicated by the Court under article 39 of its Rules permit the Court to effectively examine a case and facilitate the “*effective exercise*” of the right of the individual petition under article 34. This protection is granted in the sense of preserving the subject matter of the application, when that is considered to be at risk of irreparable damage through the acts or omissions of the respondent state. When a State Party does not comply with the Court’s interim measures, a violation of article 34 of the Convention occurs, as such a conduct efficaciously impedes the Court from its task<sup>193</sup>. This is why the Committee of Ministers has already advised States Parties to comply with the interim measures of the Court, especially when it concerns a request to stay extradition pending a decision on the matter<sup>194</sup>.

More specifically, when the requested state proceeds to the extradition contrary to the Court’s order and subsequently the Court meets difficulties even by the action of the receiving state, which constitute the exercise of the applicants right under article 34 of the Convention seriously thwarted, the requested state has violated article 34, even though the difficulties may not be imputable to it<sup>195</sup>. The fact that the requested state has co-operated in the examination by the Court of the applicant’s allegations – despite the non compliance to the interim measures order - does not mean that no problem is raised in the case in its whole. The Court, thus, follows a view of coherence throughout the conduct of transnational proceedings; that there exists an inter-relation of responsibility between the two States throughout the execution of the extradition.

For example, the fact that Russia’s handling of the case affected the effective examination of the applicant’s allegations against Georgia, as the examination of the part of the case against Russia was not possible, signifies a violation of article 34 of the Convention by Russia, too<sup>196</sup>. Therefore, Georgia has violated article 34 because of the interference against the right therein by Russia, and Russia has violated the same article on grounds of impeding its effective exercise against Georgia. This is an example of the firm orientation that the Court gives to the transnational cooperation; it seems to support a strong interaction as far as the conduct of the states’ involved.

## CHAPTER V

### ***RIGHTS OF THE INDIVIDUAL IN OTHER TRANSNATIONAL PROCEEDINGS***

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

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<sup>193</sup> *Chamaiev et autres c. Georgie et Russie*, 12-4-2005, para. 463; *Mamatkulov and Askarov v. Turkey*, 4-2-2005, para. 108

<sup>194</sup> Para. 2, *Recommendation No. R (80) 9 of the Committee of Ministers to Member States concerning Extradition to States not Party to the European Convention on Human Rights*, 27-7-1980, 321<sup>st</sup> meeting of the Ministers’ Deputies.

<sup>195</sup> *Chamaiev et autres c. Georgie et Russie*, 12-4-2005, para. 477-478

<sup>196</sup> *Chamaiev et autres c. Georgie et Russie*, 12-4-2005, paras. 478, 517

### V. 1. ACCESS TO INFORMATION

Article 4 of the European Convention on the Transfer of Sentenced Persons<sup>197</sup> concerns the transmission of various elements of information to be furnished during the course of the transfer proceedings to the sentenced person, by the Administering State, and the Sentencing State. The provision applies to three different phases of the procedure: paragraph 1 concerns information by the sentencing State to the sentenced person on the substance of the convention. This is to make the sentenced person aware of the possibilities for transfer offered by the convention and the legal consequences, which a transfer to his home country would have. The information will enable him to decide whether he wishes to express an interest in being transferred. Therefore, the information to be given to the sentenced person must be in a language he understands<sup>198</sup>. Paragraphs 2 to 4 concerns information to be furnished by the one state the other, without involving the individual. Paragraph 5 concerns information to be given to the sentenced person on the action or decision taken with regard to a possible transfer. The sentenced person who has expressed an interest in being transferred must be kept informed, in writing, of the follow-up action taken in his case. He must, for instance, be told whether the information referred to in paragraph 3 has been sent to his home country, whether a request for transfer has been made and by which State, and whether a decision has been taken on the request.

The European Convention on the International Validity of Criminal Judgments<sup>199</sup> provides the possibility of execution of a sentence of a person to a State other than the one that rendered the sentence. A person convicted *in absentia* in the requesting state has a right to be informed of the decision of the requesting state, when the requested state decides to take action on the request to enforce a judgment of the requesting state<sup>200</sup>.

An issue raised in certain Conventions is whether the fact that information which is transferred from one Contracting State to another and concerns the individual, should be notified to that person. For example, paragraph 2 of article 9 of the European Convention on Offences Relating to Cultural Property<sup>201</sup> requires that the letters rogatory should indicate the identity of the person concerned. The European Convention on the Control of the Acquisition and Possession on Firearms by Individuals<sup>202</sup> in Article 8 obliges States Parties to notify one another about the identity, the number passport or identity card and the address of the person to whom the firearm in question is sold. An exchange of information is provided in the framework of the Convention of Insider Trading<sup>203</sup> in Article 6:

*4 Save to the extent strictly necessary to carry out the request, the requested authority and the persons seeking the information requested are bound to maintain secrecy about the request, the component parts of the request and the information so gathered.*

<sup>197</sup> *Convention on the Transfer of Sentenced Persons*, Strasbourg, 21-3-1983, E.T.S. No. 112

<sup>198</sup> Explanatory Report, para. 28, *European Convention on the Transfer Sentenced Persons*, Strasbourg, 21-3-1983, E.T.S. No. 112

<sup>199</sup> *European Convention on the International Validity of Criminal Judgments*, The Hague, 28-5-1970, E.T.S. No. 70

<sup>200</sup> Article 23, para. 1, *European Convention on the International Validity of Criminal Judgments*, The Hague, 28-5-1970, E.T.S. No. 70.

<sup>201</sup> *European Convention on Offences Relating to Cultural Property*, Delphi, 23-6-1985, E.T.S. No. 119

<sup>202</sup> *European Convention on the Control of the Acquisition and Possession on Firearms by Individuals*, Strasbourg, 28-6-1978, E.T.S. No. 101

<sup>203</sup> *Convention of Insider Trading*, Strasbourg, 20-4-1989, E.T.S. No. 130

5 However, at the time of the designation of the authority, provided for by Article 4, each Party shall declare the derogations to the principle set forth in paragraph 4 of this article possibly imposed or permitted by national law:

- either to guarantee free access of citizens to the files of the administration;

or when the designated authority is obliged to denounce to other administrative or judicial authorities information communicated or gathered within the framework of the request;

or, provided the requesting authority has been informed, to investigate violations of the law of the requested Party or to secure compliance with such law.

There is no definite answer in the above-mentioned question. Personal data are part of the private life of a person and therefore the person whose data are being processed has to at least have access to the fact that are being processed and the content of the information. The Schengen Information System concerning the personal data protection provides an interesting paradigm<sup>204</sup>.

