Extradition – Recent Developments in European Criminal Law

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A. The Legal Basis

I. Introduction

The arrest in the territory of a certain state (e.g. Greece) of a person prosecuted is effected by a reasoned arrest warrant issued by a judge or a court (Article 6, paragraph 1 of the Greek Constitution) which can be executed in the whole territory of the state in which it has been issued (e.g. in Greece: Article 277, paragraph 1 Code of Penal Procedure: CPP). Likewise, the execution of a court decision imposing a penalty of deprivation of freedom is effected by the public prosecutor of the court which has issued it or of the public prosecutor of the place of domicile of the convicted person (Article 549, paragraph 1 CPP). The difference between the place of issue of a warrant of arrest or of a decision convicting a person to a custodial sentence and the place in which these documents are executed does not create a problem, provided that they are going to be executed within the territory of the Greek state.

The situation is totally different, however, when a person who must be arrested either in order to be prosecuted and tried or in order to serve the custodial penalty imposed on him is living or happens to stay in the territory of another state. Then the procedure of extradition must be followed. Extradition in the wider sense of the word means the surrender of a person prosecuted or convicted by the authorities of one state to the authorities of another state in order to be tried or to serve the penalty imposed on him.

In previous times and almost until two or three centuries ago, such a surrender was a practice which was not the rule but rather a rare exception. The reason for this was that in international relations no common conscience or solidarity existed, but rather a diffidence and 'state selfishness' reigned. When exceptionally it occurred that a fugitive suspect or criminal was surrendered from one state to another, this was considered a political act, depending on the absolute will of the sovereign. The fugitive was surrendered as if he were an object, without questioning of course whether he had any objections to being surrendered. The

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reasons of the surrender were political expediencies and the decision of the sovereign was of course not subject to any control by another organ. Whenever a surrender of criminals occurred it concerned mainly what we would call today political criminals, not criminals of the common penal law.[1]

The extradition has been formed into an institution regulated by the Law under the influence of the idea of world justice, of which first inventor and promoter has been Hugo Grotius, who worded the principle *aut dedere, aut punire*. This principle has not, however, been able to acquire the force of an international custom by which the judicial authorities of a requested state would be obliged to surrender a wanted person. The reason for this were the 'selfish' ideas of sovereignty of the monarchs of the requested states, and also the fear that such a principle could be abused. Therefore, it had been generally accepted that an obligation to extradite could be based only on a treaty. At first bilateral treaties have been stipulated between many states. Later, especially during the second half of the 20th century, also multilateral conventions were signed to that effect. The regulation of extradition by these treaties and conventions resulted in the formation of the extradition as a legal institution, regulated by norms. Previously, the extradition and surrender of a criminal was an act concerning exclusively the executive power, and depended on the absolute, arbitrary and not subject to any control, decision of the two sovereigns, the one of which was interested in receiving the criminal and the other conceded in surrendering him, in view of some advantage(s). Now, the procedure has been to a great extent 'judicialised' and has become a matter belonging to the jurisdiction of courts.

In most cases the prerequisites and the procedure of the extradition are provided in legal texts, mostly in international treaties or conventions, but also in domestic laws. Besides, the control whether these prerequisites are fulfilled, i.e. whether a requested person must be extradited or not, is entrusted to courts, but in the laws of many states, not exclusively. Even to day the extradition is an international transaction between two states. Initially, these states were the only parties to the transaction, while the requested person played simply a passive role, that of the object of that procedure. However, the recognition now that the requested person is a party to the extradition proceedings, which concern him substantially, has been an important step toward protecting him.

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[1] A case of surrender of fugitives is recorded to have occurred according to a peace treaty between the Pharao of Egypt Ramses II and the King of the Hittites Hatusilli as early as in 1280 B.C. (M. C. Bassiouni, *Extradition, The United States Model*, *in* M. C. Bassiouni (Ed.), International Criminal Law, Vol. II (1986), at 405). A characteristic example of a surrender as a an act of political expediency has been the case of the Greek poet and political visionary Rigas and 7 of his associates. They were surrendered on 10 May 1798 by the Austrian Empire to the Ottoman Empire, although: 1) their offence (incitement or propagating of a political change in the Ottoman Empire) was not a crime under Austrian law; 2) they had not been requested by the Ottoman Empire; 3) they had not the least right or opportunity to defend themselves or to object to the surrender; 4) finally, they were strangled by the Ottomans in prison, without any proceedings (L. I. Vranousis, Rigas (in Greek), (1953), at 102). (The titles of publications in Greek cited hereinbelow, are translated into English.)

Consequently, the extradition is now a formal process by which a criminal suspect or convicted person held by one government, is handed over to another government for prosecution and trial or, if that person has already been convicted, in order to serve his sentence.

The consensus in international criminal law is that a state does not have an obligation to surrender such persons to a foreign state, as one principle of sovereignty is that every state has legal authority over the people within its borders. Therefore, such absence of international obligation on the one hand, and the desire to demand such suspects or convicts from other countries on the other, has caused as compromise solutions the web of bilateral treaties at first, and multilateral conventions later, to evolve. The leading principle in such treaties, and in the relations concerning extradition in general, is the one of reciprocity.

II. The Various Sources of the Law on Extradition

As to the sources of the law on extradition, we may mention the ones concerning the European states according to the group of states of which they are members.

1) the conditions and the procedures of extradition in the Council of Europe (CoE) are included in the following main categories of norms and provisions:

First, there are various multilateral conventions, of which the most important is the European Convention on Extradition (ECE) fof 13 December 1957. Important developments in the application of it in more recent years have been the accession of the UK to it, as well as of most states of Eastern and Central Europe. Therefore, at this moment the ECE embraces almost all members of the Council of Europe (CoE). It should be noted, that the ECE has been supplemented by two additional Protocols of 1975 and 1978. Another important relevant Convention of the CoE is the European Convention for the Suppression of Terrorism of 1977.

2) Several multilateral conventions also exist, which have a more limited field of application. Such as the Nordic Union and the Benelux Extradition Convention.

3) The Conventions signed among the member states of the European Union should be mentioned. The most important ones are:

   (a) the Convention Applying the Schengen Agreement of 19 June 1990 between the member states having ratified it, which includes certain provisions (Articles 59-66), pertaining to extradition;

   (b) the Agreement of 26 May 1989 on simplification and updating of the methods of transfer of extradition requests;

   (c) the Convention on Simplified Extradition Procedure between the member states of the EU of 10 March 1995 (CSEP 1995);

   (d) the Extradition Convention of 27 September 1996 (ECEU 1996);

   (e) the Convention of 26 July 1995 on the establishment of a European Police Office (Europol).

(f) Finally, also the Framework Decision of the 13 June 2002 on the European Arrest Warrant (EAW) should be mentioned. As of 1 January 2004 it has replaced all the above Conventions. There have been some delays in several of the member states, but in the course of 2004 that aim was achieved.

(g) It should be noted, that most European states are also parties to or bound by: (i) The Statute of the International Tribunal for the Former Yugoslavia,[2] (ii) The Statute of the International Tribunal for Rwanda,[3] and (iii) The Rome Statute of the International Criminal Court.[4] These instruments include provisions on arrest warrants to be executed in all member states. The states which are parties to these instruments are many more than the EU member states, but the procedure of the arrest warrants of these international courts have some similarities to the procedures of the EAW.

4) Many European states have become party to several bilateral treaties, both between them, which initially had the purpose of filling gaps in the multilateral conventional network and are being applied accordingly, and also with third states. Of special importance among the latter ones is the Agreement between the EU and the USA on extradition of 25 June 2003 (*see infra* under IV).

5) Finally, also national legislations usually include provisions on extradition, which have mostly a subsidiary character, i.e. they are applied in the event that no international convention or treaty exists, or if the existing ones do not include provisions which could be applied in a particular case.

Furthermore, if in a particular case none of the above categories of legal norms exists or can be applied, general principles of international law and the declarations on reciprocity may apply.

In view of this network of legal sources, each European country is facing a four-tier extradition framework in its relations with the various other countries. The tiers are classified by order of effectiveness as follows:

(a) They start with tier one, i.e. a fast-track procedure for EU Member states, consisting today mainly of the EAW procedure (*infra* under III). The execution of the arrest warrants of the two ad hoc international tribunals and the ICC, although having different legal bases, belongs also to such fast track procedures.

(b) The procedures become more rigorous in tier two, which includes ECE 1957 and other Council of Europe conventions and protocols.

(c) In tier three are included the relations with countries with which a state has concluded bilateral treaties or regional conventions, including the Agreement between the European Union and the USA (EU/USEx).

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2 SC Res. 780 (1992), Arts. 29 and 55-61.

3 SC Res. 935 (1994), Art. 28 and Art. 14 of it, by which Arts. 55-61 of the Yugoslavia Tribunal Statute are applicable the Rwanda Tribunal as well.

