Penn State International Law Review

Volume 15
Number 2 *Dickinson Journal of International Law*

Article 2

1-1-1997

New Conventions on Extradition in the European Union: Analysis and Evaluation

G. Vermeulen

T. Vander Beken

Articles

New Conventions on Extradition in the European Union: Analysis and Evaluation

G. Vermeulen and T. Vander Beken*

I. Introduction

Extradition has always been a mainstay in the area[1] of international cooperation in criminal matters between states. Presently, the "new" basic instruments of the Council of Europe on the international validity of criminal judgments[2] and on the transfer of proceedings in criminal matters[3] do not threaten the

---

* Assistant-professors Criminal Law, Research Group Drug Policy, Criminal Policy, International Crime, University of Ghent, Belgium.

1. H. Schultz, 'Das Ende der Auslieferung?,' *in* AKTUELLE PROBLEME DES INTERNATIONALEN STRAFRECHTS. BEITRÄGE ZUR GESTALTUNG DES INTERNATIONALEN UND EINES SUPRANATIONALEN STRAFRECHTS 138 (D. Oehler and P.G. Pötz, eds., 1970).

2. European Convention on the International Validity of Criminal Judgments, The Hague, 28 May 1970, *E.T.S.* 70. There is also a similar Benelux Convention on the subject: Traité Benelux sur l'Exécution des Décisions Judiciaires Rendues en Matière Pénale, Brussels, 26 Sept. 1968, *Union Economique Benelux, Textes de Base*, which never entered into force because of non-ratification by Luxembourg. *Id.*

3. European Convention on the Transfer of Proceedings in Criminal Matters, Strasbourg, 15 May 1972, *E.T.S.* 73. *See also* the Traité entre le Royaume de Belgique, le Grand-Duché de Luxembourg et le Royaume des Pays-Bas sur la Transmission des Poursuites, Brussels, 11 May 1974, *Union Economique Benelux, Textes de Base*, which never was entered into force because of non-ratification by

longstanding principles of extradition. Even if these instruments were ratified on a large scale,[4] these instruments could never be a complete substitute for extradition as Europe knows it.[5]

This does not mean, however, that extradition laws have remained unaltered. Two recent and parallel events can be recognized in extradition jurisprudence. First, extradition procedures have become broader and more supple. Modern extradition treaties no longer contain limited lists of extraditable offences; instead, extradition in principle is possible for any serious offence. Thus, traditional exceptions based on sovereignty, such as the political or the fiscal offence exception, lose significance.

Second, the need for more intense and effective international cooperation also leads to less rigid procedural requirements, to more direct ways of communication, and to the simplification of procedures.[6] Thus, the mode of thinking regarding international cooperation in criminal matters and extradition has evolved. The traditional emphasis on state-to-state obligations allows the person charged only the rights or safeguards granted to him or her as an object rather than as a subject of the process. Modern extradition, however, applies a more legal protection-oriented approach. There is a growing awareness that the individual bears the ultimate consequences of state action which has created a need for a reevaluation of the framework and structures of international extradition law.[7]

These two recent evolutions in extradition law are not always compatible. The unbridled simplification of extradition procedures

---

Belgium and Luxembourg.

4. Both Conventions were ratified by only five Union Member States (chart of 2 Sept. 1996): Austria, Denmark, the Netherlands, Spain, and Sweden. However, the European Convention on the Transfer of Sentenced Persons, Strasbourg, 21 Mar. 1983, *E.T.S.* 112, which deals with an aspect of the international validity of criminal judgments (prisoner transfer) has been ratified by all Union Member States. *Id.*

5. Schultz, *supra* note 1, at 142; A.H.J. Swart, NEDERLANDS UITLEVERINGSRECHT 6-8 (1986).

6. SWART, *supra* note 5, at 22-23.

7. M.C. BASSIOUNI, INTERNATIONAL EXTRADITION AND WORLD PUBLIC ORDER 558-559 (1974); M.C. Bassiouni, *World Public Order and Extradition: A Conceptual Evaluation*, *in* AKTUELLE PROBLEME DES INTERNATIONALEN STRAFRECHTS. BEITRÄGE ZUR GESTALTUNG DES INTERNATIONALEN UND EINES SUPRANATIONALEN STRAFRECHTS 10-18 (D. Oehler and P.G. Pötz, eds., 1970); S.A. Williams, *Human Rights Safeguards and International Cooperation in Extradition - Striking the Balance*, *in* PRINCIPLES AND PROCEDURES FOR A NEW TRANSNATIONAL CRIMINAL LAW 535 (A. Eser, et al. eds., 1992). An interesting article on this evolution is H.G. van der Wilt, *Après Soering: The Relationship Between Extradition and Human Rights in the Legal Practice of Germany, the Netherlands and the United States*, 42 NETH. INT'L L. REV. 53-80 (1990).

can lead to an infringement of fundamental rights and a lack of legal protection. Making extradition too complicated, however, may be seen as a sign of distrust between states or may lure States into practices such as abduction or disguised extradition. This could lead to less protection for the requested person[8] rather than an improvement of his legal rights in the process.[9] As is the case of international criminal law, extradition should strike a balance between the protection of society through the effective operation of the criminal justice system and the protection of the rights of the individual defendants and victims, and the maintenance of the rule of law.[10] Between the European Union (EU) Member States, striking this balance has lead to close inter-state relations,[11] undergirded by the achievements of the European human rights convention and its protocols.

This Article outlines this balancing effort by analyzing the negotiations and achievements of the European Union in the field of extradition. The trend towards a regional-Union approach in criminal matters has been confirmed by Article K.1.7 of the Treaty on European Union, which states explicitly that Member States shall regard judicial cooperation in criminal matters as a matter of common interest.[12] This trend remains based, however, on the already existing bilateral and multilateral extradition treaties and on some Conventions from the period before the entry into force of the Treaty on European Union.[13]

---

8. Note that this Article uses the terms "requested state," "requesting state," or "person charged," to signify the role of each party in the extradition process.

9. Ch. Van Den Wyngaert, *Applying the European Convention on Human Rights to Extradition: Opening Pandora's Box?*, 39 INT'L & COMP. L.Q. 757-79 (1990).

10. Schomburg, *The Regionalization of International Criminal Law and the Protection of Human Rights in International Cooperation in Criminal Proceedings. Section IV of the XV Congress of The International Association of Penal Law, IAPL*, EUR. J. CRIME, CRIM. L. AND CRIM. JUST. 98-105 (1995).

11. *See* G. Vermeulen and T. Vander Beken, *Extradition in the European Union: State of the Art and Perspectives*, EUR. J. CRIME, CRIM. L. AND CRIM. JUST. 200-25 (1996).

12. Treaty on European Union, Maastricht, 7 Feb. 1992, *Official Journal of the European Communities*, 1992, C 191.

13. The Council of Europe, the Schengen Group, and the Benelux Economic Union were established between the EC Member States within the scope of the European Political Cooperation.

II. Multilateral Extradition Treaties: The Council of Europe, the Schengen Group, and the Benelux Economic Union

The relationship between the fifteen EU Member States in the field of extradition is rather complicated. The basic convention relied upon is the 1957 Council of Europe European Convention on Extradition (ECE).[14] The ECE has been ratified by all Member States except Belgium. However, according to Article 60 of the Schengen Convention (SC),[15] the ECE is applicable between Belgium and the other six countries where the SC has entered into force. The relationship between Belgium and the other EU Member States is still governed by bilateral extradition treaties.[16]

---

14. European Convention on Extradition, Paris, 13 Dec. 1957, *E.T.S.* 24. *See also* Resolution (75)12 on the Practical Application of the European Convention on Extradition, Resolution (78)43 on Reservations Made to Certain Provisions on the European Convention on Extradition, Recommendation No. R(80)7 of the Committee of Ministers to Member States concerning the practical application of the European Convention on Extradition, 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 and Recommendation No. R(86)13 concerning the practical application of the European Convention on extradition with respect to detention pending extradition.

15. Convention d'application de l'Accord de Schengen du 14 juin 1985 entre les Gouvernements des États de l'Union Economique Benelux, de la République fédérale d'Allemagne et de la République française, relatif à la suppression graduelle des contrôles aux frontières communes, Schengen, *Moniteur Belge*, 15 Oct. 1993. Now there are ten contracting parties, seven for which the Convention is in full application. Belgium, the Netherlands, Luxembourg, Germany, France, Spain, and Portugal and three for which there is no application yet, Italy, Greece, and Austria. Article 60 of the Convention states, among other things, that in relations between two contracting parties, one of which is not a party to the ECE, the provisions of the ECE shall apply.

16. Austria: Convention d'extradition entre la Belgique et l'Autriche, Vienna, 29 Mar. 1881, *Moniteur Belge*, 12 Apr. 1881; Denmark: Convention d'extradition entre la Belgique et le Danemark, Copenhague, 25 Mar. 1876, *Moniteur Belge*, 30 Apr. 1876; Finland: Convention d'extradition et d'assistance judiciaire en matière pénal conclue entre le Royaume de Belgique et la Republique de Finlande, Stockholm, 23 Jan. 1928, *Moniteur Belge*, 1 June 1928; Greece: Traité d'extradition entre la Belgique et la Grèce, Athens, 26 June-9 July 1901, *Moniteur Belge*, 26 Feb. 1904; Italy: Convention d'extradition entre la Belgique et l'Italie, Rome, 15 Jan. 1875, *Moniteur Belge*, 10 Mar. 1875; Ireland: Traité entre la Belgique et le Royaume-Unie de Grande-Bretagne et d'Irlande pour l'extradition réciproque des criminels fugitifs, Brussels, 29 Oct. 1901, *Moniteur Belge*, 7 Mar. 1902; Sweden: Convention d'extradition entre la Belgique et la Suéde et la Norvége, Stockholm, 26 Apr. 1870, *Moniteur Belge*, 1 Aug. 1870 and United Kingdom: Traité entre la Belgique et le Royaume-Unie de Grande-Bretagne et d'Irlande pour l'extradition réciproque des criminels fugitifs, Brussels, 29 Oct. 1901, *Moniteur Belge*, 7 Mar. 1902.