## V. 2. ACCESS TO A LAWYER

The right of access to a lawyer is not expressly included in the bodies of the Conventions adopted in the framework of Council of Europe's criminal justice schemes. However, since these transnational proceedings concern criminal issues they require the presence and essential involvement of a lawyer for the person concerned. This stems from an analogy to the requirement of article 6 of the European Convention on Human Rights. In any case, if one was to disagree on the similarity of transnational procedures nature to criminal charge proceedings, this right would still apply on another basis. In the extradition proceedings access to a lawyer is required, even though they are not considered being covered by article's 6 standards, finding a legal basis elsewhere, as analysed in the respective chapter. Therefore, transnational proceedings of lesser intrusive degree are to guarantee the same right, especially in view of the long-term impact that the enforcement of such transnational procedures has for the person's situation.

## V. 3. ACCESS TO AN INTERPRETER

The right to receive information during transnational procedures involves simultaneously the obligation of the State to provide this information in a language that the individual understands; not only in a non technical manner, but also in a language that the individual understands. This is the case of the European Convention on the Transfer of Sentenced Persons<sup>205</sup>. After all, it seems that there is a common ground of communication of the person's rights and duties by the state authorities during the transnational proceedings,

<sup>204</sup> Articles 28-31, *Proposal for the Regulation to the European Parliament and the Council on the establishment, operation and use of the second generation Schengen Information System (SIS II) by the Commission on the 31 May 2005*, 2005/0106 (COD), COM (2005) 236 final

<sup>205</sup> Explanatory Report, para. 28, *European Convention on the Transfer Sentenced Persons*, Strasbourg, 21-3-1983, E.T.S. No. 112

which may not be lower than those afforded in the European Convention on Human Rights. The right to an interpreter even stems from the rule of law and good faith principles.

#### V. 4. RIGHT TO AN EXPEDIENT PROCEDURE

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

Article 16 of the European Convention on the Transfer of Proceedings in Criminal Matters stipulates the prompt communication of the requested state's decision concerning the individual's case. Articles 9 and 12 of the European Convention on the Supervision of Conditionally Sentenced or Conditionally Released Offenders<sup>206</sup> impose the same obligation of "without delay" information from the part of the requesting state to the requested state of its decision, minimising the time frame of the whole procedure.

Furthermore, the requirement of promptness has its legal foundation on the obligation of *non-arbitrariness* in case of the detention of an individual, as it has been examined in the section concerning the procedural safeguards provided by article 5 of the European Convention on Human Rights. The *Chamaiev* case is an interesting example of the responsibility of both states involved in the transnational procedure<sup>207</sup>.

#### V. 5. RIGHT TO BE HEARD

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

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

More specifically, the right is ensured in the European Convention on the Transfer of Proceedings in Criminal Matters<sup>208</sup>. Article 17 requires that the suspect be informed of the request for proceedings against him/her with a view to allowing him/her to present his view on the matter before the requested state has taken a decision on the request. According to the explanatory report of the Convention, the intention behind this requirement is to respect the individual's right to defend himself/ herself, since the decision – even when within the province of an administrative authority – is liable to affect the outcome of the criminal

<sup>206</sup> *European Convention on the Supervision of Conditionally Sentenced or Conditionally Released Offenders*, Strasbourg, 30-6-1964, E.T.S. No. 51

<sup>207</sup> *Chamaiev et autres c. Georgie et Russie*, 12-4-2005, 477-478

<sup>208</sup> *European Convention on the Transfer of Proceedings in Criminal Matters*, Strasbourg, 15-5-1972, E.T.S. No. 73

proceedings to a very considerable degree<sup>209</sup>. Furthermore, the Committee of Ministers recommended<sup>210</sup> that the Contracting Parties should:

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

The European Convention on the Transfer of Sentenced Persons<sup>211</sup> affords a person sentenced the possibility to be transferred to another Contracting State for the purpose of enforcing the sentence. That other State, that is the "administering (of the sentence) State", is – by virtue of Article 3.1.a – the State of which the sentenced person is a national. The right to be heard in the present Convention is twofold; it appears in the form of the consent of the individual for his transfer in article 3 paragraph 1d; and in article 2 paragraph 2 as far as his/her interest to which state to serve his sentence.

Although the sentenced person may not formally apply for his transfer, his/her consent is essential for the transfer mechanism<sup>212</sup>. It follows from Article 2 paragraph 3 that the transfer may be requested only by the requested or the administering State. But, it does not constitute a "tripartite agreement" between the two states and the individual<sup>213</sup>. Nevertheless, Recommendation (84) 11 of the Committee of Ministers stipulating that they inform and translate the possibility of being transferred according to the Convention to the prisoners stresses the importance of the consent of the individual. Moreover, in the absence of the rule of speciality in the Convention, the consent right means that the individual will know if further proceedings are pending against him in the administering state, and whether in such a case he is willing to submit to the proceedings<sup>214</sup>.

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

According to paragraph 2 of article 2 he/she may express his/her interest in being transferred under the Convention, and he/she may do so by addressing himself/herself to either the Sentencing State or the Administering State. There is however no international obligation of the state to react to such an initiative.

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<sup>209</sup> *European Convention on the Transfer of Proceedings in Criminal Matters*, Explanatory Report, article 17, p.28

<sup>210</sup> *Recommendation No. R (79) 12, of the Committee of Ministers to Member States Concerning the Application of the European Convention on the Transfer of Proceedings in Criminal Matters*, 14-7-1979, 307<sup>th</sup> meeting of the Ministers; Deputies

<sup>211</sup> *Convention on the Transfer of Sentenced Persons*, Strasbourg, 21-3-1983, E.T.S. No. 112

<sup>212</sup> *Convention on the Transfer of Sentenced Persons*, Strasbourg, 21-3-1983, E.T.S. No. 112, article 3, para. 1d

<sup>213</sup> Helmut Epp, *Transfer of Prisoners, The European Convention*, in ed. Cherif Bassiouni, *International Criminal Law, Procedural and Enforcement, Mechanisms*, 2<sup>nd</sup> ed., Transnational Publishers, 1999, p. 573

<sup>214</sup> Helmut Epp, *Transfer of Prisoners, The European Convention*, in ed. Cherif Bassiouni, *International Criminal Law, Procedural and Enforcement, Mechanisms*, 2<sup>nd</sup> ed., Transnational Publishers, 1999, p. 575

In the framework of the European Convention on the International Validity of Criminal Judgments<sup>215</sup> a right to opposition is available. The person who has been sentenced *in absentia* and a decision for the enforcement of his sentence in another state has been taken, has the right to oppose to this decision either in the requesting state or the requested one. The Convention, in fact, provides a detailed procedural framework for this right in articles 24 to 30.