4 Adopted by the UN Diplomatic Conference of Plenipotentiaries on 17 July 1998.

(d) Finally, tier four covers relations with countries with which no extradition arrangements exist and the national provisions, the general principles of international law and the declarations on reciprocity may apply.

An essential part of our discussion will be dedicated to the *European Arrest Warrant* and its application up to day. Also some reference to the contents of the EU-US Extradition Agreement will be made, which has not yet come into effect but is the latest development in bilateral treaties.

III. The European Arrest Warrant

1. Historical Background

During the European Council Meeting in Tampere, Finland on 15-16 October 1999 the will for a closer judicial cooperation of the member states of the EC/EU was declared. More specifically, in Conclusion No. 35 the European Council urged member states to speedily ratify the 1995 and 1996 EU Conventions on extradition. Furthermore, it considered, that the formal extradition procedure should be abolished among the member states as far as persons are concerned who are fleeing from justice after having been finally sentenced, and be replaced by a simple transfer of such persons, in compliance with Article 6 TEU, providing for the respect of human rights and fundamental freedoms. In view of these provisions the diffidence and state selfishness should be replaced by the mutual recognition of the judicial systems of the EU states as systems based on the same values. Therefore, consideration should also be given to fast track extradition procedures, without prejudice to the principle of fair trial. The European Council invited the Commission to make proposals on this matter in the light of the Schengen Implementation Agreement.

The European Commission submitted to the European Council a proposal for a framework decision "on the European arrest warrant and the surrender procedures between member states", composed of 53 articles. That proposal has been subjected to further processing and revision by the Coordinating Committee of Article 36 TEU and the final text produced after such work became the Framework Decision of the Council.

On 18 July 2002 the Framework Decision on the European Arrest Warrant (FDEAW) of 13 June 2002 and the surrender procedures between member states of the EU was published in the Official Journal of the European Communities. According to Article 34 of the Framework Decision, member states shall take the necessary measures to comply with the provisions of the Framework Decision by 31 December 2003.

2. TEU Provisions Constituting the Legal Basis of the FDEAW

The provisions of the Treaty on European Union (TEU) on the basis of which the above Framework Decision of the Council has been issued are the following:

Article 29 TEU of Title VI, providing that the Unions' objective shall be to provide citizens with a high level of safety within an area of freedom, security

and justice. As means to achieve that objective are mentioned the developing of common action among the member states in the fields of police and judicial cooperation in criminal matters. According to Article 31, common action on judicial cooperation in criminal matters shall include, among other things, the facilitating of extradition between member states. Article 34 paragraph 2 provides that the Council shall take measures and promote cooperation, using the appropriate form and procedures, as set out in that Title, contributing to the pursuit of the objectives of the EU. To that end, acting unanimously on the initiative of any member state or of the Commission, the Council may "… adopt framework decisions for the purpose of approximation of the laws and regulations of the member states, binding them as to the result to be achieved but leaving to the national authorities the choice of form and methods. These framework decisions shall not entail direct effect."

In accordance with the above provisions, member states will be bound to enact national legal provisions having the purpose to achieve the result aimed at, while choosing the form and the means to that end. Consequently, e.g. Greece, which as all the other member states was obliged to introduce relevant legislation, complied with that obligation by Law 3251/2004.

3. The Preamble

The Framework Decision on the European Arrest Warrant (FDEAW) is composed of 34 articles, 19 less than the initial proposal of the Commission. The operative provisions are preceded by a Preamble (whereas clauses) of 14 paragraphs. Among them of particular interest are the following.

Paragraph 5, whereby the objective set for the Union to become an area of freedom, security and justice has removed the need for extradition between member states, which is to be replaced by a system of surrender between judicial authorities.

Paragraph 6, which states that the FDEAW is the first concrete measure in the field of criminal law implementing the principle of mutual recognition which the European Council termed a "cornerstone of judicial cooperation."

Paragraph 7, where it is stated, *inter alia*, that in accordance with the principle of proportionality, the FDEAW does not go beyond what is necessary in order to achieve its objectives.

Paragraph 8, whereby decisions on the execution of the FDEAW must be subject to sufficient controls, which means that a judicial authority of the member state where the requested person has been arrested will have to take the decision on his or her surrender.

Paragraph 10, stressing that the mechanism of the EAW is based on a high level of confidence between member states, and that it can be suspended only in the event of a severe breach by one member state of the principles set out in Article 6 (1) of the TEU.

Of special importance is Paragraph 12, stating: firstly, that the FDEAW respects the fundamental rights and observes the principles recognized by Article 6 of TEU and reflected by the Charter of Fundamental Rights of the EU, notably

Chapter VI thereof. Secondly, that nothing in the FDEAW may be interpreted as prohibiting refusal to surrender a person for whom an EAW has been issued, when objective elements exist for believing that the EAW is issued for the purpose of prosecuting a person on account of his/her sex, race, religion, ethnic origin, nationality, political opinion or sexual orientation, or that that person's position may be prejudiced for any of these reasons (cf. ECE 1957 Art. 3, paragraph 2).

Finally, paragraph 12a should be mentioned, which states that persons should not be removed, expelled or extradited to a state where there is a serious risk that they would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment.

4. The Operative Clauses

In Article 1 the obligation of member states to execute any European arrest warrant is provided, on the basis of the principle of mutual recognition. However, it is stressed that the FDEAW shall not have the effect of modifying the obligation to respect fundamental rights and fundamental legal principles as enshrined in Article 6 of the Treaty on European Union.

In Article 2 as 'threshhold' for extraditable offences a custodial sentence or a detention order is provided a *maximum period of at least 12 months* or, where a sentence has been passed or a detention order has been made, sentences of at least four months.

In Article 2, paragraph 2, the offences are enumerated for which surrender under the EAW is mandatory. They are criminal offences punishable according to the laws of the member state issuing the EAW by a custodial sentence or a detention order for a maximum period of at least three years and as they are defined by the law of the issuing member state, shall, under the terms of the FD and without verification of the double criminality of the act, give rise to surrender pursuant to a EAW. The list comprises 32 offences and includes, inter alia, the participation in a criminal organisation, the terrorism, the unlawful seizure of aircrafts and ships, the corruption, and the sabotage.

In Article 2, paragraph 4 it is provided, that for offences other than those included in the list of paragraph 2, surrender may be subject to the (dual criminality) condition i.e. that the acts for which the EAW has been issued constitute an offence under the law of the executing member State, whatever its constituent elements are or however it is described.

In Article 3 the following three grounds for mandatory non-execution of the EAW are provided;

(a) if the offence on which the EAW is based is covered by amnesty in the executing member state;

(b) if the executing judicial authority is informed that the requested person has been finally judged by a member state in respect of the same acts, the sentence has been served or is currently being served or may no longer be executed under the law of the sentencing member state;

(c) if the person who is the subject of the EAW may not, owing to his age, be

held criminally responsible for the acts on which the EAW is based under the law of the executing state.

In Article 4 a list of grounds for optional non-execution of the EAW are provided, such as: if, the person who is the subject of the EAW is being prosecuted in the executing member state for the same act as that on which the EAW is based; where the judicial authorities of the executing member state have decided either not to prosecute for the offence on which the EAW is based or to halt proceedings, or where a final judgment has been passed upon the requested person in a member state in respect of the same acts, which prevents further proceedings; where the criminal prosecution or punishment of the requested person is statute-barred according to the law of the executing member state and the acts fall within the jurisdiction of that member state under its own criminal law; if the executing judicial authority is informed that the requested person has been finally judged by a third state in respect of the same acts provided that, where there has been a sentence, the sentence has been served or is currently being served or may no longer be executed under the law of the sentencing country; if the EAW has been issued for the purposes of execution of a custodial sentence or detention order, where the requested person is staying in, or is a national or a resident of the executing member state and that state undertakes to execute the sentence or detention order in accordance with its domestic law; where the EAW relates to offences which: (a) are regarded by the law of the executing member state as having been committed in whole or in part in the territory of the executing member state or in a place treated as such; or (b) have been committed outside the territory of the issuing member state and the law of the executing member state does not allow prosecution for the same offences when committed outside its territory.

In Article 5 certain procedural guarantees are provided to be given by the issuing member state in particular cases, such as:

- if the EAW has been issued for the purposes of executing a sentence or a detention order imposed by a decision rendered *in absentia*, surrender may be subject to the condition that the person who is the subject of the EAW will have an opportunity to apply for a retrial of the case in the issuing member state and to be present at the judgment;
- if the offence is punishable by custodial sentence for life or life-time detention order, the execution of the said arrest warrant may be subject to the condition that the issuing member state has provisions in its legal system for a review of the penalty or measure imposed, on request or at the latest after 20 years, or for the application of measures of clemency to which the person is entitled to apply for under the law or practice of the issuing member state, aiming at a non-execution of such penalty or measure;
- if a person who is the subject of a European arrest warrant for the purposes of prosecution is a national or resident of the executing member state, surrender may be subject to the condition that the person, after being heard, is returned to the executing member state in order to serve there the custodial sentence or

detention order passed against him in the issuing member state.