The ECE has been supplemented by two separate protocols,[17] by bilateral treaties[18] (in accordance with Article 28.2 ECE), and by the SC (Articles 59-69).[19] Extradition between the Nordic countries[20] and between the United Kingdom and Ireland[21] is partially subject to special national regulations (in accordance with Article 28.3 ECE).[22] Between the Benelux (lowland) countries, the ECE is not applicable by virtue of special arrangements between these countries; extradition is governed by the Benelux Extradition Treaty (BET).[23]

The Council of Europe's European Convention on the Suppression of Terrorism (ECST)[24] is one European[25] treaty which provides for special extradition regulations. This treaty, which was adopted by all EU Member States, limits the application

---

17. Additional Protocol to the European Convention on extradition, Strasbourg, 15 Oct. 1975, *E.T.S.* 86 (in force in Denmark, The Netherlands, Portugal, Spain, and Sweden) and Second Additional Protocol to the European Convention on Extradition, Strasbourg, 17 Mar. 1978, *E.T.S.* 98 (in force in Austria, Denmark, Finland, Germany, Italy, The Netherlands, Portugal, Spain, Sweden, and the United Kingdom: chart of signatures and ratifications of 2 Sept. 1996).

18. See the German bilateral treaties: *Bundes Gesetz Blatt*, 31 Jan. 1972, Ger.-Aus., 1975 II S. 1163, 1976 II. S. 1798; *Bundes Gesetz Blatt*, 8 Nov. 1976, Ger.-Den., *Bundes Gesetz Blatt*, 24 Oct. 1979, II S. 1827; Ger.-Italy, 1982 II S. 106; 1985 II S. 835; *Bundes Gesetz Blatt*, 30 Aug. 1979, Ger.-Neth. 1981 II S. 1153, 1983 II S. 32. 'Über die Ergänzung des europäschen Auslieferungsübereinkommens vom 13. Dezember 1957 und die Erleichterung seiner Anwendung.'

19. *See supra* note 15.

20. See, e.g., C.F. Mulder and C.F. Rüter, *Het Scandinavisch model. Samenwerken met behoud van identiteit*, 21 DELIKT EN DELINKWENT 26-29 (1995). The Nordic countries (Denmark, Finland, Iceland, Norway, and Sweden) have a uniform law which is applicable in their mutual relations. This means that the ECE is not applicable between these states. See Declaration of Iceland to the ECE (20 June 1984): "The Convention shall not apply to extradition to Denmark, Finland, Norway or Sweden as extradition between the Nordic countries is governed by a uniform law." *Id.*

21. See, e.g., F. THOMAS, DE EUROPESE RECHTSHULPVERDRAGEN IN STRAFZAKEN 161 (1980).

22. *See supra* note 14.

23. Traité d'extradition et d'entraide judiciaire en matière pénale entre le Royaume de Belgique, le Grand-Duché de Luxembourg et le Royaume des Pays-Bas, Brussels, 27 June 1962, *Union Economique Benelux, Textes de Base.*

24. European Convention on the suppression of terrorism, Strasbourg, 27 Jan. 1977, *E.T.S.* See also Resolution (74)3 on international terrorism and Recommendation No. R(82)1 concerning international cooperation and punishment of acts of terrorism.

25. Of course there are UN-treaties containing special extradition regulation applicable around the world. See, e.g., *The Convention on illicit traffic in narcotic drugs and psychotropic substances*, MONITEUR BELGE, 21 Mar. 1996. Since they are not "European," these treaties are not commented on in this Article.

of the political offence exception[26] by listing a number of serious offences that will not be considered as political offences, offences connected with political offences, or offences inspired by political motives.

III. European Union

A. Before the Enactment of the Treaty on European Union: A History on the Treaties in the 1970s and 1980s

The idea of a so-called "European judicial area"[27] was launched by France at the Brussels European Summit of 5-6 December 1977.[28] Within the scope of the judicial cooperation between the attending Member States, a working group designed a number of draft treaties in order to establish a "European judicial area."[29] A "European judicial area" was thought to offer more extradition possibilities than the existing Council of Europe structures.[30] This ambition, however, proved to be unrealistic and the activities of the working group reached a deadlock in the early 1980s.[31] Nevertheless, they had achieved results on the subject of the suppression of terrorism.[32]

On 4 December 1979, the EC Member States committed themselves to the Dublin Agreement, a strict application of the 1977 Council of Europe ECST by all EC member states.[33] The main goal of the Dublin Agreement was a broader utilization of the

---

26. *Id.*

27. E. Crabit, *Recherches sur la notion d'espace judiciaire européen*, Talence, Presses Universitaires de Bordeaux, 1988, 588, 'Espace judiciaire européen. A propos des troisièmes journées françaises de droit pénal tenues à Nice du 2 au 4 octobre 1980' Revue de Droit Pénal (1984) 37-49; F. Thomas, "'L'espace judiciaire européen.' Een alibi?," 11 *Delikt en Delinkwent* (1981) 543.

28. R. Errera, *Combating Fraud, Judicial Criminal Matters and Police Co-operation, in* THE TREATY ON EUROPEAN UNION. SUGGESTIONS FOR REVISION 327 (1995).

29. *Id.* at 327-28.

30. *Id.*

31. *Id.*

32. *Id.*

33. R. de Gouttes, *De l'espace judiciaire pénal européen à l'espace judiciaire pénal pan-européen, in* MÉLANGES OFFERTS À GEORGES LEVASSEUR. DROIT PÉNAL. DROIT EUROPÉN 5 (1992); Ch. Van Den Wyngaert, *De internationale strafrechtelijke samenwerking bij de bestrijding van de E.E.G.-fraude, in* DE JURIDISCHE BESCHERMING VAN DE FINANCIËLE BELANGEN VAN DE EUROPESE GEMEENSCHAPPEN. LA PROTECTION JURIDIQUE DES INTÉRÊTS FINANCIERS DES COMMUNAUTÉS EUROPÉNNES 81-82 (F. Tulkens, et al. eds., 1992). *See also supra* note 24.

ECST by all EC Member States.[34] Through the Dublin Agreement, the ECST enables the Council of Europe's Member States to regard a number of serious, terrorism-related offences as political offences, as offences connected with political offences, or as offences inspired by political motives.[35] For Member States, the Dublin Agreement means that the traditional political offence exception, as laid down in Article 3.1 ECE or Article 3 BET, would not justify a refusal of extradition in the case of terrorist acts as established in Articles 1-2 ECST.[36] According to Article 13 ECST, however, any State is allowed to declare that it reserves the right to refuse extradition with respect to any Article 1 offence on account of the political offence exception, provided that particularly serious aspects of the offence[37] are taken into due consideration when evaluating the character of the offence.[38] In accordance with the provisions of Article 13, over half[39] of the EU Member States, all of them having ratified the ECST, have (at least partially) reserved the right to refuse extradition to an offence that is considered a political offence.[40]

The 1979 Dublin Agreement aimed at undoing this ambiguous situation. Member States who reserved the right to refuse extradition in accordance with Article 13 of the ECST must, under the Dublin Agreement, explicitly declare whether they wish to make use of this reservation in their relations with other Member States.[41] Parties are thus encouraged not to reiterate the reservations they made with respect to the extradition obligation for terrorism-related offences.[42] Nevertheless, the four Member States which ratified the Dublin Agreement confirmed the reservations they made under Art. 13 of the ECST. This, however,

---

34. *Id.*
35. *Id.*
36. *See supra* notes 14, 23, and 25.
37. This includes the fact that it created a collective danger to the life, physical integrity or liberty of persons, or that it affected persons foreign to the motives behind it, or that cruel or vicious means have been used in the commission of the offence. *See supra* note 24.
38. *Id.*
39. *Id.* Belgium, The Netherlands, Denmark, Finland, France, Greece, Italy, and Sweden. *Id.*
40. *Id.*
41. de Gouttes, *supra* note 33.
42. *Id.*

was not enough for the Dublin Agreement to be enacted;[43] therefore, the Agreement had very little surplus value.

In addition to the Dublin Agreement, the "European judicial area" activities lead to a draft Convention Between the Member States of the European Communities on the Cooperation in Criminal Matters.[44] This draft Convention[45] dealt largely with extradition.[46] The draft was finished in June 1980, but failed after the Netherlands refused to sign it.[47] The idea of the "European judicial area" has not been revisited.

At the end of the 1980s, a working group called "Judicial Cooperation" was formed under the intergovernmental framework of the so-called European Political Cooperation. This group continued the goals of the "European judicial area."[48] Through the working group, treaties[49] have been completed in the area of cooperation in criminal matters between the twelve EC Member States.[50] Most of these treaties are merely application conventions

---

43. *Id.* Nine ratifications are necessary for the entry into force of the Dublin Agreement and there have only been ratifications by Belgium, The Netherlands, Luxembourg, and Italy. *Id.*

44. THOMAS, *supra* note 21, at 546-48; Ch. Van Den Wyngaert, *Euroterrorisme en "espace judiciaire européen:" de fundamentele rechten van het individu in het gedrang?*, 43 RECHTSKUNDIG WEEKBLAD 2675-92 (1980).

45. Ch. Van Den Wyngaert, *Het "Europees rechtsgebied (espace judiciaire européen): naar een tweespalt binnen de Raad van Europa? Enkele beschouwingen n.a.v. het Verdrag tussen de lid-staten van de Europese Gemeenschappen betreffende samenwerking in strafzaken (juni 1980) en de betekenis ervan voor de rechtsbescherming van het individu*, 45 RECHTSKUNDIG WEEKBLAD 1206-07 (1982).

46. The Convention was drawn up on the basis of Article K.3 of the Treaty on European Union, relating to extradition between the Member States of the European Union, Dublin, 27 Sept. 1996, *Official Journal of the European Communities*, C 313/12, 23 Oct. 1996. The draft convention contained some aspects that were also discussed in the negotiations of the Convention of 27 Sept. 1996, relating to extradition between the EU Member States.

47. THOMAS, *supra* note 21. *See also* de Gouttes, *supra* note 33.

48. Van Den Wyngaert, *supra* note 33, at 81. *See supra* notes 27-32.

49. Agreement on the application, between the EC Member States, of the Convention on the transfer of sentenced persons, Brussels, 25 May 1987; Convention on the application of the principle "ne bis in idem," Brussels, 25 May 1987; Agreement on the simplification and modernization of methods of transmitting extradition requests, Donostia - San Sebastian, 26 May 1989; Agreement on the transfer of criminal proceedings, Rome, 6 Nov. 1990; Convention on the execution of foreign criminal judgments, The Hague, 13 Nov. 1991.