#### *V. 6. DOUBLE CRIMINALITY*

The principle of double criminality is an indispensable condition for the enforcement of foreign penal judgements. Otherwise the detention of the transferred person in the administering state, if the conduct was not considered an offence, would violate fundamental rights of the individual, such as article 7 of the European Convention on Human Rights, and the right to liberty, article 5 of the Convention. Thus, even the consent of the prisoner to serve a sentence imposed on him is not a behaviour constituting a criminal offence in the state of nationality, could not overcome these considerations<sup>216</sup>.

### CHAPTER VI

#### ***BARS AND REQUIREMENTS LINKED TO HUMAN RIGHTS STANDARDS***

The European Convention on the Transfer of Proceedings in Criminal Matters ensures the non conflict of the obligations of the Contracting States stemming from itself and the human rights obligations concerning the protection from a risk run in the requesting state. Article 11 paragraph stipulates:

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

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

In any case the material human rights guarantees stipulated in the European Convention, as explained in the respective section, bind the Contracting Parties at any action or omission concerning persons that are under their jurisdiction. It therefore provides the safety net in any condition.

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

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<sup>215</sup> *European Convention on the International Validity of Criminal Judgments*, The Hague, 28-5-1970, E.T.S. No. 70.

<sup>216</sup> Helmut Epp, *Transfer of Prisoners, The European Convention*, in ed. Cherif Bassiouni, *International Criminal Law, Procedural and Enforcement, Mechanisms*, 2<sup>nd</sup> ed., Transnational Publishers, 1999, p. 574



## CHAPTER VII

***TRANSNATIONAL PROCEEDINGS OF INTERNATIONAL CRIMINAL TRIBUNALS***

As new international criminal judicial fora have been created, new procedures have emerged in the field of criminal enforcement. In the context of transnational proceedings, the ones of surrender and transfer of an accused to an international criminal tribunal<sup>217</sup>, the European system of human rights protection is also activated, when contracting parties get involved. First, during the arrest and surrender and second, as far as the fair trial standards afforded under the International Tribunal's jurisdiction or other human rights extraterritorial application standards, as they have been analysed in detail in the respective section relating to extradition procedures.

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

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

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<sup>217</sup> Simon N. Young, Surrendering the Accused to the International Criminal Court, *British Yearbook of International Law*, 2000, p. 317- 356

*by the person in any such case if the person does not have sufficient means to pay for it; and*  
 (d) *To be questioned in the presence of counsel unless the person has voluntarily waived his or her right to counsel.*

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

A critical issue in these cases of multiple international fora adjudicating over the same matter or inter-related facts is the harmonisation and coherence between their judgements. Cases where the continuity of the proceedings would be infringed according to a judgement of the European Court, for example in case of breach of sovereignty and a demand of repatriation of the individual unlawfully apprehended, while the ICC or an *ad hoc* Tribunal would conclude contrary on the matter. What would be the solution then? The most optimist answer would be that the international criminal tribunal would interpret its Statute in such a manner in order to achieve consistency with the human rights standards; but this is a mere discretion.

Issues of unlawful arrest and transfer to an international tribunal have been raised in the cases of *Todorovic*, *Nikolic* and *Krajisnik* before the ICTY. The Tribunal found itself before a fundamental dilemma; to encourage the apprehension of suspects and the bringing to justice individuals who have engaged in serious crimes on the one hand; and the safeguard of international legality and fundamental human rights<sup>218</sup>. It seems that the administration of justice considerations have prevailed in the reasoning of the ICTY, which as mentioned above, poses certain doubts concerning the respect of the presumption of innocence of the individual, an obligation found in article 6 of the European Convention on Human Rights.

## CHAPTER VIII

### ***TRANSNATIONAL NE BIS IN IDEM***

*Ne bis in idem* is considered to be a general principle of international law<sup>219</sup> and stipulates that a person should not be tried twice for the same offence. A distinction is made between the application of the *ne bis in idem* at the national level and its application at the

<sup>218</sup> Susan , *Illegal Arrest and the Jurisdiction of the ICTY*, in R. May et al, *Essays on ICTY Procedure and Evidence in Honour of Gabrielle Kirk McDonald*, Kluwer Law International, 2001, p. 39-40

<sup>219</sup> M. L. Frieland, *Double Jeopardy*, Oxford University Press, 1969, p. 391-392; Sure Log, *The Practical Applications of Ne Bis in Idem in International Criminal Law*, in *International Crime and Punishment, Selected Issues*, Vol. 2, (ed) Sienho Yee, University press of America, 2004, p. 169. Although some doubt its nature as a general principle of law on the basis of interpretation diversity world wide, as will be discussed in the ext paragraphs, see K. Kittichaisaree *International Criminal Law*, 2001 p. 291

international and transnational level. At the national level the principle is generally recognised for a final judgement delivered in a particular State has the effect of debarring the authorities of that State from taking once more proceedings against the same person on the basis of the same body of facts.

At the international level, on the other hand, the principle has not been generally recognised. No State, in which a punishable act has been committed, is debarred from prosecuting the offence only because the *same* offence has already been prosecuted in another State.

At the transnational level, meaning in the jurisdiction of international tribunals and the proceedings concerning the transfer and surrender of an accused by a state to them, the principle seems to be well founded<sup>220</sup>, but differentiated in view of the diverse nature and function of the international judicial forums.

A central issue on double jeopardy is the operational purpose of it. What constitutes the “same offence” for the purposes of the *ne bis in idem*? The same two approaches applied in double criminality, the one centered to the conduct and the one centered to the wording of the offence definition, also apply here. It operates to prevent further prosecution of the same facts as formed the basis of an existing conviction or acquittal facts (*in concreto* application, based on the identity of conduct) or only further prosecution of the same offence or legal head of liability (*in abstracto* application, relating to the legal identity of the offences)?<sup>221</sup> But, the approach to be followed has to be clearly established, as it seems to be an inconsistency in the framework of the Council<sup>222</sup>. The International Criminal Tribunals seem to adopt the *in concreto* approach<sup>223</sup>.

In the absence of express treaty provision it is uncertain whether the plea *autrefois acquit*, *autrefois convict* will be a ban to extradition; however it has been submitted that it has attained the status of customary international law<sup>224</sup>. The European Convention on Human Rights does not guarantee respect for the *ne bis in idem* (or double jeopardy)<sup>225</sup>. Protocol No. 7 Additional to the European Convention stipulates in article 4 the absolute, non-derogable character of the right not to be tried or punished twice under the jurisdiction of the *same* state<sup>226</sup>:

<sup>220</sup> *Rome Statute of the International Criminal Court*, UN Doc. A/CONF. 183/9, article 20; *Statute of the International Criminal Tribunal for the Former Yugoslavia*, UN Doc. S/RES/827, 1993, article 10; *Statute of the International Criminal Tribunal for Rwanda*, UN Doc S/RES/955, 1994, article 9; *Statute of the Special Court for Sierra Leone*, article 9.