Under Article 11 the rights of the requested person to be informed of the contents of the EAW are provided, especially his right to be assisted by a legal counsel and by an interpreter and also of the possibility of consenting to surrender to the issuing judicial authority.

In Article 13 the procedure to be followed in the event of such consent is provided and in Article 14 the hearing of the requested person in case he/she does not consent to his/her surrender.

In Article 27 the conditions of a possible prosecution, sentencing or carrying out of a custodial sentence of the requested person for other offences committed prior to his or her surrender

In Article 31 the relation of the FDEAW to other legal instruments applicable in the field of extradition in relations between the member states are provided.

Finally, in the same article it is provided that the FDEAW replaces in such relations all relevant instruments as of 1 January 2004.

IV. The EU/US Agreement on Extradition

On 25 of June 2003 an Agreement on Extradition (EU/USEx) and another on Mutual Legal Assistance (EU/USAs) were signed in Washington, between the Greek Minister of Justice, who represented the EU during the Greek Presidency, and the General Attorney of the USA. In this way the long negotiations which took place during the Spanish, the Danish and the Greek Presidencies came to a solemn completion.[5] The Agreements will enter into force after the exchange of the necessary ratification documents.[6] It is of interest to consider now, the significance, especially of the EU/USEx, the hopes connected with its execution, as well as the relevant apprehensions and objections which have been expressed.

Right form the outset it is important to stress, that this Agreement is the first one signed between the EU, as an organisation at a level higher than the state, and a third state. Therefore it should serve as a model for similar agreements with other third states, e.g. Russia. It will also form a new framework for future relations.

Concerning the relations between the EU member states and the USA, the two Agreements will form a new framework which will determine such relations in future. Therefore, 12 EU member states have declared that, before they ratify the Agreements, certain conditions demanded by their constitutions have to be fulfilled.

The two Agreements have been the expression of solidarity by the EU member states to the USA after the terrorrist attacks of the 11 September 2001. Immediately after it the leaders of the EU states and the President of the Commission declared that they were prepared to take initiatives together with the USA to facilitate the mutual judicial cooperation between the competent authorities of the USA

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5 A. Wgontzas, Poiniki Dikaiosyni (2003), at 742 *et seq.*, where more details are included about the creation of the two Agreements.

6 Art. 22 EU/USEx; Art. 18 EU/USAs.

and of the EU member states in the field of terrorism, in accordance with the constitutional norms of these states.[7] Negotiations followed, the basic principles of which were first, the reciprocity and second, the necessary guarantees for the protection of human rights. In view of these prospects and principles we may now consider the contents of the first of the two Agreements, the EU/USEx.

As the European Parliament (EP) declared in its Recommendation to the Council of 3 June 2003[8] (hereinafter "EP Recommendation"), that the two draft Agreements, if account is taken of the concerns set out in that Recommendation, will constitute an important political step forward. In particular:

Firstly, as to the efficacy of the fight against international crime, especially the fact that these two Agreements concern two important areas, the USA and Europe, will clear the way for other agreements of a similar nature with other countries, such as Russia, and will also indirectly strengthen the implementation of the UN Convention Against Transnational Organised Crime.

Secondly, with respect to the strengthening of the European Judicial Area, since it would oblige member states, and before long also the applicant member states, to strengthen their relations and cooperation by implementing initially among themselves the European Conventions signed but not yet ratified, which serve as the basic texts for the agreements with the US. Furthermore, the requirement to respect international obligations should encourage member states once and for all to regulate data-protection standards in a less chaotic and less arbitrary way.

Thirdly, with respect to the strengthening of guarantees for the accused, since the Agreements will confirm the guarantees already laid down in the bilateral agreements between the member states and the US, while adding thereto the guarantees deriving from European legislation.[9]

B. The Main Questions

I. General Observations

The traditional problems of the law on extradition are many and complicated, because the interests and values involved in applying this institution are in many respects contradictory. First is the interest of the requesting state to obtain the surrender of a person to its authorities in order to be able to prosecute him or to execute a penalty which has already been imposed by its courts. Then, the interests of the requested state should be considered, such as the one to safeguard its sovereignty intact or not to interfere with matters concerning the requesting

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7 Declaration of the Heads of State or Government and the President of the Commission, point 4, cited verbatim by Wgontzas, *supra* note 5, at 742, fn 4.

8 P5-TA-PROV (2003) 0239, A5-0172/2003.

9 *Id.*, at 3. It should be noted, however, that the EU/USEx draft Agreement has been strongly criticized in various countries, including Greece. About particular parts of such criticism *see infra* Section B, under V., VI., and VII; *see also* D. Spinellis, *Auslieferungs- und Rechtshilfeabkommen zwischen EU und USA*, *in* J. Arnold, *et al*. (Eds.), Festschrift für Albin Eser zum 70. Geburtstag (2005), at 873 *et seq.*

or a third state, with which the requested state would not like to have any involvement. Then, there are the interests of third states, who for instance would like to request the surrender of the same person. Last, but not least, the interests of the person requested should be considered, not to be surrendered to the requesting state in violation of his fundamental rights or after being surrendered to suffer such violations.

All these sides should be considered and, to the extent to which they are conflicting with each other, compromise solutions should be sought, in which the conflicting interests are balanced in the best possible way. These thoughts have traditionally influenced and conditioned the treaties and the laws on extradition. However, due to the development of European integration, the relevant problems appear in a new light.

Some of the most important questions related to the extradition, in which recent developments in the framework of the EU or of Europe in general have occurred or are expected to occur in future, are the following: (a) for which offences is extradition permissible (which offences are extraditable); (b) the double or dual criminality question; (c) the exception to extradition[10] for political offences; (d) The exception to extradition in the event of risk of capital punishment or of torture in the requesting state (e) the extradition of nationals of the requested state; (f) the guarantees for a fair process and against a conviction in absentia; (g) the rule of speciality and (i) the question of which authority should decide to surrender or extradite a person sought.

In the following these questions are going to be considered, at first, under the usual conditions of bilateral and regional treaties and conventions. In this context also some of the provisions of the ICC will be mentioned. Then, the regulations of the European Convention on Extradition of 13 December 1957 (ECE 1957) are going to be regarded. The ECE 1957 is today the basic text to which not only subsequent amendments or new conventions are referring, but which has been used by most bilateral treaties or multilateral conventions as a model of their provisions.[11] Finally, as a basis for comparison the provisions of the two Conventions will be regarded, which have been signed in the recent years in the framework of the EU, namely the 1995 European Convention on Simplified Extradition Procedure (CSEP 1995) and the 1996 European Convention on Extradition European Union (ECEU 1996).

It should be noted that in each of these complexes of norms we may distinguish between the international obligations, the international discretionary powers and the domestic obligations of a state.

In consideration of these developments some thoughts and some conclusions will be added.

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[10] Other exceptions are the ones provided in the ECE 1957 for military offences (Art. 4), fiscal offences, (Art. 5), pending procedures for the same offences in the requested party (Art. 8); the *ne bis in idem* (Art. 9); the lapse of time (Art. 10) etc.

[11] As examples, the following two of the latest bilateral treaties of Greece are considered, namely the ones with Tunis (Greek Law 2312/1995) and with Canada (Greek Law 3008/2002), hereinafter referred to respectively as: Greece-Tunis 1995 and Greece-Canada 2002.

II. Extraditable Offences – Dual Criminality

In order to determine for which offences extradition can be granted, Article 2 ECE 1957 applies the so-called eliminative system, according to which extraditable offences are determined by the upper limit of the penalty provided for them. In Article 2 ECE 1957 this limit is fixed to at least one year, under the laws of both the requesting and the requested state. In this way the definition of the offences which are extraditable is combined with the condition of dual criminality. The eliminative system has been followed in many recent bilateral treaties.[12]

The dual criminality principle is one of the traditional principles provided for in extradition treaties. It means that an act can be a ground for extradition if it is a criminal offence pursuant to the legislation of both the requesting and of the requested state. There are several reasons to apply this principle. The one most often mentioned is that it would be inconceivable for the authorities of a state to detain a person during the extradition procedure for an act which in that state is not a criminal offence.

The requirement of dual criminality can be explained also by the need to satisfy the reciprocity in the relation of both states with respect to judicial co-operation. It could create various legal problems during the relevant procedure, such as whether it must be fulfilled *in abstracto*, i.e. it is sufficient that there is a general relevant provision in the law of the requested state or in a treaty, or *in concreto* i.e. that the act for which extradition is requested constitutes a criminal offence, punishable under the law of the requested state. More difficult special problems will arise in the case of complex offences.