50. The application of these treaties has been extended to all fifteen EU Member States. When Austria, Finland, and Sweden joined the European Union, they undertook to accede to those which, by date of accession have been opened for signature by the then present Member States. This principle is in Article 3 of the Act concerning the conditions of accession of the Kingdom of Norway, the

of the judicial cooperation treaties of the Council of Europe.[51] Ireland did not sign the Agreement and the three new Member States have not acceded until recently.[52]

B. *The Treaty on European Union and Beyond: European Extradition Law in the 1990s*

1. Background.—The rules of inter-governmental cooperation on extradition matters between the Member-States of the European Union in the field of Justice and Home Affairs (JHA) were established in Title VI of the Treaty on European Union (TEU) of 7 February 1992.[53] Title VI, which contains Article K of the Treaty, is referred to as the "Third Pillar of the European Union."[54] As was previously mentioned, Article K.1.7 states that the Member States shall regard judicial cooperation in criminal matters as a matter of common interest.[55] Article K.1.7 provides the Member States with a new institutional framework.[56] Until Article K.1.7. judicial cooperation had been discussed only in work groups within the European Political Cooperation.[57] On 28 September 1993, the European Ministers of Justice adopted a declaration on the subject of extradition at a meeting in Limelette (Ottignies-Louvain-la-Neuve, Belgium) (Limelette Declaration).[58] The Limelette Declaration contained a detailed mandate for a technical work group[59] which was to develop specific instruments to modernize extradition.[60]

Republic of Austria, the Republic of Finland, and the Kingdom of Sweden and the adjustments to the Treaties on which the European Union is founded. *Official Journal of the European Communities*, C 241/21, 29 August 1994.

51. *See supra* note 49 in its entirety.

52. *Id.*

53. *See supra* note 12.

54. *Id.*

55. *See supra* note 12 and accompanying text.

56. *Id.*

57. J.J.E. Schutte, *Europese samenwerking inzake justitie en veiligheid. De wordingsgeschiedenis en betekenis van de bepalingen inzake justitie en binnenlandse zaken in het Unieverdrag van Maastricht*, 13 PANOPTICON 540-42 (1992).

58. *Id.*

59. Since the entry into force of the Maastricht Treaty on 1 Nov. 1993, this working group is situated in Title VI of the Treaty, in the Steering Group III (Judicial Cooperation).

60. D. Flore & R. Troosters, *Maastricht in Beweging. Enkele bedenkingen na het Belgisch Voorzitterschap van de Europese Unie*, 15 PANOPTICON 311-15 (1994); A.M. Rouchaud, *Convention relative à la procédure simplifiée d'extradition entre les États Membres de l'Union Européenne*, 3 AGON 3 (1995).

Shortly thereafter, at the European Council of 29-30 October 1993 in Brussels, an extraordinary session was held to prepare the entry of the TEU into force.[61] It was stated that the policy of the EU on sensitive matters, such as JHA, should provide citizens with assurances that the creation of a judicial area without frontiers would not be achieved at the expense of their security.[62] Instead, security would be guaranteed more effectively in the future due to systematic and well-organized cooperation between the Member States.[63] The European Council asked that the JHA Council prepare an action-plan covering several aspects of the JHA for their December meeting, including talks on the strengthening of judicial cooperation, particularly in the area of extradition.[64]

As a result, the JHA Council of 29-30 November 1993 immediately set up the working structures referred to in the European Union Treaty and drew up a detailed action plan regarding judicial cooperation in criminal matters. This plan stressed the need to give special attention to the task of improving existing extradition arrangements.[65] The plan was a consolidation of the former Limelette Declaration and aimed at giving expression to the Member States' common desire to relax the conditions and political grounds for refusing extradition.[66] This was approved by the European Council of 10-11 December 1993.[67]

This plan has served as a key for negotiations and decision making on extradition under the "Third Pillar."[68] It reflects the commitment of the Member States to improve judicial cooperation in the struggle against crime, in the areas of judicial proceedings, and the execution of sentences.[69] Improving the existing extradition practice between the Member States was therefore considered a high priority.[70]

According to the plan, methods to relax the conditions for extradition and to make extradition procedures more efficient

---

61. Rouchard, *supra* note 60, at 3-4.
62. *Bulletin of the European Communities*, 10 (1993), point I.5, at 9; *see also* Council of the European Union, 10655/93 JAI 11, 2 Dec. 1993, 14.
63. *Id.*
64. *Id.*
65. *Bulletin of the European Communities,* 11 (1993), point 1.5.1, at 93; *see also* Council of the European Union, 10655/93 JAI 11, 2 December 1993, at 1, 14.
66. Council of the European Union, 10655/93 JAI 11, 2 Dec. 1993, 14.
67. *Id.*
68. *Bulletin of the European Communities*, 11 (1993), point 1.5.1, at 93.
69. *Id.*
70. *Id.*

needed to be examined.[71] However, these methods would not be examined unless the European Convention on the Protection of Human Rights and Fundamental Freedoms and the national laws of the Member States were observed.[72] Basic conditions and grounds for refusal of extradition were subject to thorough examination. Reservations made by the Member States at the time of the ratification of the 1957 ECE had to be taken into account for the plan to work.[73] Any relaxation of the conditions of extradition had to consider issues such as the imprisonment threshold and extraditable offences in general, also including the political offence exception, tax offences, lapse of time, extradition of nationals, and the speciality rule.[74]

When examining extradition procedures with a view towards making them more efficient, the JHA Council recommended that a number of measures be considered. Those measures included simplification of judicial control on the admissibility of extradition, simplification of political (governmental) intervention in the extradition decision, and simplification of procedures where the person concerned consents to his extradition.[75]

At the JHA Council of 23 March 1994, there was consensus between the Member States on a number of provisions.[76] Agreement was reached on the acceptance of a minimum threshold imprisonment of at least one year in the requesting state and at least six months in the requested state, on the extradition for fiscal offences concerning excise, value added tax and customs duties, and on the abolition of the speciality rule, especially when the person concerned consents to extradition.[77] However, on the issue of abolishing the political exception and the extradition of nationals, there was disagreement. A majority of the delegations argued that a political debate should be held on these subjects.[78]

Later, during discussions on the issue of "simplified extradition" at the JHA Council of 30 November and 1 December

---

71. *Bulletin of the European Communities*, 11 (1993), point 1.5.9, at 95; *see also* Council of the European Union, 10655/93 JAI 11, 2 Dec. 1993, 14.
72. Council of the European Union, 10655/93 JAI 11, 2 Dec. 1993, 14.
73. *Id.*
74. *Id.*
75. *Id.*
76. Council of the European Union, 5366/94, 7 Mar. 1994, JUSTPEN 13, 2-3.
77. *Id.*
78. Council of the European Union, 5366/94, 7 Mar. 1994, JUSTPEN 13, 2-3; Tweede Kamer (the Netherlands), 1993-1994, 23 490, n.9, at 4.

1994,[79] it became clear that all delegations could agree on a text on simplified procedure. Because of this consensus, it seemed expedient to write any provisions on simplified extradition in a separate convention.[80] Further, as negotiations on a general treaty on the improvement of extradition between the Member States were expected to take some time, the delegations to the JHA Council wanted to make sure that at least a text would be adopted on the subject of simplified extradition. On 10 March 1995, the JHA Council finally drew up the Convention on Simplified Extradition Procedure Between the Member States of the European Union. The Convention was signed by the EU Member States on the same day.[81]

Discussions on other extradition procedures were continued, with the goal of drawing up a separate and general Convention on Improvement of Extradition between the Member States.[82] On 23 November 1995, the Council adopted conclusions by examining and recognizing the progress gained by adopting such a Convention and by consolidating existing agreements with regard to extraditable offences and tax offences.[83] They also created guidelines for the further examination of issues such as the exclusion of the political nature of offences as grounds for refusing extradition and the relaxing of the double criminality rule.[84]

In the Spring of 1996, a fragile compromise on the relaxation of the double criminality rule[85] and the political offence exception seemed possible.[86] On 27 September 1996, an agreement was reached on the Convention Relating to Extradition between the Member States of the European Union.[87]

2. The Convention on Simplified Procedure.—The Convention on Simplified Procedure Between the Member States of the

79. Tweede Kamer (the Netherlands), 1994-1995, 23 490, nr. 20, at 5.
80. *Id.*
81. *See also General Report EU*, 1995, 385 and Council of the European Union, 11795/95, 17 Nov. 1995, JUSTPEN 159, 1-2. In the meantime, Denmark ratified the Convention on 19 Nov. 1996; it was the first Member State to do so.
82. *Id.*
83. *Id.*
84. *Id.*
85. Council of the European Union, 5288/96, JUSTPEN 26.
86. Staten-generaal (the Netherlands), 1995-1996, 23 490, nrs. 90e en 43, 2; Council of the European Union, 5288/96, JUSTPEN 26.
87. Tweede Kamer (The Netherlands), 1994-1995, 23 490, nr. 20, at 5.

European Union (Convention on Simplified Extradition),[88] drawn up on the basis of Article K.3.2(c) TEU and signed on 10 March 1995, was the first Convention to be adopted under Title VI of the Union Treaty.[89] It clearly follows the aforementioned Limelette statement on extradition adopted by the November 1993 JHA Council.[90]

During talks on the Convention on Simplified Extradition, it was stated that, in addition to the simplification and modernization of the communication of extradition requests and documents, a relaxation of judicial control could also improve the extradition procedure in general.[91] Most of the delegations considered a complete abolition of judicial control as unfeasible, but were willing to accept the possibility of direct extradition between the competent authorities for prosecution or execution. However, the person claimed had to give consent to an independent authority who controlled the extradition conditions.[92] This measure would not only simplify the procedure but would also meet the interests of the person claimed. Statistics indicate that in more than thirty percent of the cases, the person concerned consents to his extradition.[93]

In spite of this consent, the procedure can still last several months.[94] The procedure is automatically stayed unless the person claimed has been surrendered to the authorities of the requesting state.[95] If this delay is the result of due process problems, the delay is acceptable. However, if the person concerned consents, such long delays are not justifiable.[96] Thus, it is clear that in case of consent, a simplified procedure reducing extradition formalities would accelerate the extradition procedure without jeopardizing the legal position of the person concerned.[97]

---

88. Van Den Wyngaert, *supra* note 33, at 81, as well as: Explanatory Report, Council of the European Union, 6711/1/95, 31 July 1995, JUSTPEN 60; *Bulletin of the European Union*, 3 (1995), at 85; X., *Internationaal strafrecht*, 25 DD 901-03 (1995); Errera, *supra* note 28, at 334-35.