<sup>221</sup> Gerard Conway, *Ne Bis In Idem and the International Criminal Tribunals*, *Criminal Law Forum*, 2003, Kluwer Academic Publishers, 2004, Vol. 14, p. 356.

<sup>222</sup> *Gradinger v. Austria*, 1994; *Oliviera v. Switzerland*, 1997

<sup>223</sup> *Rome Statute of the International Criminal Court*, UN Doc. A/CONF. 183/9, articles 20 and 17; *Statute of the International Criminal Tribunal for the Former Yugoslavia*, UN Doc. S/RES/827, 1993, article 10 para. 1; *Statute of the International Criminal Tribunal for Rwanda*, UN Doc S/RES/955, 1994, article 9, para. 1; *Statute of the Special Court for Sierra Leone*, article 9, para. 1; *Prosecutor v. Bagasora*, (Case No. ICTR – 96- 7 – D), Decision, 17-5-1996, para. 13; Gerard Conway, *Ne Bis In Idem and the International Criminal Tribunals*, *Criminal Law Forum*, 2003, Kluwer Academic Publishers, 2004, Vol. 14, p. 358-359

<sup>224</sup> M. L. Frieland, *Double Jeopardy*, Oxford University Press, 1969, p. 391

<sup>225</sup> *Gestra v. Italy*, 16-1-1985, p.89

<sup>226</sup> Article 14 paragraph 7 of the ICCPR also provides for the *ne bis in idem* principle and the Human Rights Committee has interpreted the provision restrictively in order to comprise only the multiple prosecution in the same state: *A.P. v. Italy* (204/1986), ICCPR, A/43/40, 2-11-1987, para. 7.3

- 1 *No one shall be liable to be tried or punished again in criminal proceedings under the jurisdiction of the same state for an offence for which he has already been final acquitted or convicted in accordance with the law and penal procedure of that State.*
- 3 *No derogation from this article shall be made under Article 15 of the Convention.*

Therefore, neither the European Convention on Human Rights or the Additional to it Protocols ensure the double jeopardy principle in an international or transnational context.

The European Convention on Extradition explicitly establishes the principle in an international background. According to article 9 of the European Convention on Extradition:

*Extradition shall not be granted if final judgement has been passed by the competent authorities of the requested Party upon the person claimed in respect of the offence or offences for which extradition is requested. Extradition may be refused if the competent authorities of the requested Party have decided either not to institute or to terminate proceedings in respect of the same offence or offences.*

The provision of the first sentence of the article requires that all means of appeal have been exhausted and that the judgement has acquired the *res judicata* status. Certainly, the second paragraph of the article does not apply when new facts or other matters concerning the verdict come to light<sup>227</sup>. This provision corresponds to paragraph 2 of article 4 of the 7th Additional Protocol.

Additional Protocol I to the European Convention on Extradition gave a solution to the case of an individual for whom a final judgement has been rendered in a third state<sup>228</sup>.

But is the same protection afforded to the individual by the requested state, in case of a request for extradition by a state, which has already tried the person concerned for the same offence? This case would be covered by the extraterritorial application of article 4 of Protocol 7 to the European Convention on Human Rights; in the sense that the state bound by the Protocol would violate it, by extraditing the person to be tried twice for the same offence in the same legal order; this argument refers to the jurisprudence of the Court concerning the extraterritorial application of the Convention, as examined in the relevant section. In the absence of such a restraint stemming from the obligation of Protocol 7, one could support that such a case would constitute a risk of flagrant denial of justice in the requesting state, as it has been analysed in detail in the relevant chapter.

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<sup>227</sup> Article 9, Explanatory Report, *European Convention on Extradition*, ETS No. 24, ; Reservations of Malta, Moldova, Switzerland in the European Convention on Extradition. The same has been supported in the framework of the ICCPR :General Comment on article 14 paragraph 7, UN Human Rights Committee, General Comment 13/21, para. 19; even though it has been criticised by publicists: Rock Tansey QC, *The Rule Against Double Jeopardy- Nemo Debet Bis Vexari Pro Eadem Causa*, in (ed.) Ilias G. Anagnostopoulos, *Internationalisierung des Strafrechts*, Nomos Verlagsgesellschaft, Baden-Baden, 2003, pp.115-129

<sup>228</sup> *Additional Protocol to the European Convention on Extradition*, Strasbourg, 15-10-1975, E.T.S. No. 86, chapter II.

In a recent judgment concerning the trial *in absentia* by French Courts of a German national, in favour of whom a final discharge order had been made in Germany, the Court did not examine the international *per se* aspect of the procedure. It ruled over the fair trial rights of the applicant relating to the *in absentia* proceedings in France. The Court ruled that the domestic courts should have permitted the applicant's lawyers, who were present at the hearing – while he did not present himself, although he had been properly summoned - to put forward the defence case, as the argument they intended to rely on concerned a point of law, namely an objection on public policy grounds based on an estoppel *per rem judicatam* and the *non bis in idem* rule, applied in the international level<sup>229</sup> (the accused had been acquitted in Germany). It did not mention in its reasoning the European Convention on Extradition. However, it may be inferred by this ruling that it considers the double jeopardy principle deeply rooted in the European system of protection concerning justice, even in its international context.

The European Convention on the Transfer of Proceedings in Criminal Matters<sup>230</sup> is the most relevant instrument to the *ne bis in idem* principle as such. It prohibits the requested state to realise the request to take proceedings against an individual, if it is contrary to the principle of the *ne bis in idem* in its international dimension. According to article 10 of the Convention:

*The requested State shall not take action on the request:*  
*b. if the institution of proceedings is contrary to the provisions of Article 35;*

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

*1. A person in respect of whom a final and enforceable criminal judgement has been rendered may for the same act neither be prosecuted nor sentenced nor subjected to enforcement of a sanction in another Contracting State:*

- a if he was acquitted;*
- b if the sanction imposed:*
  - i has been completely enforced or is being enforced, or*
  - ii has been wholly, or with respect to the part not enforced, the subject of a pardon or an amnesty, or*
  - iii can no longer be enforced because of lapse of time;*
- c if the court convicted the offender without imposing a sanction.*

*2. Nevertheless, a Contracting State shall not, unless it has itself requested the proceedings, be obliged to recognise the effect of ne bis in idem if the act which gave rise to the judgment was directed against either a person or an institution or any thing having public status in that State, or if the subject of the judgment had himself a public status in that State.*