At the 16th International Congress of the International Association of Penal Law (AIDP) (Budapest 1999), it has been accepted that with respect to extradition, whenever problems related to dual criminality arise, states should adopt the "transformative interpretation method", developed in Germany,[13] which means that the law of the requested state would be applicable "after analogous conversion of facts." Other lacunae should be filled by the harmonisation of the definitions of crimes for which extradition is sought.

Article 2 ECEU 1996 lowered the upper limit to six months for the law of the requested state. It considers therefore as sufficient, that the act for which extradition is requested is also a criminal offence under the law of the requested state, but it is not necessary that it is punishable by an equally high penalty. Further facilitations of the extradition between EU member states concern differences between the legislation of the requesting state and requested state in the field of security measures or the case in which some or more offences for which extradition is requested are punishable in the requested state by pecuniary penalties. Furthermore, if the extradition is requested for a criminal act, which is classified by the law of the requesting member state as a conspiracy or an association to commit offences and is punishable by a maximum prison term or

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12 *See* Art. 17 Greece-Tunis 1995; Art. 2 Greece-Canada 2002.

13 *See* § 3 paragraph 1 of the Gesetz über die internsationale Rechtshilfe in Strafsachen (IRG), where the relevant wording is included ("bei sinngemässer Umstellung des Sachverhalts").

detention of at least 12 months, extradition shall not be refused on the ground that the law of the requested member state does not provide for the same facts to be an offence; provided, however, that the conspiracy or an association is to commit terrorist offences, drug trafficking, other forms of organised crimes and certain serious acts of violence, which are punishable by a prison term of at least 12 months. Finally, in Article 6 it is provided that, with respect to fiscal offences, the extradition shall not be refused on the ground that the requested state does not impose the same taxes or duties. With such exceptions the dual criminality principle has lost much of its field of application.

Presently, the prospects are that the double criminality condition will be restricted in the EU to a great extent, but not totally abolished, at least not in the near future. The reasonings for this abolition will be firstly, that each member state should have the right to apply its own penal laws and secondly, the mutual trust and the solidarity among the EU member states. In view of these considerations the fact that an act is punishable in the other member state will be sufficient ground for the arrest and temporary deprivation of freedom of a person. A solid legal basis for this measure should be created in order to safeguard the fundamental rights of the prosecuted person. Especially, a clear description of the offences where the dual criminality principle shall not be applied is necessary, but not always attained in Article 2, paragraph 2 FDEAW.

Most of the problems connected with the extraditable offences and the dual criminality are now solved[14] to a great extent by the introduction of the EAW. The FDEAW undertakes to replace the condition of dual criminality by applying a mixed system in Article 2, paragraph 2. At first it is an enumerative system, providing a list of 32 categories of crimes for which states will execute the EAW without verifying the double criminality. But it is also an eliminative system, providing that these crimes shall be punishable by the law of the issuing state by a custodial penalty of at least three years. Under the regulations of the FDEAW, the legal basis of the detention of the person sought will be the national law introducing the FDEAW. Justification of this regulation will be the principle of confidence and the mutual recognition between the member states of the EU.

For offences other than those included in the list of Article 2, paragraph 2 FDEAW, surrender may still be subject to the condition of double criminality, but this applies whatever the constituent elements of the offence under the law of the executing state are or however it is described (Art. 2, paragraph 4). This wording obviously refers to the "transformative interpretation method"[15] and is

[14] Five years ago it looked as if the *Corpus Juris* (CJ) or the similar set of rules of the *Green Book* would enter into force in the near future. Then, the situation would look totally different, because these systems of rules are directed toward the creation of a unified European legal space, limited to the reaction against the offences against the financial interests of the EU. Within this legal space the offences would be provided by generally binding penal norms and would be prosecuted exclusively by the European prosecuting authority, so that it would be irrelevant whether and how such acts are punished in each of the member states. With respect to all other criminal offences the above question would remain of course open.

[15] *See supra* note 13.

now followed also by some bilateral treaties.[16] The listing in Article 2, paragraph 2 FDEAW and the above provisions are rationalisations of the double criminality principle, so that the execution of an EAW would not be considered as violating the constitutionally protected fundamental rights of the person sought.

The dual criminality should also be understood *in concreto*, namely it should be checked whether any ground for which the illegal character, the imputability, the prosecution or the execution of the sentence are excluded or even if any ground exists extinguishing *ex post* the punishability of the offence, such as the lapse of time (e.g. as provided in Article 438(d), Greek CPP). This check should be made alternatively, according to the laws either of the requesting or of the requested state. The punishability check *in concreto* under the provisions of the requested state should be made on the hypothesis that the criminal act has been committed in its territoty. Article 10 ECE 1957 stipulates the same as to the lapse of time, but in the EU it has been amended by Article 8. 1 of the EUCE 1996, where it is provided that the extradition may not be refused on the ground that the prosecution or punishment of the person would be statute-barred according to the law of the requested state.

In relation to the punishability in concreto it should be recalled that Article 3 FDEAW provides three grounds for mandatory non-execution of the EAW.[17] Furthermore, Article 4 FDEAW provides a list of grounds for optional non-execution of the EAW, which all include some elements of relation of the offence to the executing or a third state.[18]

III. The Political Offence Exception

According to Article 3, paragraph 1 ECE 1957 the extradition shall not be granted if the offence, in respect of which it is requested, is regarded by the requested state as a political offence[19] or as an offence connected with a political offence. Furthermore, paragraph 2 provides that the same rule shall apply, if the requested Party has substantial grounds for believing that the request for extradition for an ordinary criminal offence has been made for the purpose of prosecuting or punishing a person on account of his race, religion, nationality or political opinion or that that person's position may be prejudiced for any of these reasons. The taking or attempted taking of the life of a Head of State or a member of his or her family, however, shall not be deemed to be a political offence for the purposes of the Convention (attentat clause).[20]

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16 E.g. Art. 18 Greece-Tunisia 1995; Art. 2 paragraph 2 Greece-Canada 2002.

17 *Supra* Section A.III.4 The Operative Clauses re Art. 3 grounds for mandatory non-execution.

18 *Supra* Section A.III.4 The Operative Clauses re Art. 4 grounds for optional non-execution

19 The concept of the polical offence has been introduced and defended by the French jurist and statesman François Guizot in two treatises of his published in 1821 and 1822.

20 It was called *clause d'attentat* or also *clause belge*, because it was first introduced in the Belgian legislation in 1856.

The political offence exception and the attentat clause are provided also in most, even recent, bilateral treaties[21] and national legislations.[22] The main reasons for this exception are: firstly, the diffidence of the requested state to the judicial system of the requesting state. Secondly, the wish of the requested state not to get involved in the internal political disputes of the requesting state, which are probably the reasons of the political offence.

An important step toward restricting the political offence exception was made by the European Convention for the Suppression of Terrorism of 1977 (ECST). Article 1 ECST lists a series of acts which shall not be regarded as political acts. Among these are the seizure of aircraft, other acts against the safety of civil aviation, attacks against internationally protected persons, kidnapping and hostage taking, use of bombs and other weapons and attempts or participation in such acts. Article 2 provides that certain other acts may not be regarded as political at the discretion of the requested state.

In Article 5, paragraph 1 ECEU 1996 an effort has been made to abolish totally the political offence exception. The reasoning for this was that in a community or union of states with common interests, having similar criminal justice systems, and which are bound by the European Convention of Human Rights, the safeguard of the rights of the claimed person in the member states is equally secured, so that no ground for a diffidence toward the requesting state, which would justify the refusal to extradite remains.

Paragraph 2 of Article 5 provides, however, the possibility for each member state to declare that it will apply paragraph 1 only in relation to terrorist offences, conspiracy or association to commit such offences, as provided in the European Convention for the Suppression of Terrorism of 1977. If this happens, the political offence exception will remain applicable in many other cases and this can be explained by the second of the above mentioned reasons, namely the wish of the requested state not to be involved in the internal affairs of other states, even if they are member states of the EU. It should be noted that Greece has made the above declaration, so that under the ECEU 1996 it is bound not to refuse extradition for political offences only in the event that these are included in the ECST. Considering this provision, it is doubtful that the political offence exception will be easily, soon or fully abolished.

The provisions of the CPPs and other ordinary laws or Acts of Parliament may be abolished or amended by similar enactments. The provisions of the ECE 1957 and similar provisions in bilateral treaties may be amended by agreements between the contracting parties. Since all EU member states are also party to the ECE 1957, the change to its laws by ECEU 1996 has not caused any problems. Presumably, the application of the FDEAW will not cause any problems either among the EU member states, so that none of the member states will be entitled to refuse the application of a EAW for that reason.

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[21] E.g. in Art. 19 Greece-Tunisia 1995, Art. 4, para. 1 Greece-Canada 2002.

[22] E.g. Art. 5 French Law on Extradition of 10 March 1927; para. 6 of German IRG; Art. 698 Italian CPP; Art. 438 (c) Greek CPP.