89. Council of the European Union, 6711/1/95, 31 July 1995, JUSTPEN 60.

90. *See supra* note 61.

91. Council of the European Union, 7456/94, 14 June 1994, JUSTPEN 41, 9-10.

92. *Id.*

93. These figures have been given by the Member States and relate to the total amount of EU extraditions and the average duration of the inter-state procedures. In 1992 there have been approximately 700 EU extraditions.

94. Council of the European Union, 6711/1/95, 31 July 1995, JUSTPEN 60, 3; *see also* Rouchaud, *supra* note 60, at 3.

95. Council of the European Union, 6711/1/95, 31 July 1995, JUSTPEN 60, 3.

96. Rouchard, *supra* note 60, at 3-4.

97. G. VERMEULEN, ET AL., INTERNATIONALE SAMENWERKING IN STRAFZAKEN EN RECHTSBESCHERMING 226-27 (1995).

The ECE does not contain a provision allowing simplified procedure with consent. However, the Committee of Ministers of the Council of Europe stressed the value of such a provision.[98] In Recommendation R (80)7,[99] the Committee urges the Member States' governments to implement such a provision "with a view to expediting extradition and keeping the period of provisional arrest as short as possible, . . . [using] a summary procedure enabling the rapid surrender of the person sought without following ordinary extradition procedures, provided that the person concerned consents to it."[100]

Indeed, Article 66 of the SC already introduced an "informal" extradition procedure with the consent of the person concerned as a supplement to the ECE.[101] Moreover, the Benelux countries had Article 19 of the BET, which provided an analogous procedure.[102] In the European judicial area negotiations, the matter has been discussed between the Member States (Article 10 of the above-mentioned 1980 draft Convention on the cooperation in criminal matters).[103] The fact that the subject has been reintroduced after the TEU is a positive evolution.[104]

3. The Convention on Simplified Extradition and the Procedures on Simplified Extradition in the Schengen Convention, and the Benelux Extradition Treaty.—Under the simplified extradition procedure as provided for in the Simplified Extradition Convention of 10 March 1995, Member States are to surrender to one another those persons sought for the purpose of extradition, as long as these persons give consent and the requested state agrees.[105] The consent of the arrested or wanted person must be given under circumstances which afford him or her sufficient legal guarantees. The agreement of the competent authority of the requested state must also be given in accordance with its national procedures.[106]

---

98. *Id.*
99. Recommendation R(80)7 concerning the practical application of the European Convention on extradition, adopted by the Committee of Ministers on 27 June 1980.
100. *Id.*
101. *See supra* note 14 and 15 and accompanying text.
102. *See supra* note 23.
103. Van Den Wyngaert, *supra* note 45, at 1206.
104. *See supra* note 12.
105. *See supra* note 81, at Art. 2.
106. *Id.* at Art. 5.

The Convention on Simplified Extradition Procedure of March 1995[107] focuses on those situations in which the provisional arrest of the requested person is asked for or a report is made in the Schengen Information System in accordance with Article 95 of the SC.[108] First, the arrested person consents within 10 days after his provisional arrest.[109] The requested state shall then immediately notify the requesting state of the consent of the claimed person.[110] If no consent is given within this 10-day period, the requesting state shall submit a request for extradition according to the normal procedure.[111] Taking into account the delays of Article 16.4 of the ECE, the requesting state then has a minimum of eight and a maximum of 30 days[112] in which to produce an official extradition request.[113] The person concerned may, however, give his consent after this first 10-day period, as long as no official request for extradition has been received. If the requested state agrees, the person concerned can give his consent even after receipt of the request for extradition.[114] Next to this, Member States may use the simplified procedure when there has been no request for provisional arrest and when the person claimed consents after receipt of the official extradition request.[115]

In any case, within 20 days after the person claimed has given his consent, the decision pursuant to the simplified procedure shall be made available to the requesting state. Within 20 days after this notification, surrender shall take place, except when prevented by circumstances beyond the control of the requested state.[116] The total duration of this simplified procedure, from the date of the

---

107. *Id.* at Art(s). 3-11.

108. Explanatory Report, Council of the European Union, 6711/1/95, 31 July 1995, JUSTPEN 60, 6; *see also* Rouchaud, *supra* note 60, at 4.

109. *See supra* Explanatory Report, note 108, at 6.

110. *Id. But see contra*: Rouchaud, *supra* note 60, at 5. Rouchaud states that the consent of the person, that can be given immediately, should be notified to the requested state within 10 days.

111. *Supra* note 108.

112. *Id. But see contra*: Explanatory Report, Council of the European Union, 6711/1/95, 31 July 1995, JUSTPEN 60, 11; *see also* Rouchaud, *supra* note 60, at 5.

113. Article 16.4 ECE: "Provisional arrest may be terminated if, within a period of 18 days after arrest, the requested Party has not received the request for extradition and the documents mentioned in Article 12. It shall not, in any event, exceed 40 days from the date of such arrest." *Id.*

114. *Supra* note 108.

115. *Id.*

116. *Id.*

provisional arrest to the date of surrender, shall not exceed 50 days.[117]

When compared to the Benelux situation, it appears that chances have been missed in the Convention on Simplified Procedure of March 1995. According to Article 19 of the BET, the surrender of the person concerned must take place within five days and within 18 days after the provisional arrest.[118] Considering the current possibilities of telecommunication and transport, the EU period of 50 days seems extremely long. It appears as though the simplified procedure found in the EU Convention of 10 March 1995 is aimed primarily at avoiding formal extradition procedures and at saving the judicial, ministerial, or diplomatic authorities time-consuming and complex procedures.

Addressing questions concerning the range of the consent of the arrested or claimed person is essential.[119] In all cases where the person consents, this consent implies consent with a surrender to the requesting state.[120] In some cases, however, his consent also implies a renunciation to the Speciality Rule.[121] This is the case when the requested state has declared that the rules laid down in Article 14 of the ECE on speciality do not apply: 1. when the person consents to extradition (Rule of Article 19 of the BET),[122] or 2. when the person consents to speciality extradition and

---

117. X., *Internationaal strafrecht*, 25 DD 903 (1995). According to the original Belgian proposal on the simplified procedure, surrender had to take place within 18 days after the day of the provisional arrest, and, if the surrender did not take place within 8 days, the requesting state was invited to send an extradition request according to Article 12 of the ECE. This proposal was very similar to Article 19 of the BET, where a surrender within 5 (not 8) days after the provisional arrest is provided. The other delegations could not agree. France, for example, proposed a prolongation of the surrender period to 40 days after the provisional arrest. The United Kingdom added that the starting point of the delay should not be the day of the provisional arrest, but the day of the consent of the person claimed. Finally, these proposals have been approved: surrender shall take place within 40 days (20 days for the notification of the extradition decision and 20 days for the surrender) after the consent of the person concerned, given within 10 days after his provisional arrest.

118. *See supra* note 23.

119. *Id.* at Article 9. See also Explanatory Report, Council of the European Union, 6711/1/95, 31 July 1995, JUSTPEN 60, 10.

120. *See supra* note 23, at Art. 9.

121. *Id.*

122. The consent to the informal surrender implies automatically, according to Article 19 of the BET, the non-application of the rule of speciality, so that the person concerned, after his surrender, can be prosecuted and punished for all sorts of offences. The initial Belgian proposal on the simplified procedure contained such provisions as well.

expressly renounces his entitlement to the Rule (Rule of Article 66.2).[123] Further, there are occasions when consent and renunciation of entitlement to the Speciality Rule may not be revoked under the SC.[124]

As immediate surrender often times automatically implies renunciation of entitlement to the Speciality Rule or renders the declaration irrevocable, it is essential that the arrested or claimed person has the right to legal counsel during the simplified procedure.[125] This is guaranteed by Article 19 the BET and Article 66 of the SC.[126] The Convention on Simplified Extradition[127] provides this right to legal counsel.[128] Further, this Convention on Simplified Extradition stipulates that the consent or the express renunciation of entitlement to the Speciality Rule must be established in a manner which shows that the person concerned has expressed it voluntarily and intelligently.[129] Consent and renunciation must be given before a competent judicial authority of the requested state.[130] This authority may be a judge, a court, or a prosecution officer, depending upon the declaration of the concerned Member State to the Convention.[131]

During the talks surrounding the Convention on Simplified Extradition Procedure, the simplification of political control of extradition between Member States was also discussed.[132] Most Member States did not want an extradition procedure without a governmental decision.[133] However, in cases of consent, an exception seemed acceptable.[134] The initial Belgian Draft Con-

---

123. According to Article 66.2 of the SC, the person claimed can only renounce entitlement to the speciality rule by an explicit declaration. *Id.*

124. Member States may however indicate, in a declaration, that consent and renunciation may be revoked, in accordance with the rules applicable under national law.

125. *See supra* note 119.

126. *Id.*

127. Council of the European Union, 6711/1/95, 31 July 1995, JUSTPEN 60.

128. *Id.*

129. *Id.*

130. *Id.*

131. *Id.* According to the BET, the consent should be given before a public prosecution officer. In the SC, consent is to be given before a member of the judiciary (not further described). *See Circulaire ministérielle relative á l'extradition et á l'entraide judiciaire en matière pénale entre les états parties á la convention d'application de l'accord de Schengen du 19 juin 1990*, MONITEUR BELGE, 15775, 2 June 1995.

132. Council of the European Union, 7456/94, 14 June 1994, JUSTPEN 41, 10-11.

133. *Id.*

134. *Id.*

vention on Extradition with Consent provided for a direct surrender between the judicial authorities of the Member States, without any formal governmental or ministerial decisions.[135] This "direct surrender" regulation was very similar to Article 19 of the BET, which created a summary extradition procedure between the Benelux states.[136]

According to both Article 66 of the SC and Article 10 of the Convention on Simplified Extradition, a formal intervention of competent authorities of the requested state is still necessary.[137] In the Convention on Simplified Extradition, the authority of the requesting state shall notify the authority of the requested state of its decision to use the simplified procedure.[138] This means that there is a "simplified" procedure, not an actual "summary" procedure.[139]

In the enactment of the Convention on Simplified Extradition,[140] the same principle was applied as in the European Political Cooperation Agreements between the Member States of the late 1980s.[141] In general, the Convention on Simplified Extradition shall become effective only 90 days after the date of deposit of the instrument of ratification, acceptance, or approval by the last Member State to do so. However, enactment on a bilateral basis may be anticipated because any Member State may declare that the Convention shall apply in its relations with other Member States that have made the same declaration.[142]

It is unclear which of the already existing conventions governing the relations between certain EU Member States are supplemented by the Convention on Simplified Extradition. According to Article 1, this Convention exists to supplement and facilitate the application of the 1957 ECE. The Convention does

---

135. *Id.*

136. *Id. See also supra* note 23.