*3. Furthermore, a Contracting State where the act was committed or considered as such according to the law of that State shall not be obliged to*

<sup>229</sup> *Krombach v. France*, 13-5-2001, para. 90

<sup>230</sup> *European Convention on the Transfer of Proceedings in Criminal Matters*, Strasbourg, 15-5-1972, E.T.S. No. 73

*recognise the effect of ne bis in idem unless that State has itself requested the proceedings.*

Therefore, *ne bis in idem* does not apply to the State, where the offence has been committed or where to the state that has a special interest for the suppression of the crime, according to paragraphs 2 and 3 of the Convention. For those cases a supplementary rule has been laid down; any period of deprivation of liberty already served in one Contracting State as part of the enforcement of a sanction shall be deducted from the sanction which may be imposed in another Contracting State (Article 36). The same provisions are adopted by the European Convention on Offences Relating to Cultural Property<sup>231</sup>. One should not forget, though, that according to Appendix I of the Criminal Proceedings Convention, there is a possibility to make a reservation to this Section.

The Convention on Transfer of Sentenced Persons also includes a provision concerning *ne bis in idem* in respect to the enforcement of the sentence after the transfer has been effected. Article 8 ensures that the sentencing state is prevented from enforcing the sentence if the administering state considers enforcement of the sentence to have been completed<sup>232</sup>.

The European Convention on the Punishment of Road Traffic Offences<sup>233</sup> bars the State of residence from enforcing a penalty imposed in the State of the offence, in respect of an offence committed in that State on the ground of the *ne bis in idem* rule. In addition, The Agreement on Illicit Traffic By Sea, Implementing Article 17 of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances<sup>234</sup> involves the issue of preferential jurisdiction providing in this way a measure to prevent double jeopardy problems between the Contracting States.

It is worth noting that the *ne bis in idem* principle relates to the issue of choice of forum. Because of the intensity of the effects of the double jeopardy's application, there has to be a careful choice of jurisdiction. Which legal order is, therefore, the appropriate one to block all other jurisdictions and exercise its own over the person concerned? The state where the person concerned is apprehended by chance may not be the convincing legal basis; rather it is submitted that solid criteria of "*jurisdictional quality*," to be adopted. Criteria are not only related to jurisdictional bonds, such as territoriality, passive or active nationality; they are also attached to the interests of prosecution, the main interest of criminal justice, meaning the bringing of the accused to justice and those of the individual involved<sup>235</sup>. In that sense they have to do, for example, with the location of the most important evidence, but also with the domicile of the person involved, who must have a possibility to address a court in view of the effects that a criminal charge may have in the long run.

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<sup>231</sup> Article 17, *European Convention on Offences Relating to Cultural Property*, Delphi, 23-6-1985, E.T.S. No. 119

<sup>232</sup> *Convention on the Transfer of Sentenced Persons*, Strasbourg, 21-3-1983, E.T.S. No. 112, article 8, para. 2

<sup>233</sup> *European Convention on the Punishment of Road Traffic Offences*, Strasbourg, 30-6-1964, E.T.S. No. 52

<sup>234</sup> *Agreement on Illicit Traffic By Sea, Implementing Article 17 of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances*, Strasbourg, 31-1-1995, E.T.S. No. 156

<sup>235</sup> Otto Ladogny, Report "*The Legal Protection of the Accused from a Comparative View*, p.46, Committee of Experts on Transnational Criminal Justice, 2nd meeting, 31/1-2/2-2005, European Committee on Crime Problems.

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

*A person whose trial has been finally disposed of in one Contracting Party may not be prosecuted in another Contracting Party for the same acts, provided that it has been enforced, is actually in the process of being enforced or can no longer be enforced under the laws of the sentencing Contracting Party.*

It is important to address the issue of transnational proceedings of transfer of the accused to an international Tribunal and its implication with the duty of the member states of the Council of Europe stemming from the principle of *ne bis in idem*. As far as the International Criminal Tribunals are concerned there seems to be a difference of application of the principle depending on the Statute provisions of every one of them. The two *ad hoc* Tribunals (I.C.T.Y. and I.C.T.R.) are provided with broad exceptions to challenge the judgments of national courts, while the later are absolutely barred from retrying cases decided by the Tribunals. Additionally, they are under no obligation to respect the penalties previously imposed by national courts. These procedural constructions reflect the relationship of the Tribunals with the national courts; primacy<sup>236</sup>.

To the contrary, the I.C.C. works on the principle of complementarity as far as the national jurisdictions are concerned<sup>237</sup>. Article 20 of the Rome Statute introduces the *ne bis in idem* principle in three levels; as it applies for Court's own decisions (paragraph 1), where it affirms the prohibition of re-trial of a person by the Court for the same conduct, giving priority to the conduct centred approach. Article 81 of the Statute adopts the rule that the *ne bis in idem* does not apply until all appeals are exhausted. Furthermore, as it applies to national courts after a decision by the Court (paragraph 2). In that respect the Statute introduces the notion of the same "crime", not conduct. The result of this provision is that national courts may prosecute individuals for national crimes outside I.C.C.'s jurisdiction for the same conduct without even applying the principle of deduction, meaning that they may be sentenced without taking into account the sentences previously served for the same conduct. Lastly, as it applies to the ICC for decisions of the national courts. Paragraph 3 of article 20 reads:

*3. No person who has been tried by another court for conduct also proscribed under article 6, 7 or 8 shall be tried by the Court with respect to the same conduct unless the proceedings in the other court:*

*(a) Were for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court; or*

<sup>236</sup> *Statute of the International Criminal Tribunal for the Former Yugoslavia*, UN Doc. S/RES/827, 1993, article 9; *Statute of the International Criminal Tribunal for Rwanda*, UN Doc S/RES/955, 1994, article 8; *Statute of the Special Court for Sierra Leone*, article 8; Bartram S. Brown, Primacy or Complementarity: Reconciling the Jurisdiction of national Courts and international Criminal Tribunals, *Yale Journal of International Law*, 1998, Vol. 23, pp. 384-436

<sup>237</sup> *Rome Statute of the International Criminal Court*, UN Doc. A/CONF. 183/9, articles 13 and 17; John T. Holmes, The Principle of Complementarity, in ed Roy S. Lee, *The International Criminal Court: The Making of the Rome Statute – Issues, Negotiations, Results*, 1999

(b) *Otherwise were not conducted independently or impartially in accordance with the norms of due process recognized by international law and were conducted in a manner which, in the circumstances, was inconsistent with an intent to bring the person concerned to justice.*

The ICC Statute contemplates the accused challenging his/her surrender in the national courts on the basis of *ne bis in idem*. National courts are required to defer the issue until the ICC has decided the admissibility of the case, prior to surrender<sup>238</sup>.