IV. Prohibition to Extradite 'Alien Freedom Fighters' under the Greek Consitution

A special problem exists in Greek law. Article 5, paragraph 2b of the Greek Constitution provides that "the extradition of aliens prosecuted for their action as freedom fighters shall be prohibited." The historical explanation of this provision[23] is related to the centuries long fights of the Greek people for freedom against foreign domination and indigenous oppressors – recently against the dictatorship of the Colonels of 1967-1974 – and has created a special feeling of solidarity with all persecuted freedom fighters. Furthermore, Article 120, paragraph 4 of the Greek Constitution recognises the right and the duty of all Greeks to resist by all possible means whoever attempts the violent abolition of the Constitution. To the same extent as Greeks have the right to resist, should foreigners who have exercised such a right not be extradited by Greece. The following remarks should be made about this provision

First of all, as a provision of the Constitution, it has a higher binding force, not only than the ordinary laws (Acts of Parliament), [24] but also than the international conventions and treaties. According to Article 28 of the Constitution, the latter has a higher binding force than ordinary laws but, according to the prevailing opinion in Greek doctrine and case law,[25] a lower one than the Constitution itself. Therefore, the aforementioned provisions of the ECE 1957 and the ECEU 1996 cannot prevail over this prohibition of the Constitution. Consequently, a request for extradition for a terrorist offence could not be denied on the basis of a political offence objection,[26] but it could be denied if the act is characterized as an activity in the framework of the fight for freedom.

Secondly, an act of the fight for freedom is only partially covered by the concept of the political offence. For instance, the acts of a dictator who abolished the democratic form of government could be considered as political acts, but of course not as a fight for freedom. Vice-versa, according to the 'objective theory', which is followed by the case-law of the *Areios Paghos,* i.e. the Greek Supreme Court (AP), offences which may have political motives but are not targeted at the state power and the Constitution and do not have the purpose of subverting them, are not considered political offences.

For instance, the AP ruled that the attempt to attack with explosives the bureaus of the Italian Communist Party (Massagrande case), was not a political offence. Nor were considered as political the offences of conspiracy with the purpose of committing forgery of documents, fraud, blackmail, and armed resistance

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[23] Cf. a similar wording in the Preamble of the French Consitution 1946; cf. also in the Consitutions of Italy (Art. 26, para. 2), Germany (GG 16a para. 1), and Portugal (Art. 33, para. 5).

[24] Art. 28, para. 1 of the Greek Constitution.

[25] Ph. Vegleris, The Convention for the Protection of Human Rights and the Consitution 103 (1977); D. Tsatsos, Constitutional Law 277 (1985); J. Katras, *Contribution to the Interpretation of Art. 5.2 of the Constitution*, 48 Efimeris Ellinon Nomikon 244 (1981); G. Mavrias, Constitutional Law 263-264 (2004); E. Roukounas, International Law, Vol. I, 31-32 (1980).

[26] Which is provided not only in Art. 3 ECE, but also in Art. 438 (c) and (e) of the Greek CPP.

against the state forces, and also offences with explosives, even when they were committed with the remote purpose of changing the social system of the western countries (Pohle case).[27]

However, such acts could be considered as activities within a "fight for freedom." The AP held in the Alsomar Osama case that the bomb attack of the PLO on a synagogue in Rome, in which a person was killed and many others were wounded, was not a political offence. Rather, it was an act in the framework of the fight for freedom, because the fight for the self determination of peoples falls under this category as well. The AP held the same opinion in the case of Rashid,[28] whose extradition was requested for conspiracy to commit murders, for completed murder, for other offences by means of explosives and for placing a bomb in an airplane.

It should be noted that in these cases the Ministry of Justice denied nevertheless the extradition, obviously for political reasons. Since such decisions of the Ministry were considered as "acts of government"at that time, which are not subject to judicial control, Osama was expelled from the country, as no jurisdiction of the Greek courts existed to try him for his acts. Rashid, however, for whom vicarious jurisdiction existed according to Article 7 of the 1970 Hague Convention for the Suppression of Unlawful Seizure of Aircraft and Article 7 of the 1971 Montreal Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, was tried in Greece and was convicted finally to a prison term of 16 years.

It is questionable, however, whether Greece will be in breach of Article 5, paragraph 2 of its Constitution, if the Greek authorities extradite a person who claims to be or is recognised to have acted as a "freedom fighter", as provided by Article 5, paragraph 2 of the Constitution and interpreted by decisions of the Supreme Court. It should be reminded that according to the prevailing opinion in the decisions of the Greek Supreme Court, while according to Article 28 of the Constitution provisions of international conventions and treaties prevail over ordinary laws (Acts of Parliament), the provisions of the Constitution itself prevail over such international conventions and treaties.[29] Therefore, Article 5, paragraph 2 of the Constitution prevails over all the conventions mentioned above, such as the ECE 1957, the ECEU 1996 and the ECST 1977. Whether this hierarchy of provisions applies also to the EU provisions - primary or derived - is a disputed question.[30]

It should also be stressed that the concepts of 'political offence' and 'action as freedom fighter' are not identical. According to the objective theory followed by the Areios Paghos, offences are considered as political if they are directed against the form of government, the political organization of the state and tend

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[27] AP 761/1975, (P.Chr. 26, 150); AP 890/1976, (P.Chr. 27, 317).
[28] AP 1741/1984, (P.Chr. 35, 522) and AP 820/1989, (P.Chr. 40, 183).
[29] *See supra* note 25.
[30] *See* J. Iliopoulou-Stranga, Greek Consititutional Law and European Integration (in Greek) (1996), at 64-96 and 102-141; E. Roukounas, International Law, Vol. I, 31-33 (1980); K. Ioannou, *in* K. Ioannou, *et al.* (Eds.), Public International Law 129-131, 138-140 (1990).

to overthrow or change the constitutionally established order in it.[31] According to this opinion, e.g. a coup d' état which tends to overthrow the democratically established government of the country, the establishment of a dictatorship and the crimes committed by the dictator in order to obtain or retain power, are political offences. It is, however, obvious, that the persons prosecuted for such crimes cannot be characterized as "freedom fighters" in the sense of Article 5, paragraph 2 of the Constitution. Consequently, the latter is in this respect narrower than that of the political crime.

On the other hand, although the 'action for freedom' is a concept that has not been interpreted and clarified sufficiently by court decisions so far, the following can be regarded as true. While, according to the objective theory followed by the *Areios Paghos*, politically motivated crimes, which are not directed against the state power and the form of government are not considered as 'political', they could be considered as 'action for freedom'. Such action may consist of acts not involving directly bloodshed, such as the preparatory acts for the offence of high treason, e.g. conspiring, printing and distributing propaganda material etc. But it also includes violent acts, resulting in the death and injuries of people, kidnappings, taking of hostages, piracy of aircraft, use of bombs and explosives etc., i.e. the main forms of terrorist acts as provided in the ECST 1977. Consequently, the concept of the "action in the fight for freedom" is also much broader than the concept of a "political crime".

Now, in view of the FDEAW the question looks different. The FDEAW does not include, either in the mandatory grounds for refusal to execute the EAW of Article 3 or in the ones of optional refusal of Article 4, any mention that could cover the application of Article 5, paragraph 2 of the Greek Constitution. Consequently, at first sight, it appears that no possibility exists to refuse the execution of a EAW for the prosecution or execution of a sentence for acts included in the list of Article 2, paragraph 2 FDEAW which also fall under the definition of "acts for the fight for freedom" as described above. Therefore, an antinomy may occur which could not be solved by the provisions of the FDEAW.

The case law of Areios Paghos mentioned above, which follows a restrictive interpretation when applying Article 5, paragraph 2 Greek Constitution, can help to solve such antinomy. In the cases of Alsomar Osama and Rashid the Areios Paghos, holding that the prohibition to extradite could not be justified or excusable because such acts are contrary to Article 2, paragraph 1 Greek Constitution, which protects human dignity,[32] offered a legal basis to put a limit to the application of the "fight for freedom" concept.

This argument and opinion of the *Areios Paghos* could eventually provide a solution in cases of conflict between the provisions obliging the execution of an EAW concerning terrorist acts and Article 5, paragraph 2 of the Greek Constitution. It is, however, possible that acts considered by the ECST as terrorist acts were directed against military targets, such as military and police forces or

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31 AP 761/1975, P.Chr. 26, 150-151.

32 *Supra* note 28.

politicians who have recently come into conflict with groups of freedom fighters. In such cases the Greek courts would face a dilemma in which the above solution would not help.

According to another opinion,[33] the action for freedom includes necessarily also acts of violence, even resulting in the death of persons. An action for freedom, however, is unthinkable if it aims to overthrow the democratic form of government in a state where also the rule of law and the institutions for the protection of the fundamental human rights exist. In such a state the political struggles are fought freely, therefore acts of violence in it are not necessary and cannot be considered as "action for freedom". Consequently, according to that opinion, Article 5, paragraph 2 Greek Constitution is not applicable in the extradition relations between the member states of the EU because a democratic form of government exists in them, but it may be applied in such relations between Greece and third countries.