137. *See* Article 5 of the Convention which also states that the competent authority of the requested state shall give its agreement in accordance with its national procedures. Council of the European Union, 6711/1/95, 31 July 1995, JUSTPEN 60, Art. 5.

138. *Id.*

139. Regarding the difference see in detail: *Circulaire ministérielle du 24 avril 1995 relative à l'extradition et à l'entraide judiciaire en matière pénale entre les états parties à la convention d'application de l'accord de Schengen du 19 juin 1990*, MONITEUR BELGE 15775, 2 June 1995. The Dutch translation of the Convention of 10 March is rather poor where it refers to a 'summary' procedure.

140. Council of the European Union, 6711/1/95, 31 July 1995, JUSTPEN 60, Art. 16.

141. *See supra* note 36.

142. This includes 90 days after the deposit of its declaration.

not modify the extradition regulation adopted in other instruments which are in force between Member States, such as the BET[143] or the SC. One reason for this limitation is that both the BET and the SC already contain a summary or simplified procedure.

Therefore, there is no reason to supplement Article 19 of the BET or Article 66 of the SC. However, it is unfortunate that only a supplement to the ECE was opted for since the Convention of 27 September 1996 supplemented the ECE, the BET, and the SC.[144] As mentioned above, the Convention on Simplified Extradition allows the simplified procedure to apply after receipt of the extradition request or even without any request for provisional arrest at all.[145] This is an important and welcome extension to the simplified procedure, which traditionally applied only in cases of provisional arrest and before the receipt of the extradition request.[146] Further, Article 19 of the BET has been supplemented with Article 66 of the SC, offering more possibilities for the Schengen countries. Consequently, the simplified procedure may be used between these countries under the same circumstances provided for in the Convention on Simplified Extradition.[147]

However, Article 66 of the SC has been formulated in a very vague way, often obstructing regular control over the course of applying the simplified procedure. The Convention on Simplified Extradition, on the contrary, contains clear rules and strict guarantees, making this Convention very attractive.[148] However, since it does not aim at supplementing the BET or the SC, the enactment of the Convention on Simplified Extradition could create an inequality between the Benelux, or even all Schengen countries, and the other Member States. Such a situation would be far from satisfactory. A general rationalization of the simplified procedure in the European Union, with a possible preservation of more favourable bilateral or multilateral regulation, would most likely have been more ideal than the Convention on Simplified Extradition.[149]

---

143. Explanatory Report, Council of the European Union, 6711/1/95, 31 July 1995, JUSTPEN 60, 5.

144. The September Convention dealt with extradition between EU Member States. *See supra* note 46 and accompanying text.

145. Council of the European Union, 6711/1/95, 31 July 1995, JUSTPEN 60.

146. *Id.*

147. *See id.*

148. *See id.*

149. Convention, 10 Mar. 1995, art. 1.2. In the case of a presumed application of the Convention between the Benelux-countries, the more favourable regime of

The goal of simplified procedures with the consent of the person claimed may be considered very positive. This is also true for the guarantees found in the Convention on Simplified Extradition and for its clear rules with regard to delays and procedures. However, the automatic or quasi-automatic renunciation of entitlement to the principle of speciality clearly represents a considerable regression.[150]

At the start of the negotiations for the Convention on Simplified Extradition, the delegations had agreed that it should be possible to renounce entitlement to the Speciality Rule, while at the same time consenting to extradition would provide that the renunciation and consent procedures would take place separately.[151] However, the Member States have currently changed their opinion on this important issue; this is unfortunate. The consent to surrender of the person concerned may not be assimilated with a spontaneous decision to go to the requesting state. The consent has no meaning other than that the person concerned renounces the formalities of a normal extradition procedure.[152] However, it certainly should not imply a complete renunciation of protection by the Speciality Rule.

Any "spontaneous" character of the renunciation of entitlement to the Speciality Rule should be examined closely. Most present-day judicial systems strictly adhere to the protection guaranteed by the Speciality Rule, even when the person concerned consents to its violation.[153] Under the Speciality Rule, only the requested state can consent to prosecution of the surrendered person for offences committed prior to his surrender other than those subject to the extradition request.[154] However, the overzealous attitude within the European Union towards a strict connection between the consent of the person concerned, a simplified and informal extradition procedure, and the renunciation of entitlement to the speciality rule, does not meet the standards aimed for in the early negotiations in the Convention on Simplified Extradition. It appears as though the current main goal is not to improve the legal position of the person concerned, but rather to

---

the simplified procedure could be preserved without any special formal political decision.

150. Errera, *supra* note 28, at 329.

151. Council No. 7456/94, 14 June 1994, 41 JUSTPEN 9-10.

152. A. ZAVRI, LE PRINCIPE DE LA SPÉCIALITÉ DE L'EXTRADITION AU REGARD DES DROITS DE L'HOMME 38-39 (1992).

153. *Id.*

154. *Id.* at 40-41.

prevent the normal preliminary control over certain basic rules such as *(ne bis in idem*, non-discrimination) and extradition conditions.

IV. General Procedural Improvement Within Extradition

Other extradition procedures, in addition to the simplified procedure, are in need of improvement. The EU Member States' delegations have discussed the admissibility of extradition requests and especially the basic conditions and grounds for refusal of extradition. Procedural aspects have been considered as well.[155] However, most of these topics have been inserted in the Convention Relating to Extradition between the EU-Member States of 27 September 1996.

A. Transmission of Extradition Requests and Supporting Documents

According to Article 12.1 of the ECE, extradition requests should be communicated through diplomatic channels; however, other means of communication may be arranged between two or more parties.[156] Indeed, the Second Additional Protocol to the ECE (Article 5), the BET (Article 11.1) and the SC (Article 65.1) state that requests for extradition, can be sent by the relevant Ministry of the requesting party to the relevant Ministry of the requested party.[157] The 1989 Agreement between the EC Member States on the Simplification and Modernization of Methods of Transmitting Extradition Requests creates the additional possibility of sending these requests by fax.[158] Direct communication between competent judicial authorities is not possible, but it has been suggested that such communication should be accepted for requests for supplementary information.[159]

The Agreement Between the Member States of the European Communities on the Simplification and Modernization of Methods of Transmitting Extradition Requests (Telefax Agreement) should

---

155. *Id.* The transmission of extradition documents and the duration of national procedures or provisional arrest have been presented.

156. *See supra* note 14.

157. *See supra* notes 14, 15, and 23.

158. The Convention of 27 Sept. 1996 Relating to Extradition Between the Member States of the European Union incorporates the text of this "Telefax Agreement." *See infra* note 160.

159. Council No. 7891/94, 16 June 1994, 42 JUSTPEN. Convention on Improvement of Extradition, art. 11. Council No. 7753/96, 30 May 1996, JUSTPEN 77. Convention Relating to Extradition Between the Member States of the European Union, 27 Sept. 1996, art. 14.

be mentioned when discussing extradition.[160] According to the Telefax Agreement, each Member State shall designate a central authority in some way overseeing the transmission and reception of extradition requests and the necessary supporting documents, as well as any other official correspondence relating to extradition requests.[161] The Member States that ratified the Agreement designated that their respective Ministry of Justice departments be the central authority.[162] The introduction of present-day transmission techniques is critical in the domain of judicial cooperation in criminal matters: extradition requests and the accompanying documents need to be sent by fax.[163] Therefore, the central authorities must be equipped with a fax machine that must be equipped with a cryptographic device.[164] Further, in order to ensure the authenticity and confidentiality of transmissions, this device should be in operation only when the equipment is being used for the Agreement's purposes.[165] To guarantee the authenticity of extradition documents, the central authority of the requesting Member State must declare in its request that it certifies the faxed documents and shall describe the pagination.[166] Whenever authenticity is disputed, the production of original documents within a reasonable time period through traditional channels may be required.[167]

It is remarkable that the above-mentioned 1989 Agreement contains no provisions on the communication of requests for provisional arrest.[168] Since these requests can be communicated directly to the competent judicial authorities, communication by fax should be possible.[169]

---

160. As was already mentioned, this agreement was signed at Donostia - San Sebastian on 26 May 1989. The text has been published in *Tractatenblad van het Koninkrijk der Nederlanden*, 1990, No. 97, 6. *See also* de Gouttes, *supra* note 33, at 12; R. Koering-Joulin, *L'entraide judiciaire répressive au sein de l'Union Européenne*, *in* QUELLE POLITIQUE PÉNALE POUR L'EUROPE? 182-83 (M. Delmas-Marty, ed., 1993).

161. *Tractatenblad, supra* note 160.

162. *Id.*

163. *Id.*

164. *Id.*

165. *Id.*

166. *Id.*

167. *Tractatenblad, supra* note 160.

168. The "European judicial area" draft Treaty between the Member States of the European Communities on the cooperation in criminal matters, contains a contrary provision on the subject. *See* art. 8(3). *See* Van Den Wyngaert, *supra* note 45, at 1206.