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

## CHAPTER IX

### ***PROTECTION OF VICTIMS IN TRANSNATIONAL PROCEEDINGS CONCERNING CRIMINAL MATTERS***

The notion of victim differs in each national legal order. Moreover, a distinction must be drawn between the notion of victim used on the national level and in the context of the European Convention of Human Rights. The second one is independent from the criteria, which regulate the *locus standi* on the national level<sup>239</sup>. It refers to victims of violations of their rights stemming from the Convention and is based on the fulfilment of the several requirements set out in Article 34 of the Convention and set by the jurisprudence of the Commission and the Court<sup>240</sup>.

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

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

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<sup>238</sup> *Rome Statute of the International Criminal Court*, UN Doc. A/CONF. 183/9, article 89, para. 2.

<sup>239</sup> *Norris v. the United Kingdom*,

<sup>240</sup> *Deweer v. the United Kingdom; Modynos v. Cyprus*.



## IX.1. THE RIGHT TO BE INFORMED

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

This right is first found in a relevant Recommendation of the Committee of Ministers<sup>241</sup>; it affirms the right of the victim to be informed by the police authorities of the possibilities of obtaining assistance, legal advice, and compensation from the offender and state compensation. According to article 11 of the European Convention on the Compensation of Victims of Violent Crimes<sup>242</sup> the victim has the right to information about the compensation scheme, which is available, according to the provisions of the Convention, to potential applicants.

*Article 12 of the recently adopted Trafficking Convention stipulates the translation and interpretation services, when appropriate; information, in particular as regards their legal rights and the services available to them, in a language that they can understand.*

### *b. of the course of the criminal proceedings*

The right to be informed of the course of the proceedings begins with the outcome of the police investigation<sup>243</sup> and covers the proceedings up to the outcome of the Courts' decision<sup>244</sup>. However, since the victim may be compensated by the state it has to be also informed of the enforcement of the sanction imposed to the offender.

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

## IX.2. THE RIGHT TO LEGAL REDRESS AND COMPENSATION

The European Convention on the Compensation of Victims of Violent Crimes<sup>245</sup> defines the persons eligible for its protection. The right of the victim to physical, psychological and social recovery includes also the right to assistance by the authorities to enable the victim's rights and interests to be presented and considered at appropriate stages of criminal proceedings against offenders<sup>246</sup>. Moreover, the right to ask for a review by a competent authority of a decision not to prosecute, or the right to institute private proceedings guarantee the right to

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<sup>241</sup> Recommendation No. (85) 11, of the Committee of Ministers on the Position of the Victim in the Framework of Criminal Law and Procedure, adopted by the Committee of Ministers on 28 June 1985 at the 387<sup>th</sup> meeting of the Ministers' Deputies, p.1.

<sup>242</sup> European Convention on the Compensation of Victims of Violent Crimes, Strasbourg, 24-6-1983, E.T.S. No. 116

<sup>243</sup> Paragraph I, A 1, Recommendation No. (85) 11, of the Committee of Ministers on the Position of the Victim in the Framework of Criminal Law and Procedure, adopted by the Committee of Ministers on 28 June 1985 at the 387<sup>th</sup> meeting of the Ministers' Deputies, p.1.

<sup>244</sup> Paragraph I, D 9, Recommendation No. (85) 11, of the Committee of Ministers on the Position of the Victim in the Framework of Criminal Law and Procedure, adopted by the Committee of Ministers on 28 June 1985 at the 387<sup>th</sup> meeting of the Ministers' Deputies, p.2

<sup>245</sup> European Convention on the Compensation of Victims of Violent Crimes, Strasbourg, 24-6-1983, E.T.S. No. 116

<sup>246</sup> Article 12, para. 1 e, Council of Europe Convention on Action against Trafficking in Human Beings, Warsaw, 16-5-2005, E.T.S. No. 197

standing of the victim<sup>247</sup>. If, in proceedings against offenders, the criminal courts are not empowered to determine civil liability towards the victims, it must be possible for the victims to submit their claims to civil courts with jurisdiction in the matter and powers to award damages with interest<sup>248</sup>.

Article 15 of the Trafficking Convention explicitly stipulates:

*1 Each Party shall ensure that victims have access, as from their first contact with the competent authorities, to information on relevant judicial and administrative proceedings in a language which they can understand.*

*2 Each Party shall provide, in its internal law, for the right to legal assistance and to free legal aid for victims under the conditions provided by its internal law.*

*3 Each Party shall provide, in its internal law, for the right of victims to compensation from the perpetrators.*

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

Reference is made to “court and administrative proceedings” so as to take into account the diversity of national systems. For example, compensation of victims can be a matter for the courts (whether civil or criminal) or so sometimes for administrative authorities with special responsibility for compensating victims of offences. In the case of illegally present victims eligible for a residence permit under Article 14, information about the procedure for obtaining the permit is likewise essential. Traditionally, grant of residence permits is an administrative matter but there may also be judicial review by means of appeal to the courts. It is important that victims be informed of all relevant procedures<sup>249</sup>.

Even though Article 6 paragraph 3 c of the European Convention on Human Rights provides for free assistance from an officially appointed lawyer, only in criminal proceedings, the Court recognises, in certain circumstances, the right to free legal assistance in a civil matter on the basis of Article 6 paragraph 1 of the Convention<sup>250</sup>. Taking into account the complexity of the proceedings, even in the absence of legislation granting free legal assistance in civil matters, it is for the national courts to assess whether, in the interest of justice, an applicant who is without financial means should be granted legal assistance if unable to afford a lawyer.

<sup>247</sup> Paragraph I, B 7, *Recommendation No. (85) 11, of the Committee of Ministers on the Position of the Victim in the Framework of Criminal Law and Procedure*, adopted by the Committee of ministers on 28 June 1985 at the 387<sup>th</sup> meeting of the Ministers’ Deputies, p.2

<sup>248</sup> Explanatory report, para. 197, *Council of Europe Convention on Action against Trafficking in Human Beings*, Warsaw, 16-5-2005, E.T.S. No. 197

<sup>249</sup> Explanatory report, para. 193, *Council of Europe Convention on Action against Trafficking in Human Beings*, Warsaw, 16-5-2005, E.T.S. No. 197

<sup>250</sup> *Airey v. Ireland*, 9-10-1979

In a transnational framework, it is interesting that article 27 of the Trafficking Convention stipulates that:

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

It is modelled on Article 11(2) of the European Union Council Framework Decision of 15 March 2001 on the standing of victims in criminal proceedings<sup>251</sup>. Its purpose is to make it easier for a victim to complain by allowing him or her to lodge the complaint with the competent authorities of his or her State of residence. If the competent authority with which the complaint has been lodged decides that it does not itself have jurisdiction in the matter, then it must forward the complaint without delay to the competent authority of the Party in whose territory the offence was committed. The obligation in Article 27(2) is an obligation merely to forward the complaint to that competent authority and does not place any obligation on the State of residence to institute an investigation or proceedings.