These two opinions offer possibilities to solve certain cases of antinomy. Further possibilities are given by paragraph 12 of the Preamble of the FDEAW,[34] although it will be rare that a refusal would occur in a case of execution of an EAW between EU member states.[35] Nevertheless, in view of the opinion in the case law of Areios Paghos as to the prevalence of the Constitution over the EU law, it is most probable that even in case of conflict between the obligation to execute an EAW and Article 5, paragraph 2 Greek Constitution the Greek courts will decide by applying the constitutional provision. Such a conflict may occur, however, in extradition relations involving a EU member state and a third state that requests the extradition of e.g. a Palestinian claiming to be a freedom fighter. In such a case the prevailing opinion in the case law will facilitate a solution in conformity with the Constitution, although this may create a dispute with the state requesting the extraditition.

The opinion limiting the application of Article 5, paragraph 2 Greek Constitution to cases aiming to overthrow an illegal oppressive regime, is more adequate of solving conflicts within the EU and in view of executing an EAW. The other opinion, setting a limit to Article 5, paragraph 3 Greek Constitution, if an act for the fight for freedom is in conflict with respect of human dignity, may be useful in cases of antinomy occurring in extradition requests from most states outside the EU.

The problem, however, of the Greek constitutional provision about the freedom fighters cannot be solved by judge-made law of the courts, because Article 5, paragraph 2 of the Greek Constitution is clear and has been repeatedly interpreted

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[33] P. Pararas, Constitution of 1975 – Corpus, Vol. I (1982), 150-152; the same in an article in newspaper To Vima of 13 January 2002.

[34] Providing the refusal to execute the EAW if there are reasons to believe that the person to be arrested is going to be prosecuted or punished on the grounds of his or her sex, race, religion, ethnic origin, nationality, language, political opinions or sexual orientation, or that that person's position may be prejudiced for any of these reasons.

[35] In both AP 1741/1984, P.Chr. 45, 552 and AP 820/1980, P.Chr. 40, 183 the persons requested were going to be prosecuted for acts they were accused of and probably also due to their above qualities.

and applied by decisions of the *Areios Paghos*. Let us hope that in the future and, at least in the framework of the EU, no fights for freedom will be needed, so that it will not be necessary to apply this prohibition to extradite.

The situation has not changed under Article 5 of the ECEU 1996. Anyhow, in view of the great ideological and sentimental weight of Article 5, paragraph 2 Greek Constitution in the Greek public opinion, a change of that provision in the near future is not very likely.

V. The Extradition of Nationals of the Requested State

The grounds for the prohibition to extradite nationals are legal, political and sentimental. The most often invoked ground is that the relation of a citizen to a free democratic polity has as a commensurate result that he may in principle not be excluded from this association.[36] Furthermore, the principle of loyalty of each state toward its citizens is referred to, as well as the diffidence to foreign judicial systems, the principle of the natural judge, from whom the person requested should not be taken away, combined with the argument based on the active personality principle, which, according to the Greek Penal Code at least, permits the application of Greek penal laws to Greek citizens who committed a crime abroad. These grounds have lost much of their persuasiveness, in view of the principle of reciprocal confidence in the judicial systems of all the EU member states, of the dedication to the rule of law and the protection of fundamental rights. Finally, it should be considered that the most suitable place to prosecute and try a criminal offence in view of the correct rendering of justice is the place where the act has been committed. Therefore the extradition of a national to the state where the crime has been committed is more just and expedient because it leads to a better judgement and, finally, it is more favourable, even to the defendant and to the public order in general.

The extradition of Greek citizens is prohibited according to Article 6 ECE 1957 and Article 438 (a) of the Greek CPP, but these provisions, and similar ones in other EU member states, can be considered as been partly abrogated, in-as-much as they are contrary to the more recent provision of Article 7 of the ECEU 1996.[37] There are constitutional provisions in some EU member states which include the prohibition to extradite nationals, such as Article16.2 German GG and Article 12 Austrian ARHG. Although the Greek Constitution does not explicitely include such a prohibition, some legal scholars allege that it may be inferred from the prohibition of the extradition of alien freedom fighters. According to that opinion, Greek nationals have not been mentioned in Article 5, paragraph 2 of the Constitution, because in the sense of that provision the prohibition to extradite nationals is taken for granted and self-understood. Although this contention can be refuted by reasoning that a view based on a rather far-fetched interpretation

[36] German BverfG 64/2005 (18 July 2005).

[37] It should be noted, however, that Greece has declared, making use of the possibility it had under paragraph 2, that it will not extradite its own nationals.

cannot stand against an express provision of an international convention, it creates nevertheless a legal problem which should be solved.[38]

Another important point is the change of the concept of "citizen" in the framework of the EU. Article 17, paragraph 1 of the Treaty Establishing the European Communities (TEC) provides that "citizenship of the Union is hereby established. Every person holding the nationality of a member state shall be a citizen of the Union. Citizeship of the Union shall complement and replace national citizenship." In view of these provisions it may be maintained that the execution of an EAW for the arrest and surrender of a citizen of the EU can no longer be considered as an "extradititon of a citizen" in the traditional sense of the word. It is more akin to an arrest of a person by the authorities of a region of a country on the basis of an arrest warrant issued by the authorities of another region of the same country.

It should be noted that according to the active nationality principle (Article 6 Gr. PC) a Greek citizen is subject to the jurisdiction of the Greek Courts, also for offences committed outside Greece.

The prohibition to extradite Greek citizens is not set out in the Greek Consitution (as is the case in the Constitutions of other countries, e.g. Germany, Austria and Poland), but only in Article 438 (a) of the CPP and in all the bilateral treaties which Greece has entered into. In multilateral Conventions Greece, while ratifying them by domestic laws, has made a reservation to that effect, as in the ECE 1957 under Article 6 and in ECEU 1996 under Article 7. Therefore, by a simple law (Act of Parliament) the prohibition to extradite Greek nationals to other member states of the EU can be abolished.

In the FDEAW no provisions are included permitting the refusal to execute an EAW because the person sought is a citizen of the executing state. There are, however, two provisions aiming at covering human rights problems which may arise due to the abolition of the prohibition to extradite nationals. Article 4, paragraph 6 provides that

> the executing judicial authority may refuse to execute the EAW if it has been issued for the purposes of execution of a custodial sentence or detention order, where the requested person is staying in, or is a national or a resident of the executing member state and that state undertakes to execute the sentence or detention order in accordance with its domestic law. [undertaking of execution of a sentence already imposed].

Article 5, paragraph 3, stipulates that

> the execution of the EAW by the executing judicial authority may, by the law of the executing member state, be subject to [inter alia] the following condition: where a person who is the subject of a EAW for the purposes of prosecution is a national or resident of the executing member state, surrender may be subject to the condition

[38] A thorough change could have been brought about by the *Corpus Juris*, (*supra* note 13) but only with respect to the offenses of Euro-fraud etc. provided in it, in the event that its provisions will ever enter into force. According to Art. 24 CJ, warrants of arrest and decisions relating to the offences defined in Arts. 1-8 CJ, issued by the courts of any of the member states, are valid across the whole territory of the European Union, as are judgments. According to that provision, a "European arrest warrant" would have entered into force also on that legal basis.

> that the person, after being heard, is returned to the executing member state in order to serve there the custodial sentence or detention order passed against him in the issuing member state [undertaking of execution of sentence to be imposed].

The purpose of both these provisisons is clear: while the prosecution and trial in the issuing state will be facilitated, the responsibility of the execution of the sentence is transferred to the state with which the person sentenced has the closest relations – i.e. not only citizenship but also residence. In this way the execution of the sentence will become more human and the resocialisation of the person sentenced easier.

It should be noted that in Greek Law 3257/2004 these two possibilities, which under the FDEAW are optional grounds of refusal to execute the EAW, have been included in the article prohibiting the execution of the EAW.

VI. Capital Punishment – Danger of Torture

Article 11 of the ECE 1957 provides that, if the offence for which extradition is requested is punishable by death under the law of the requesting Party, and if, in respect of such offence, the death penalty is not provided for in the law of the requested Party or not normally carried out, extradition may be refused, unless the requesting Party gives such assurance which the requested Party considers sufficient that the death-penalty will not be carried out. A similar provision is included in bilateral treaties, for instance in Article 6 of the recent Greece-Canada 2002 Treaty.