169. VERMEULEN ET. AL., *supra* note 97, at 223 n.436.

The Telefax Agreement has also found its way into the new European Union instruments. The Convention relating to extradition of 27 September 1996 repeats verbatim the text of the Agreement.[170]

B. The Time Period of Extradition Procedures

Although the formal process of an extradition request is not too complicated, extradition procedures themselves are often lengthy. Therefore, some delegations have proposed measures that would reduce the length of extradition procedures.[171] However, a consensus on a maximum length has not been found.[172]

C. Duration of Provisional Arrest

Article 16.4 of the ECE states that provisional arrest may be terminated if, within a period of 18 days after arrest, the requested party has not received the request for extradition and the necessary documents.[173] In any event, the arrest cannot exceed 40 days.[174] Within the EU, there have been two different proposals on the matter. The first proposal eliminates the first 18-day period and provides a 40-day period that ends when the request and the documents arrive in the requested State.[175] This proposal is less strict than the ECE-provisions because it provides a time limit only for the arrival of the request.[176] The proposal therefore makes it possible that the total duration of the provisional arrest will exceed 40 days.[177] The second proposal is even less protective for the person concerned because it only states that the detention 'can' be terminated after 40 days.[178] Finally, there were no provisions on this subject inserted in the Convention Relating to Extradition of 27 September 1996.[179]

---

170. *See supra* note 158.
171. The Germans submitted a proposal of six months. Council No. 7871/94, 16 June 1994, 42 JUSTPEN. Council No. 11701/94, 8 Dec. 1994, 81 JAI 76 PV/CONS. This proposal was for a period of nine months. *Id.*
172. German proposal; Council of the European Union, 7871/94, JUSTPEN 42, 16 June 1994. Council of the European Union, 7871/94, JUSTPEN 42, 16 June 1994.
173. *See supra* note 14.
174. *Id.*
175. Council No. 7871/94, 16 June 1994, JUSTPEN 42, 13.
176. *Id.*
177. *Id.*
178. Council No. 8489/95, 26 June 1995, 97 JUSTPEN.
179. *See id.*

D. The Enactment Relationship With Other Conventions

The enactment of the Convention Relating to Extradition of 27 September 1996 is governed by an analogous principle to that applied in the Convention on Simplified Extradition.[180] This principle holds that enactment shall be 90 days after the last Member State has notified the Secretary-General of the Council of the European Union of the completion of the constitutional procedures for the adoption of the convention.[181] Nevertheless, enactment is possible in the bilateral relationship of the Member States that have declared that the Convention shall apply to its relations with Member States that have made the same declarations.[182]

The Convention on Simplified Extradition aims at facilitating the extradition procedures between the EU Member States of the ECE, by supplementing its provisions (Article 1.1).[183] The Convention of 27 September 1996 supplements the ECE, the BET, the SC, and the ECST.[184] The Convention of 27 September 1996 does not adversely affect favourable provisions in bilateral or multilateral agreements.[185] It also does not affect extradition on the basis of a uniform law providing for its execution in a Member State's territory or arrest warrants issued in the territory of another Member State.[186]

The Convention on Simplified Extradition states that it shall apply only to requests submitted after the day on which it was enacted between the requested and the requesting state (Article 16.5).[187] The Convention of 27 September 1996 contains a similar provision (Article 18.5).[188]

---

180. *Id. See also* Council of the Eurpoean Union, 6711/1/95, 31 July 1995, JUSTPEN 60.

181. Id.

182. *See* Council of the European Union, 6711/1/95, 31 July 1995, JUSTPEN 60.

183. *Id.*

184. The reference to the ECST has been subject of much discussion. It was first included in the Council 6829/95 of 2 May 1995, however, it was then left out Council 8489/95 of 26 June 1995, but it was finally included again in Council 5288/96 of 26 Feb. 1996. *See supra* note 158.

185. *See supra* note 158.

186. *Id.*

187. Council of the European Union, 6711/1/95, 31 July 1995, JUSTPEN 60, Art. 16.5.

188. In the first instance, there had been a proposal to include a provision allowing the Member States to make a declaration allowing this principal to only apply to requests with regard to Articles 1-2 ECST or to conspiracy and

E. Extraditable Offences

The extraditional threshold and the Double Criminality Rule have been debated in the negotiations within the European Union.[189]

In the requesting state and the requested state, the extraditional threshold is set at one year of imprisonment in Article 2.1 of the ECE and at six months by Article 2.1 of the BET.[190] The Convention of 27 September 1996, however, lowered the threshold in the requested state to six months (Article 2.1).[191] Initially all delegations to the Convention of 27 September 1996, were willing, in accordance with the arrangement between the Benelux countries, to uniformly lower the threshold in the requesting state to six months.[192] Finally, they chose to maintain a higher threshold of 12 months.[193] This was a good decision because allowing extradition for minor offences would not improve the relations between the EU Member States.[194]

The Double Criminality Rule has been debated frequently. Initially, to make the absence of double criminality only an optional ground for refusal[195] or to allow extradition for facts only punishable in the requesting state was considered.[196] Later, a complete abolition of the Double Criminality Rule (as far as the facts on

---

association to commit offences. *See* Council No. 7753/95, of 30 May 1996, 77 JUSTPEN 2-4. The present text is very clear and can avoid problems with regard to the applicability of treaties. G. Vermeulen & T. Vander Beken, *Uitlevering van Basken aan Spanje: juridische bedenkingen bij een politieke zaak* 9 RECENTE ARRESTEN VAN DE RAAD VAN STATE 221-27(1995). In this context the joint declaration of the Belgian and the Spanish government of 24 Sept. 1996 should be mentioned. This declaration states that both countries will ratify the Convention of 27 Sept. 1996 in the near future and will make use of the possibility of Article 18.4 of this Convention to enable the anticipated enactment of the Convention in their bilateral relationship.

189. *See generally* Flore & Troosters, *supra* note 60, at 312-13.

190. *See supra* notes 14 and 23.

191. *See supra* note 158. More fundamental proposals to drop all requirements regarding a minimum threshold in the requested state and to require only that the facts concerned are punishable there with some form of penalty or are at least subject to administrative sanctions, have not been accepted.

192. *See* Council No. 7456/94, 14 June 1994, 41 JUSTPEN 2-4.

193. *Id.*

194. For this reason the UK mainly opposed the proposal to reduce the threshold, both in the requested and the requesting state to six months. *See* Council No. 7456/94, 14 June 1994, 41 JUSTPEN 2-4.

195. Flore & Troosters, *supra* note 60, at 313.

196. *See, e.g.*, Council No. 8489/95, 26 June 1995, 97 JUSTPEN 4 (Proposal for a draft Convention on Improvement of Extradition).

which the request is based, are classifiable under the law of the requesting state as conspiracy or association to commit offences) was considered. Suggestions appeared in the early negotiations,[197] became gradually more and more important in the negotiation process, and eventually took a central place in the latest discussions on the Convention of 27 September 1996.[198] During the negotiations, it was also suggested that the Double Criminality Rule be abandoned only if, under the requesting state's laws, the facts can be classified as conspiracy or association to commit offences and are punishable with a maximum penalty of at least six months.[199] At least with regard to ECE and BET, double criminality and minimum thresholds are verified by looking at the facts themselves, without the classifications thereof in the requesting and the requested state having to correspond.[200]

The situation is very different for bilateral extradition treaties between Belgium and other non-Schengen EU Member States which also list extraditable offences. For example, the Spanish government sought extradition of a Basque couple for providing shelter and transport to members of an ETA-commando.[201] Under Spanish law, this is classified as "*association de malfaiteurs*" (association to commit offences).[202] This offence is one of those enumerated in Article 2[203] of the Belgo-Spanish Extradition Treaty of 17 June 1870.[204] According to Belgian criminal law, however, these actions cannot be regarded as an association to commit offences under the bilateral treaty because the couple was not involved in the association.[205] Although the Belgian Minister of Justice agreed to extradite, the Belgian *Conseil d'État* suspended that decision.[206] The Convention of 27 September 1996 abandoned the principle of double criminality for those offences

197. *See, e.g.*, Belgian Proposal for a Draft Convention on Improvement of Extradition, issued in mid-1994.

198. Council No. 7753/96, 30 May 1996, 77 JUSTPEN 3-5.

199. *See, e.g.*, Council No. 9142/95, 28 July 1995, 108 JUSTPEN 5.

200. *See, e.g.*, THOMAS, *supra* note 21, at 195. *See also* Council No. 10197/95, 27 Sept. 1995, 127 JUSTPEN 2 and the remarks of the Luxembourg delegation.

201. Vermeulen & Vander Beken, *supra* note 188.

202. *Id.*

203. Prior to the enactment of the SC on 26 Mar. 1995.

204. Convention pour Assurer la Répression des crimes et délits entre la Belgique et l'Espagne, Brussels, 17 June 1870, *Moniteur Belge*, 20 Aug. 1870.

205. *See* Article 324 of the Belgian Penal Code.

206. For a comment on the decision of the *Conseil d'état* and on the extradition case in general, *see* Vermeulen & Vander Beken, *supra* note 188.

classified under the law of the requesting state as conspiracy or association to commit offences.[207]

Extradition cannot be refused merely because the requesting state and requested state disagree as to whether the crime is an indictable offence.[208] However, there are exceptions. As requested by the Belgian delegation at the Convention of 27 September 1996,[209] a reservation for extradition is possible in cases of "conspiracy or association to commit offences."[210] This reservation is not absolute, since states which have entered this reservation should attempt extradition in any case in the field of terrorism as in Articles 1-2 of the ECST, drug trafficking, organized crime, or any other acts of violence against the life, physical integrity or liberty of a person, even where the accused does not take part in the actual execution of the offence or offences concerned.[211] The person who contributes to the commission of an offence must do so intentionally and with knowledge or with the intention to commit the offence or the offences concerned (Article 3.4).[212]

1. Political offences and the non-discrimination rule.—According to the BET (Article 3) and the ECE (Article 3.1) extradition shall not be granted if the offence is regarded by the requested party as a political offence or as an offence connected with a political offence.[213] The 1977 ECST enables the Council of Europe Member States to not categorize a limited number of serious, terrorism-related offences as political offences, as offences connected with political offences, or as offences inspired by political motives.[214] Title VI of the TEU or "Third Pillar" negotiations of

---

207. This provided that the conspiracy or the association is to commit offences indicated in Articles 1-2 of the ECST or any other offence punishable by deprivation of liberty or a detention order of 12 months in the field of drug trafficking and other forms of organized crime or other acts of violence against life, physical integrity or liberty of a person, or creating a collective danger for persons (Article 3). *Id.*

208. However this issue had been disputed during the negotiations. Initially only Belgium, the Netherlands, Spain, and Italy were in favour of a strict prohibition. *See* Council No. 10290/95, 5 Oct. 1995, 130 JUSTPEN 7. However, these coutries were later followed by Portugal and Germany (*see* Council No. 11267/95, 6 Nov. 1995, 148 JUSTPEN) and finally by all other Member States (*see* Council No. 4364/96, 26 Jan. 1996, 11 JUSTPEN 7).

209. Council No. 7166/96, 10 May 1996, 63 JUSTPEN 6.

210. *Supra* note 158, at Art. 3.3.