It is highly interesting that the recent instruments involving criminal matters have introduced the standing of legal persons, groups, foundations and non-governmental organisations, to participate in the criminal proceedings. The status of these legal persons is elevated; in the Trafficking Convention they are not provided with *locus standi* as such, but with the consent of the victim they may assist and support it during the proceedings; the Convention on the Protection of the Environment Through Criminal Law<sup>252</sup>, though, goes further introducing their right to participate in the criminal proceedings. However, the provision depends on a declaration of the Contracting State.

The European Convention on the Compensation of Victims of Violent Crimes provides for compensation by the Contracting States. Article 2 includes the direct victim in the event of serious bodily injury or damage to health, and the dependants of persons who have died as a result of a violent crime, the indirect victims, which will be further specified by the Contracting Parties according to their national legislation<sup>253</sup>.

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

<sup>251</sup> European Union Council Framework Decision of 15 March 2001 on the standing of victims in criminal proceedings, 15-3-2001

<sup>252</sup> Article 11, *Convention on the Protection of the Environment Through Criminal Law*, Strasbourg, 4-6-1998, E.T.S. No. 172

<sup>253</sup> Explanatory Report, *European Convention on the Compensation of Victims of Violent Crimes*, Strasbourg, 24-6-1983, E.T.S. No. 116, para. 20

Moreover, there are certain factors, which influence the amount of the compensation downwards. The applicant's financial situation; the victim's conduct before, during and after the crime or in relation to the injury or death; his/her involvement in organised crime or his membership of an organisation which engages in crimes of violence; the compatibility of an award to a sense of justice or to public policy (*ordre public*); any amount of money received, in consequence of the injury or death, from the offender, social security or insurance, or coming from any other source. According to Resolution (77) 27 of the Committee of Ministers<sup>254</sup>, which was adopted prior to the Convention, the principle of *complementarity* to compensation provided by the States and that it should be the "*fullest and fairest possible*" taking into account the nature and the consequences of the injury.

This framework has been also adopted by the European Union; the scheme introduced by the Community is more detailed in its organisation and structure ensuring "*fair and appropriate compensation*"<sup>255</sup>.

### IX.3. THE RIGHT TO CONFIDENTIALITY AND CONSIDERATION OF HIS/HER VULNERABLE SITUATION

The European legislator has taken into account the special nature of sexual crimes and has firmly maintained on the protection of the victims against publicity and disregard of their special situation. Throughout the judicial and administrative proceedings states must ensure confidentiality of record and the respect for privacy rights of children and young adults who have been victims of sexual exploitation, by avoiding the disclosure of information that could lead to identification of the victims<sup>256</sup>. Moreover, during the hearings there have to be special conditions, which will assist the award of justice involving children, who are victims or witnesses, but at the same time respect their vulnerable mental situation<sup>257</sup>.

Article 13 of the Trafficking Convention stipulates a recovery period from the influence of the offenders, which will be at least 30 days, in order to be sufficient for the person concerned to recover and escape the influence of traffickers and/or to take an informed decision on co-operating with the competent authorities. During this period it shall not be possible to enforce any expulsion order against him/her.

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<sup>254</sup> Resolution (77) 27 on the Compensation of Victims of Crime, adopted by the Committee of Ministers on 28 September 1977, at the 275<sup>th</sup> meeting of the Ministers' Deputies

<sup>255</sup> Council Directive Relating to Compensation to Crime Victims, 2004/80/EC, 29-5-2004

<sup>256</sup> General Measures, d, 13, Recommendation No. R (91) 11, of the Committee of Ministers to Member State Concerning Sexual Exploitation, Pornography and Prostitution of, and Trafficking in, Children and Young Adults, adopted by the Committee of Ministers on 9 September 1991, at the 461<sup>st</sup> meeting of the Ministers' Deputies.

<sup>257</sup> General Measures, d, 14, Recommendation No. R (91) 11, of the Committee of Ministers to Member State Concerning Sexual Exploitation, Pornography and Prostitution of, and Trafficking in, Children and Young Adults, adopted by the Committee of Ministers on 9 September 1991, at the 461<sup>st</sup> meeting of the Ministers' Deputies

Article 30 of the above mentioned Convention provides that:

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

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

Measures must comply with Article 6 of the European Convention on Human Rights; a balance has to be struck between defence rights and the interests of victims and witnesses<sup>258</sup>. After all, the appearance of the criminal defendant is of capital importance, both because of the right to be present at a hearing and because of the need to verify the accuracy of his statements and compare them with those of the victim – whose interests need to be protected<sup>259</sup>.

The detailed analysis of the protective status of the victims during proceedings is closely related to the one of the witnesses, all the more so, where a victim is also used as a witness in the proceedings. Therefore, this issue will be examined in depth in the section concerning the protection of witnesses.

## CHAPTER X

### ***PROTECTION OF WITNESSES***

For the purpose of the present analysis it is necessary to define the notion of “witness”. According to *Recommendation No. R (97) 13 of the Committee of Ministers* it means a person, irrespective of his/her status under national criminal law, who possesses information relevant to criminal proceedings. The definition includes also experts and interpreters<sup>260</sup>. The Trafficking Convention includes in the notion also the whistleblowers and informers<sup>261</sup>.

The reasoning of the Council of Europe's organs, as far as the protection of witnesses and victims is concerned, is oriented towards a continuing effort to balance the civic duty to give a testimony as witness and the right to be protected by any personal risk. From another point of view during the criminal proceedings, the right to defense and the right to privacy and personal safety are to be balanced<sup>262</sup>. The burden is not on the witness himself to carry<sup>263</sup>; States have the obligation to ensure special protection in view of the special conditions and dangers that a witness may face. Guidance on this issue was given comprehensively by *Recommendation No. R (97) 13 of the Committee of Ministers*. The drafters of the Trafficking Convention seem to have been significantly influenced by the Recommendation.

<sup>258</sup> *Doorson v. the Netherlands*, 26-3-1996, para. 70

<sup>259</sup> *Stoichkov v. Bulgaria*, 24-3-2005, para. 55

<sup>260</sup> Appendix to *Recommendation No. R (97) 13 of the Committee of Ministers to Member States Concerning Intimidation of Witnesses and the Rights of the Defence*, adopted by the Committee of Ministers on 10 September 1997 at the 600<sup>th</sup> meeting of the Ministers' Deputies.