There will not be a problem in the relations between member states of the EU and of the CoE who are bound by the above provision of the ECE 1957,[39] to the extent that the capital punishment has been abolished in these countries and they have also adhered to Protocols No. 6 and No. 13 of the ECHR. By contrast, problems may arise in the relations between a member state of the EU and a third state in which capital punishment is in force and practiced. In such cases, a EU member state which would extradite a person to such a third state would possibly be in breach of the above Protocols. But it will also be arguably violating Article 3 of the ECHR, according to the case law of the European Court of Human Rights after the ruling in the Soering case of 1989.[40] At first sight it appeared that a member state should not be held liable for results, which will probably occur outside its territory and by the organs of another state and which the extraditing member state cannot influence. Nevertheless, in that famous ruling the Court held that the decision of a member state to extradite constitutes a breach of Article 3 of the ECHR, and may make such member state liable, in the event that it has serious reasons to believe that, if the person sought is extradited to the third state, it runs the real risk to be subjected to torture or to inhuman and degrading punishment.

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[39] According to Art. 31, para. 1 FDEAW the Conventions of the CoE continue to govern the relations between EU member states and third states.

[40] *Soering v. UK*, ECHR (1989) Series A. No. 161, at paragraph 104; *Chahal v. UK*, ECHR (1996), Series, Reports of Judgments and Decisions, 1996, V, paragraph 107. *See also* V. Berger, Jurisprudence de la Cour Europénne de Droits de l' Homme (1996), at 20, para. 36.

In the Soering case this would occur, because if the person were extradited to the US (State of Virginia), he would run the risk of being sentenced to death and of suffering a long period on 'death row'. The EU member states who are also party to the ECHR, are bound not to extradite a person to a third state, if there is a danger that such a person is exposed to torture[41] or to the death penalty.

Problems have arisen especially with respect to the EU/USEx Agreement. One of the most important objections concerning that Convention addressed the critical problem of capital punishment in the requesting state if this would be the USA. With respect to Article 13, the EP took the view that it should expressly provide that no person may be extradited to the USA, who might be sentenced to death and executed.[42] Article 13 now stipulates that it is sufficient that the death penalty, if imposed, will not be executed.[43] This wording, however, is not in conformity with Article1 of Protocol No. 6 to the European Convention of Human Rights and Articles II-2, paragraph 2 and II-9, paragraph 2 of the EU Charter of Fundamental Rights of the European Union[44] (hereinafter the 'Charter'), which demand that the death penalty should not even be imposed and that not even the danger that it is imposed should exist.[45] Therefore, although the USA is not a party to the ECHR and nor will it be to the Charter, for the European states, who are parties to the ECHR and will be to the Charter, it is not sufficient to provide that they may refuse extradition on this ground; they should be obliged to.

Furthermore, Article 15, providing that the Contracting Parties, obviously states who have abolished capital punishment, shall as appropriate, consult "to enable the most effective use to be made of the Agreement," is considered as a problematic provision to the extent that it refers also to Article 13. It has been observed that the reasonable meaning of this provision can be either that the consultation will aim to persuade the American judicial authority to accept to be bound by this condition or, inversely, to persuade the requested state to extradite the person sought in spite of the prohibition. This ambiguous meaning would render the outcome of the extradition uncertain sure and the person sought would be exposed to the result of the consultations.[46]

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[41] Torture is expressly provided in Article 3.1. of the UN Convention against Torture of 10 December 1984, ratified by Greek Law 1782/1988.

[42] European Parliament (EP) Recommendation, A%-0172/2003, at 6/22, paragraph 4.

[43] Report to EP, S. 14/14 paragraph 16, where, however, it has been observed that Art. 13 of the Treaty guarantees to the person sought more protection than e.g. the French-USA Treaty of 2001.

[44] The Organisation Mondiale Contre la Torture, in an open Letter to the Europen Council and the member states refers (fn 7) to the Decision of the member states to integrate the Charter with the EU Consitutional Treaty, in which case it would have been already binding and therefore influential.

[45] With the exception of the possibility of a state to provide the death penalty for criminal offences committed in war periods. It should be noted, however, that even this exception has been abolished by Protocol No. 13 of 3 May 2002 to the European Human Rights Convention, which has been signed by 22 states (including Greece).

[46] Therefore Portugal has declared in the JIA Meeting of 5-6 June 2003 that it will not apply the request for an extradition under Art. 13, unless the death penalty is not considered at all or such a penalty is not executed in the requesting state, cf. M. Kaiafa-Gbandi, Poiniki Dikaiosyni 733, at 738 (2003).

The extradition of a person to another state, where he would be exposed to torture and inhuman and humiliating treatment or punishment, would constitute a breach of other Conventions and of the ECHR,[47] according to the case law of the European Court of Human Rights mentioned above.[48] These objections were refuted by the negotiator of the last period, the Greek lawyer Wgontzas. He pointed out that, at least with respect to Greece, the USEUEx Treaty constituted great progress compared to the existing Treaty between the USA and Greece of 1931. For instance, while in that Treaty no right to refuse extradition due to the possibility of the death penalty was provided,[49] under the EU/USEx Treaty such a right does exist.[50] Furthermore, it should be noted that also in the wording of most bilateral treaties and even in Article 11 of the ECE 1957, the exception to extradite due to the death penalty is mentioned as a provision introduced by the verb "may". This does not mean, however, that the requested state in such a case is free to refuse extradition or not, because, Greece at least, is bound to do so under Article 7, paragraph 2 of the Constitution and Article 3 ECHR, as interpreted by the ECHR in the Soering case,[51] and also by Protocols 6 and 13 of the ECHR. Consequently, no serious danger exists that a person to be extradited to the US on the basis of the EU/USEx Treaty could be exposed to the death penalty.

VII. The Right to a Fair Trial

The right to a fair trial is not based on a ius cogens rule of international law. Therefore, although it is of great importance, it is debatable whether the probabilty of a violation of it by the requesting state can be a legal ground of refusal to extradite. Since the traditional legal basis of extradition are the treaties which are binding upon the participating states, at first sight the answer should be negative, because the existence of a treaty is a presumption of mutual confidence in the penal justice systems of the parties.[52] However, in the Soering judgment, the Court, although it denied that a violation of Article 6 had taken place in that particular case, it left open the possibility that if a flagrant violation of the fair trial principle occurs, it may be invoked.[53] Therefore, it depends on the circumstances

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47 Art. 19, para. 2 of the Charter; Art. 3 UN Convention against Torture (CAT) of 10 December 1984; Art. 3 ECHR.

48 *See supra* note 40.

49 In 1931 the death penalty was still in force in Greece. It has not been executed, however, since 1973 and it was formally abolished by Law 2172 of 1993. Since the amendment of Art. 7, para. 3 (2) Constitution of 2001, capital punishment is also contrary to the Constitution (*see also* next note).

50 Art. 7, para. 3 (2) Constitution provides that the death penalty shall not be imposed, except in the cases provided for in the law of crimes committed in war period and related to the war. Consequently, in view also of the case law of the European Court of Human Rights (*supra* note 42) it would constitute a violation of the above provision of the Constitution to extradite a person to the USA, where it would risk to be sentenced to capital punishment.

51 *Supra* note 40.

52 Cf. also the rule of 'non inquiry' in USA law, by which the organs of the requested sate have no power of inquiry of the reliability of the criminal justice system of the requesting state, D. I. Chryssikos, The Extradition as an Institution of Penal Law (in Greek), 296 *et seq.* (2003).

53 Para 113 of the *Soering* judgment.

of a particular case to accept such a violation. Anyway, based on research of the international instruments, Chrysikos[54] distinguished at least the following three cases in which a refusal of extradition may be based due to the lack of fair trial:

(a) The risk that the principle of speciality may be violated in the requesting state (*see infra* under VIII, The Rule of Speciality).

(b) If the extradition request is based on a court judgement *in absentia* (Article 3 of the Second Protocol to the ECE 1957), unless the requesting state provides sufficient guarantees that the person sought will have the possibility to ask for a retrial satisfying the protection of his rights.[55] Article 5, paragraph 1 of the FDEAW has a similar content.

(c) If the person requested has been sentenced or would be liable to be tried in the requesting state by an extraordinary or ad hoc court or tribunal.[56]

The EU/USEx Agreement has attracted much criticism, concerned by the risks to the human rights of persons sought under it, especially the right to a fair process or the prohibition of torture, because these are not expressly mentioned as ground for refusal to extradite.[57] Some critics mentioned that in the USA exceptional and/or military committees or courts are competent to try cases of persons suspect of terrorism and, what is more, that their decisions are not subject to any appeals, even when they impose the capital punishment.[58] Therefore, the EP recommended that any such extraordinary or military courts should be excluded from the cooperation between EU and the USA, as well as any discrimination against European citizens, which could result by the application of the USA "Patriot Act" and the "Homeland Security Act". [59]

By contrast, according to the EU Fact Sheet, published in Washington on 26 June 2003, these rights of the person extradited are sufficiently guaranteed in the EU/USEx. Apologist of the Agreement Wgontzas[60] claimed that the guarantees

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[54] Chrysikos, *supra* note 52, at 275 *et seq.*

[55] Cf. also judgment (Beschluss) dated 11 September 2001 of OLG Wien, commented by Chryssikos *supra* note 52, at 280, based on Art. 2 of Protocol 7 of the ECHR.