211. *Id.* at Art. 3.4.

212. *Id.*

213. *See supra* notes 14 and 23.

214. *See supra* note 25.

the Convention of 27 September 1996 resulted in a further limitation of the political offence exception.[215]

According to the most radical option, terrorist offences would be treated as ordinary offences.[216] This option is based on the assumption that the Member States have complete confidence in each other's legal systems, since the political offence exception would disappear completely in their mutual relations under this option.[217] However, a lack of confidence is perhaps why this option was not acceptable to all EU Member States.[218] It appeared that a compromise would be found in the withdrawal of the political offence exception if the non-discrimination rule was emphasized.[219] The non-discrimination rule (Article 2.2 of the ECE) states that extradition shall not be granted when the requested party has substantial grounds for believing that a request for extradition has been made for the purpose of prosecuting or punishing a person on account of his race, religion, nationality, or political opinion.[220] Proposals to embed this principle into the relations between the EU Member States in all the conventions discussed[221] seem rather hypocritical. After all, there is a small chance that some Member States would express doubts with regard to the quality of another Member State's legal system. The Member States have repeated on different occasions[222] their mutual trust as far as judicial procedures and human rights are concerned.[223] However, as the non-discrimination rule remains a purely inter-state rule, it offers no real guarantees to the requested person. On the other hand, if the non-discrimination rule was an additional human right, it would be very valuable because the Strasbourg Court could then decide possible violations of the

---

215. *See supra* notes 53-54 and accompanying text.
216. Council No. 6427/95, 6 Apr. 1995, 51 JUSTPEN.
217. *Id.*
218. Council No. 7456/94, 14 June 1994, 41 JUSTPEN.
219. Council No. 6829/95, 2 May 1995, 66 JUSTPEN. Council No. 7968/95, 12 June 1995, 86 JUSTPEN. A similar provision can be found in the draft Treaty of the European judicial Area, where the political offence exception was a only an optional ground for refusal, where the violation of the non-discrimination principle excluded extradition. *See* Van Den Wyngaert, *supra* note 45, at 1208.
220. *Supra* note 14, at Art. 2.2.
221. Finally, the Convention of 27 Sept. 1996, maintained the status-quo of ECE and ECST. *See* Convention, 27 Sept. 1996, art. 5.3.
222. Council No. 8489/95, 26 June 1995, 97 JUSTPEN; Council No. 5288/96, 26 Feb. 1996, 26 JUSTPEN.
223. The confirmation of the obligations laid down in the Refugees Convention, Council No. 5288/96, 26 Feb. 1996, 26 JUSTPEN is to be seen in the same context.

principle.[224] However, this idea was never an issue in the discussions between the EU Member States. There seemed to be strong pressure to give priority to requirements of efficiency and cooperation.[225]

2. *Fiscal offences.*—Extradition for fiscal offences remains controversial, even in the European Union. The traditional point of view can be found in the BET and the ECE. Both treaties state that extradition for offences in connection with taxes, duties, and customs shall not be granted unless the contracting parties have so decided.[226] Since only a few states have decided to extradite, fiscal immunity is the norm.[227] Between the Schengen countries, however, the approach to fiscal offences is more strict. Article 63 of the SC states that extradition shall be granted for a limited list of fiscal offences such as violations with respect to excise duty, value added tax, and custom duties. For direct tax offences, extradition can still be denied between the Schengen countries.[228]

Article 2 of the Second Additional Protocol to the ECE[229] abolishes the fiscal offence exception by replacing Article 5 of the ECE. Article 2 states that extradition shall take place for any offence in connection with taxes, duties, and exchange if the offence under the law of the requested party corresponds to an offence of the same nature.[230]

Although abolishing the fiscal offence exception had been an objective in EU extradition discussions, it has turned out to be an unrealistic goal. For Luxembourg, such far-reaching provisions on

---

224. Van Den Wyngaert, *supra* note 44, at 2690-92. G. Mols, *Over de (on)wenselijkheid van de depolitisering van politieke delicten*, INTERNATIONALISERING VAN HET STRAFRECHT 150 (1986).

225. In this respect the so-called La Gomera Declaration of 23 Nov. 1995 should be mentioned. Recalling the JHA Ministers informal meeting held in La Gomera, Spain, on 14 Oct. 1995, the Council declared that, in order to prevent and combat terrorist activity, there must be a thorough coordination between Member States. This was to be accomplished by improving the mechanism of police and judicial co-operation through handing-over to the judicial authorities of those responsible for terrorist acts, having them stand trial and serve any sentences imposed, and by extradition, in accordance with the provisions of international treaties. *Bulletin of the European Communities*, 11 (1995), at 99; 23 490 Staten-Generaal 1995-1996, at n.90, 37.

226. *See supra* note 14 and 23.

227. *Supra* note 15.

228. *Id.*

229. *See supra* note 15 for the chart of ratifications.

230. *Id.*

tax offences were unacceptable.[231] A compromise has been found by combining the Schengen *acquis* (no extradition for excise duty, value added tax, and customs duties) and the Second Additional Protocol provisions (no extradition exception for fiscal offences at all). The Convention of 27 September 1996 (Article 6) states that extradition is possible for any fiscal offence, unless a Member State declares that extradition is limited to offences concerning excise duty, value added tax, and custom duties.[232]

3. Nationals.—In Europe, except the United Kingdom, it is a tradition not to extradite nationals. Article 6.1 of the ECE gives the contracting parties the right to refuse extradition of their nationals; Article 5 of the BET totally excludes extradition of nationals. In an "integrating" modern Europe, however, the arguments for an extradition refusal on that basis become vacuous.[233] All EU Member States appear willing to examine the possibilities for the extradition of nationals within the Union.[234] One possible solution[235] might be the replacement of the BET and the ECE-provisions by an Article in the Convention of 27 September 1996, stipulating that extradition of nationals would not be refused if the requesting state is seeking prosecution for execution. Nevertheless, states would retain the right to refuse the extradition of nationals, provided they submit the case to their competent authorities, so that proper proceedings may be pursued.[236] Article 68 of the SC offers a legal basis to apply the Council of Europe's Transfer of Sentenced Persons Convention without consent of the person on whom the sentence or the detention order has been imposed, in cases where this person has avoided the execution of that sentence or order by escaping to his own country.[237] This may be done without the consent of the person on whom the sentence or detention order has been imposed if this person escaped to his own country.[238]

Finally, the Convention of 26 September 1996 between the EU Member States provides for a total abolition of the ability to refuse

231. Council No. 6459/94, 27 Apr. 1994, 28 JUSTPEN; Council No. 7456/94, 14 June 1994, 41 JUSTPEN.
232. *Supra* note 158.
233. Errera, *supra* note 28, at 330; Flore & Troosters, *supra* note 60, at 314.
234. Tweede Kamer (the Netherlands), 1993-1994, 23 490, n.9, at 4.
235. For other proposals, *see* Council No. 7456/94, 14 June 1994, 41 JUSTPEN.
236. Council No. 7871/94, 16 June 1994, 42 JUSTPEN.
237. *Supra* note 15.
238. *Id.*

nationals. Nevertheless, Member States may declare to refuse such extraditions or only to grant them on special grounds.[239] These declarations should only be temporary and should be abolished in the long run.

It is noteworthy that there is no connection between the discussions on extradition and those on other criminal justice matters in the European Union. Neither the Convention on the Protection of the European Communities' Financial Interests of 26 July 1995,[240] nor its Protocol,[241] nor the draft Convention on the Struggle Against Corruption[242] deal with the problem of refusal of extradition of nationals. The only shared issue concerning nationals is the obligation to take the necessary measures to establish jurisdiction over the offence if nationals are not extradited.

4. Lapse of time and amnesty.—In an ideal extradition system, extradition may only be refused when the person claimed has become immune from prosecution or punishment due to lapse of time, under the law of the requesting state. This ideal system has not yet been realized in the European Union. According to Article 10 of the ECE and Article 9 of the BET, immunity due to lapse of time in the requested, as well as in the requesting state, can give rise to a refusal of extradition.[243] Between the Schengen countries, a further step has been taken in view of the interruption of the lapse of time. It is stated in the SL that, as far as such interruption is concerned, only the provisions of the requesting contracting Party shall apply.[244]

---

239. A possible condition is the guarantee that sentences will be carried out in the requested state. *See* Council No. 6829/95, 2 May 1995, 66 JUSTPEN; Council No. 7968/95, 12 June 1995, 86 JUSTPEN. Another proposal provides that a refusal only should be possible when the requested state has jurisdiction over the offence. *See* Council No. 10121/95, 27 Sept. 1995, 126 JUSTPEN.

240. OFFICIAL JOURNAL OF THE EUROPEAN COMMUNITIES, C 316/49, 27 Nov. 1995.

241. *Protocol drawn up on the basis of Article K.3 of the Treaty on European Union to the Convention on the Protection of the European Communities Financial Interests*, OFFICIAL JOURNAL OF THE EUROPEAN COMMUNITIES, C 313/1, 23 Oct. 1996.

242. Council No. 6185/96, 28 Mar. 1996, 42 JUSTPEN.

243. The text of both treaties is not identical. Where the ECE mentions both requesting and requested state, the BET only deals with the requested state. However, the result is the same because an immunity, due to lapse of time, in the requested state makes extradition impossible since extradition could only be asked for when prosecution or punishment in the requesting state is possible.

244. *Supra* note 15, at Art. 62.1.