<sup>261</sup> Paragraph 284, Explanatory Report, *Council of Europe Convention on Action against Trafficking in Human Beings*, Warsaw, 16-5-2005, E.T.S. No. 197

<sup>262</sup> *Doorson v. the Netherlands*, 26-3-1996, para. 70

<sup>263</sup> *Recommendation No. R (97) 13 of the Committee of Ministers to Member States Concerning Intimidation of Witnesses and the Rights of the Defence*, adopted by the Committee of Ministers on 10 September 1997 at the 600<sup>th</sup> meeting of the Ministers' Deputies.

Retaliation and intimidation of the victim and the witnesses during and after the investigation and the prosecution are the regular risks that these two list of persons run. “*Effective and appropriate protection*” has to be granted by the Contracting states<sup>264</sup> with the consent of the person concerned<sup>265</sup>. This may include physical protection, relocation, identity change and assistance in obtaining jobs. It refers to the need to adapt the level and period of protection to the threats to victims, collaborators with the judicial authorities, witnesses, informers and, when necessary, members of such persons’ families. In fact, the Trafficking Convention establishes the obligation of the Parties to ensure appropriate protection to non-governmental organisations members, in particular physical protection, when necessary.

In the era of transnational crime, the answer to the challenges has to be well organised and transnational as well; therefore, states may need to afford protection by transferring the witness in the territory of another state<sup>266</sup>. In these cases, modern means of telecommunications, which facilitate simultaneous examination of witnesses and the rights of the defence at the same time<sup>267</sup>.

However, there is no unified legislation in the member states of the Council of Europe concerning witnesses’ examination during the criminal proceedings. The main guides, therefore, for a concrete answer to this issue are the European Convention on Human Rights and its interpretation by the Council’s organs.

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

#### *X. 1. NON-PUBLIC HEARINGS*

Article 6 paragraph 1 itself states that:

*“the press and public may be excluded from all or part of the trial in the interests of morals ... where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice”.*

<sup>264</sup> Article 28, *Council of Europe Convention on Action against Trafficking in Human Beings*, Warsaw, 16-5-2005, E.T.S. No. 197

<sup>265</sup> Paragraph 289, Explanatory Report, *Council of Europe Convention on Action against Trafficking in Human Beings*, Warsaw, 16-5-2005, E.T.S. No. 197

<sup>266</sup> Appendix V, to *Recommendation No. R (97) 13 of the Committee of Ministers to Member States Concerning Intimidation of Witnesses and the Rights of the Defence*, adopted by the Committee of Ministers on 10 September 1997 at the 600<sup>th</sup> meeting of the Ministers’ Deputies, p. 83; Paragraph 291, Explanatory Report, *Council of Europe Convention on Action against Trafficking in Human Beings*, Warsaw, 16-5-2005, E.T.S. No. 197

<sup>267</sup> Appendix V, to *Recommendation No. R (97) 13 of the Committee of Ministers to Member States Concerning Intimidation of Witnesses and the Rights of the Defence*, adopted by the Committee of Ministers on 10 September 1997 at the 600<sup>th</sup> meeting of the Ministers’ Deputies, p. 83

## X. 2. AUDIO-VISUAL TECHNOLOGY AND RECORDINGS OF TESTIMONY

Admissibility of evidence in the European system of human rights protection is left to the national judiciary authorities<sup>268</sup>. The Court's role is to examine whether the proceedings as a whole, including the way in which evidence was taken according to national law, were fair.

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

- Recommendation No. R(97)13 of the Committee of Ministers to member States on intimidation of witnesses and the rights of the defence, paragraph 6
- European Union Council Resolution of 23 November 1995 on the protection of witnesses in the fight against international organised crime, article A.8
- United Nations Convention against Transnational Organised Crime, article 24.

The Court has interpreted article 6 paragraph 3 d as to allow exceptions from questions be put directly by the accused or his or her defense counsel, through cross-examination or by other means depending on the circumstances of the case<sup>269</sup>.

## X. 3 ANONYMOUS TESTIMONY

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

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

The European Court has ruled that the European Convention on Human Rights does not preclude reliance on anonymous sources; these, however, do not constitute by themselves sufficient evidence to found a conviction<sup>270</sup>, even though there have been judgments that have accepted it<sup>271</sup>. In any case the use of this measure has to be justified by the circumstances of the particular case<sup>272</sup>. The Court has accepted the use of anonymous testimony even in the absence of any specific threats made by the defendant<sup>273</sup>.

A further issue raised in this framework is the assessment by the competent courts of the credibility of an anonymous witness. Such information must indicate how reliable and credible the witness is and why he/she wishes to remain anonymous<sup>274</sup>. In any case as underlined above, a conviction should not be based either solely or to a decisive extent on anonymous statements<sup>275</sup>. In addition, while evidence must, as a rule, be produced before the accused in a

<sup>268</sup> *Schenk v. Switzerland*, 12-7-1988; *Barberà, Messegué and Jabardo v. Spain*, 6-12-1988

<sup>269</sup> *S.N. v. Sweden*, 2-7-2002

<sup>270</sup> *Kostovski v. the Netherlands*, 20-11-1989, para. 44; *Doorson v. the Netherlands*, 26-3-1996, para. 69

<sup>271</sup> *Van Mechelen and Others v. the Netherlands*, 23-4-1997, para. 52; *Doorson v. the Netherlands*, 26-3-1996, para. 69

<sup>272</sup> *Kork v. the Netherlands*, 4-7-2000, p.655

<sup>273</sup> *Doorson v. the Netherlands*, 26-3-1996, para. 71

<sup>274</sup> *Van Mechelen and Others v. the Netherlands*, 23-4-1997, para. 62; *Doorson v. the Netherlands*, 26-3-1996, para.73

<sup>275</sup> *Doorson v. the Netherlands*, 26-3-1996, para. 76

public hearing with a view to adversarial debate, there are some exceptions, provided that measures are taken to counterbalance the handicaps to the defense.

In the framework of the European system of human rights protection the witness taking part in criminal proceedings enjoys a special status of protection. The exceptional circumstances, under which he/she shall live in view of the retaliation, demand this special treatment. On the other hand, this special status may not thwart the rights of the accused to a fair trial. One has to strike a balance between the two interests. The Court's case law has accepted the special protection schemes during criminal proceedings as permitted by the ambit of article 6 of the European Convention on Human Rights; however, this interpretation is narrow and does not allow a broad margin of exceptional measures.



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