Under the Convention of 27 September 1996, the EU Member States agreed that, within certain limits, the law of the requesting state is considered when deciding whether immunity should be implemented due to a lapse of time.[245] The proposal, however, to completely replace the ECE and the BET provisions with this provision proved to be too ambitious.[246] The Convention states that the law of the requesting state is to only be considered to decide immunity due to lapse of time if the requested state has jurisdiction under its own criminal law to prosecute or punish the claimed person for the offence (Article 8).[247]

A similar situation exists in the case of amnesty. In the Schengen Convention, it has been agreed that when amnesty has been granted in the requested state, extradition shall only be refused if that state has jurisdiction under its own criminal law.[248]

5. Speciality.—During the early negotiations, the majority of the delegations to every Convention were committed to not renouncing entitlement to the Speciality Rule. Only when the person concerned expressly renounced his entitlement to this rule in circumstances offering him sufficient due process guarantees, the Speciality Rule could be overruled.[249]

The contrast between this general commitment on the Speciality Rule and a later proposal issued by the German delegation[250] was striking. The introduction of a legal fiction was proposed: the consent of the requested state to disregard the Speciality Rule was considered to be granted, except for general or particular reservations made by the state concerned.[251] Further, with regard to re-extradition to a third Member State, it was even suggested to no longer require the consent of the initially requested state, despite Article 15 of the ECE and Article 14.1 of the BET.[252] The claimed person would then be surrendered in any

245. *Supra* note 158.
246. *See, e.g.*, Council No. 7891/94, 16 June 1994, 42 JUSTPEN (German proposal).
247. *Id.* This point of view is not new.
248. *Supra* note 15 at Art. 62.2 and Art. 9.
249. Council No. 7456/94, 14 June 1994, 41 JUSTPEN 5.
250. Council No. 7871/94, 16 June 1994, 42 JUSTPEN 10-11.
251. *Id.* at 16.
252. *Id.*

case,[253] since the requested state would not be allowed to express reservations.[254]

As for re-extradition, it appeared to be preferable that the tenor of the Convention on Simplified Extradition would be repeated.[255] In light of consent from the state having granted the initial extradition, re-extradition could be dropped whenever the surrendered person had renounced entitlement to the Speciality Rule[256] or agreed to be re-extradited.[257] The Convention of 27 September 1996, however, represents a small step backwards. In principle, Article 15 of the ECE and Article 14.1 of the BET no longer apply to relations between the EU Member States, provided that they accept the provision that the person concerned has to renounce entitlement to Speciality or consents to re-extradition (Article 12), or not to accept it at all.[258]

As for the Speciality Rule, the Member States are allowed to declare that the consent required by Articles 14.1(a) of the ECE or 13.1(a) of the BET is automatically considered to be granted.[259] The principle of Speciality would no longer apply to a certain number of cases.[260] The consent of the requested state may be relinquished for offences where no provisional arrest or equivalent measure of restraint are allowed, or where the offence does not give rise to deprivation of liberty, or any other restriction of physical personal freedom.[261] In cases of express renunciation by the surrendered person of his entitlement to the Speciality Rule,

---

253. Certain versions of the draft Convention took over this proposal. *See, e.g.*, Council No. 10290/95, 5 Oct. 1995, 130 JUSTPEN 16.

254. *Id.*

255. This has been suggested by the French delegation. *See* Council No. 10290/95, 5 Oct. 1995, 130 JUSTPEN 16.

256. Council of the European Union, 6711/1/95, 31 July 1995, JUSTPEN 60, at art. 13.

257. *Id.*

258. This interpretation of Article 12 of the Convention Relating to Extradition is the only one compatible with the Convention of 10 Mar. 1995 on Simplified Extradition Procedure.

259. Previously, it had only been suggested to allow the Member States to add supplementary cases, for which the required consent of the requested state would automatically be considered already mentioned in the draft Convention. *See* Council No. 10290/95, 5 Oct. 1995, 130 JUSTPEN 7. It was not until afterward that the idea to insert a provision which a general scope was raised.

260. Minimum-option Article 10.

261. *See, e.g.*, Council No. 6427/95, 6 Apr. 1995, 51 JUSTPEN 4-5, (the Italian proposal); Council No. 6829/95, 2 May 1995, 66 JUSTPEN 9 (the results of the working group on extradition of 26-28 Apr. 1995); Council No. 8489/95, 26 June 1995, 97 JUSTPEN 10 (the proposal for a draft Convention, issued by the future Spanish Presidency at the end of the French Presidency).

the consent of the requested state may also be relinquished.[262] Thus, the person concerned could not be harmed except by the physical restraint of his personal freedom.[263]

Extradition is said to be an instrument for inter-state cooperation. It allows punitive imprisonment of the claimed person during prosecution, provisional arrest, or following conviction. Consequently, the Speciality Rule aims to protect the surrendered person against prosecution or punishment for offences committed prior to his surrender (other than those for which he was extradited). However, the surrendered person is only protected from physical restraint.[264]

Many dispute that the Speciality Rule only applies to offences that restrict a person's physical personal freedom or to minor offences.[265] As non-privative penalties, such as monetary sanctions or deprivation of certain rights, become increasingly important in today's criminal law systems, the settlement in the Convention of 27 September 1996 may erode the principle of Speciality.[266] It is a fiction to pretend that only physical deprivation of liberty could restrain a person's individual freedom.

Moreover, the starting point is not pursued consistently: if necessary, non-privative penalties, including monetary sanctions, can be substituted by imprisonment (Article 10.1.c).[267]

Every attempt to modify the Speciality Rule implies that for certain offences committed by the claimed person prior to his surrender and for which, following his surrender, he could be prosecuted or punished, the normal judicial and political control of the requested state is relinquished. In democratic constitutional systems, however, it is essential to preserve the right to examine whether certain extradition conditions are met or whether certain basic rules (*ne bis in idem*,[268] non-discrimination) are observed.[269]

---

262. This was suggested during negotiations by the Dutch, *see* Council No. 6426/95, 6 Apr. 1995, 50 JUSTPEN 3, and the Italian delegations, *see* Council No. 6427/95, 6 Apr. 1995, 51 JUSTPEN 4-5.

263. *Id.*

264. Council No. 6427/95, 6 Apr. 1995, 51 JUSTPEN 4.

265. ZAVRI, *supra* note 152, at 34-35.

266. *See also* Council No. 10197/95, 27 Sept. 1995, 127 JUSTPEN 3 (remarks made by the Luxembourg delegation).

267. Initially, a proposal had been issued by the German and Dutch delegations. Council No. 9142/95, 28 July 1995, 108 JUSTPEN 6). Further, it was announced that the Explanatory Report to the Convention Relating to Extradition would clarify which situations are envisioned here. *See* Council No. 11795/95, 17 Nov. 1995, 159 JUSTPEN 25.

268. ZAVRI, *supra* note 152, 100-01.

Supplemental extradition may be requested for offences already known to the competent prosecuting authorities of the requesting state at the time extradition is requested. As indicated, the Convention of 27 September 1996 extends the system of supplemental extradition to monetary sanctions (Article 2.3).[270] Therefore, the current erosion of the Speciality Rule seems even less justified.

6. Inter-state conflicts: Convention on Improvement of Extradition.—In the middle of 1995, the Spanish Presidency asked the Council to take note of differences that might arise between Member States regarding the application of the Convention on the Improvement of Extradition.[271] It was also proposed that the Member States stipulate that the Court of Justice of the European Communities is deemed competent to deal with prejudicial questions of interpretation or to decide the differences if the Council could not settle the dispute within six months.[272]

The impetus to deal with this issue in the Convention itself was abandoned because of the repeated objections from the United Kingdom during the Europol-Convention negotiations.[273] This issue will most likely appear in future negotiations.[274]

---

269. Luxembourg finds it unacceptable that the Speciality Rule would be generally abolished for offences that do lead to a deprivation of liberty or any other restriction of personal freedom. The implication of this could be that extradition is granted for a value added tax offence and that after surrender of the person concerned, the person is prosecuted or punished for a fiscal offence not connected with an excise duty, a value added tax or custom duties and is also subjected to a monetary penalty. *See, e.g.*, Council No. 4364/96, 26 Jan. 1996, 11 JUSTPEN 14. In later versions of the draft, Luxembourg concerns have been taken into account. *See, e.g.*, Council No. 8724/1/96, 17 July 1996, REV 1 99 JUSTPEN. Finally, Article 10.4 of the Convention of 27 Sept. 1996 Relating to Extradition provides for an "opt-out" possibility with relation to fiscal offences not connected with excise duty, value added tax, or custom duties.

270. *Supra* note 158.

271. Council No. 8489/95, 26 June 1995, 97 JUSTPEN 15.

272. *Id.*

273. OFFICIAL JOURNAL OF THE EUROPEAN COMMUNITIES, C 316/01, 27 Nov. 1995. In contrast with earlier draft versions, and as a result of the repeated veto of the United Kingdom against a possible role of the Court of Justice with regard to dispute settling, the present Article 40 of the Convention does not contain any provision about this. *Id.*

274. Council No. 7166/96, 10 May 1996, 63 JUSTPEN 1-2. According to the Council declaration on the follow up to the Convention, attached to the Convention of 27 Sept. 1996, the Council will consider, one year after the enactment of the Convention, whether jurisdiction should be given to the Court of Justice of the European Communities.

In addition, there also was a Belgian proposal to insert an Article in the Convention Relating to Extradition. This Article would provide for no unilateral suspension of the cooperation between Member States.[275] This would have a positive impact on the application of Articles 60, 65 and the Vienna Treaty on the Law of Treaties of 13 May 1969. Since this proposal was criticized by the other delegations,[276] Belgium proposed, as a compromise, to adopt a common declaration to the new Convention on that subject.[277] Ultimately, the Convention of 27 September 1996 contains no provision on the matter. However, the question will be revisited in discussions on the competence of the Court of Justice with regard to prejudicial questions of interpretation or inter-state conflicts.

V. Conclusion

While many issues were discussed during the course of the extradition negotiations following the enactment of the TEU, fairly satisfactory agreements were reached on simplified extradition procedure, the extraditional threshold, extradition for tax offences, extradition of nationals, lapse of time, and amnesty.

On fundamental points, however, the outcome of the negotiations seems rather negative. The Convention on Simplified Extradition Procedure does not supplement the BET or the SC. The Speciality Rule, both in the simplified extradition procedure and in general, is being eroded, the Double Criminality Rule is abolished in cases of conspiracy or association to commit offences. The non-discrimination rule remains a purely inter-state rule and therefore is of very little value to the subject concerned. Lastly, an agreement on clear rules regarding dispute settlement could not be reached.

In the field of extradition between the EU Member States, legal protection is increasingly dominated by law enforcement requirements and political considerations.

---

275. It appears that this Belgian demand was a result of the lasting conflict with Spain about the extradition of the Basque couple. After the suspension of the extradition decision by the Belgian *Conseil d'Etat*, Spain expressed its intention to suspend unilaterally suspend the application of Chapters II and IV of Title III of the SC in its bilateral relation with Belgium. This is in conflict with all international obligations.

276. Council No. 7166/96, 10 May 1996, 63 JUSTPEN 2; Council No. 7753/96, 30 May 1996, 77 JUSTPEN 8.

277. *Id.*