[56] Cf. Art. 4 (g) of the UN Model Treaty on Extradition. The Court of Human Rights has denied the violation of the fair trial principle in the case *Drozd and Janousek v. France and Spain*, ECHR (1992) Series A, No. 52 (it was about a court in Andorra); it accepted it in the case *Öcalan v. Turkey,* ECHR (2005) Series A, No. 282 and in other cases, by reasoning that, due to the participation in the Court of State Security of Ankara of a military judge, the Court was not an independent and impartial court, as required by Art. 6, para. 1 ECHR. .

[57] Organisation Mondiale Contre la Torture, (*supra* note 44) at 3-4, by reference to Art. 3 of the UN Convention against Torture of 10 December 1984; furthermore, N. Sitaropoulos, Report to the (Greek) National Committee of Human Rights of 2 June 2003, at 4; Joint Declaration of the Presidents of the Bar Associations of Athen, Thessaloniki and Piraeus in the newspaper Eleftherotypia of 24 June 2003; Resolution of the Marangopoulos Foundation of Human Rights of 12 June 2003; A. Roupakiotis in newspaper Avghi of 29 June 2003.

[58] Organisation Mondiale Contre la Torture, (*supra* note 44), at 4; Resolution of the Marangopoulos Foundation (*supra* note 57), at 1; J. Sotirhou on the Declaration of Amnesty International, in newspaper Eleftherotypia of 7 June 2003.

[59] EP Recommendation, *supra* note 42, at 4, para. 3, Kaiafa- Gbandi, *supra* note 46, at 735.

[60] Wgontzas, *supra* note 5, at 750-751.

are provided in the Preamble. Especially the rights of the individuals and the rule of law, the guarantees under their respective legal systems which provide for the right to a fair trial to an extradited person, including the right to adjudication by an impartial tribunal established pursuant to law are made prerequisites of the operative provisions. Furthermore, the legitimising basis of both treaties should be considered the combat of crime as a means of protecting the democratic societies of the EU and the USA and of their common values. Finally, the grounds of refusal of Article 17, pursuant to bilateral treaties and constitutional principles have also been evoked.

Article 11 of the EU/USEx Treaty has also caused apprehension, providing "consultations" and including as their objective to facilitate any dispute regarding the interpretation or application of the Agreement [61], while consultations are also provided in Articles 15 and 17, paragraph 2, in which inter alia "the interest of the requesting state" should be considered. In view of these wordings, some critics have feared that even constitutionally based obstacles to extradition could be put aside through consultations, in which also the political pressure from the Superpower could be an important factor.

In his reply Wgontzas referred to the steady practice in international treaties to provide consultations if problems about their interpretation and application arise.[62] To the question, what would be the object of the consultations, if not the violation of the constitutional prohibitions to extradition, Wgontzas answered that, obviously, it could be the eventual application of the principle aut dedere aut judicare.[63]

VIII. The Rule of Speciality

The rule of speciality is included in Article 14 of the ECE 1957, where it is provided that:

> A person who has been extradited shall not be prosecuted against, sentenced or detained with a view to the carrying out of a sentence or detention order for any offence committed prior to his surrender other than that for which he was extradited, nor shall he be for any other reason restricted in his personal freedom, except in the following cases.

Article 440 of the Greek CPP includes a similar provision and most bilateral extradition treaties do too.

By contrast, the ECEU 1996 enumerates in Article 10 a series of cases for which consent of the requested member states that an extradited person may be prosecuted, tried, detained or subjected to any other restriction of personal liberty is not necessary, and it provides the possibility of the same person to waive the benefit of the rule of speciality.

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61 Roupakiotis, *supra* note 57; A. Alawanos, in newspaper Eleftherotypia of 7 June 2003

62 These treaties are enumerated expressly and cited by Wgontzas, *supra* note 5, at 751-752, in fn 79-86. To these should be added also the recently (on 10 February 2000) ratified bilateral Agreement on Mutual Legal Assistance of 26 May 1999 between Greece and the USA.

63 Wgontzas, *supra* note 5, at 752.

The EAW includes the speciality principle as a rule in Article 27, paragraph 2 which reads as follows:

> Except in the cases referred to in paragraphs 1 and 3, a person surrendered may not be prosecuted, sentenced or otherwise deprived of his or her liberty for an offence committed prior to his or her surrender other than that for which he or she was surrendered.

Paragraph 1 of the same article provides also that,

> each member state may notify the General Secretariat of the Council that, in its relations with other member states that have given the same notification, consent is presumed to have been given for the prosecution, sentencing or detention with a view to the carrying out of a custodial sentence or detention order for an offence committed prior to his or her surrender, other than that for which he was surrendered, unless in a particular case the executing judicial authority states otherwise in its decision on surrender.

Furthermore, in Article 13 combined with Article 27, paragraph 2 the possibility of the arrested person to consent to be surrendered is provided, including also the express renunciation of entitlement to the "speciality rule". The consent and, where appropriate, renunciation, should show that the person concerned has expressed them voluntarily and in full awareness of the consequences, that it had the right to legal counsel and that the consent was formally recorded.

Consequently it can be said that the speciality principle has not been seriously affected by the FDEAW, except if a member state makes the declaration provided in Article 27, paragraph 1.

V. Decision of a Judicial Authority

As mentioned in the Introduction, an important characteristic of the traditional procedure of the extradition is, at least in the Greek law and other similar laws, the distinction of the procedure in a judicial stage, which takes place before courts, and a stage before the executive power which has the final decision, in case the extradition has been approved by the judicial authorities. More specifically, if the judicial authority decides that the request for extradition shall be rejected, its decisison is a proper judicial decision immediately enforceable; therefore if the person requested has been in custody, he is immediately released. But if the courts hold that the extradition request must be accepted, their ruling is considered as an opinion, not binding the executive power. In Greece the Minister of Justice has the discretionary power to decide freely either to extradite according to the opinion of the court or not (Article 452 CPP). It is of interest that for a long time it was held in Greece that such a decision of the Minister is not subject to any legal remedies. More specifically, while most acts of the executive power can be challenged before the adminstrative courts and the Supreme Court, namely the Council of State, that decision was considered as an act of government and therefore it could not be challenged before that Court. Consequently, the decision of the Minister of Justice not to extradite a person, contrary to the opinion of the courts, was final and irrevocable. Recently, this practice has been changed, since a decision

of the Council of State[64] considered such a recourse admissible. It held, among other things, that the decision of the Minister of Justice is not an act pertaining to the criminal justice but an executable act of the public administration, subject to the control of the Council of State. The Minister does not decide whether the requested person has commited or not the offence for which his extradititon is requested, nor exercises in any other way the penal power of the Greek state. He simply decides as an organ of the executive power permitting or not the surrender of the person requested to the authorities of the requesting state. The fact that the request for extradition is granted only when the judicial chamber gives an irrevocable favorable opinion is not an act of administering penal justice but only an act of the organs of justice controlling if all legal prerequisites are fulfilled in order to support the decision of the Minister with additional guarantees. Therefore, the decision of the Minister of Justice ordering the extradition of a requested foreigner cannot be exempted from the judicial control of the Council of State by being considered as an 'act of government'. The judicial control should extend to the correct application by the Minister of the provisions of the laws, the international conventions and treaties and the provisions of the Constitution protecting the foreigners living in the country. Considering that the exemption of the Minister's decision from judicial control exposes him to political internal or external pressures,[65] that exemption does not guarantee that his decisions are the most just and correct.

Paragraph 8 of the Preamble of the FDEAW provides that "decisions on the execution of the European arrest warrant must be subject to sufficient controls, which means that a judicial authority of the member state where the requested person has been arrested will have to take the decision on his or her surrender." Therefore, the problem of the authority which decides whether the conditions for the extradition are met is solved with respect to the EAW in the most satisfactory way.

C. General Comments and Conlusions

In view of the above I would like to draw the following general conclusions:

The institution of extradition should contribute to better cooperation of the European states in the field of criminal justice, especially under the principle of mutual recognition of the judicial systems and judicial decisions.

From the crossing and interplay of more than one interests and values which should be considered in this respect derive special difficulties and obstacles, which do not permit that institution to function easily.

Hopefully, European integration will render some of these obstacles superfluous and obsolete, for instance the condition of double criminality, the prohibition to extradite for military or taxation offences and for offences for which the death penalty is provided in the requesting state, since such a penalty has been abolished in all EU states.

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64 Greek Council of State Nr. 2190/2001.

65 C. Van den Wyngaert, The Political Offence Exception to Extradition 192-195 (1980).

It seems possible, that even the political offence exception to extradition will lose relevance in the relations between the EU states, although I think that the prohibition to extradite freedom fighters as stated in the Greek Constitution will remain, but only lose much of its field of application.

Also the prohibition to extradite nationals of the requested state will probably lose relevance in future. The development of closer relations between the EU member states leading to the creation of a European judicial space may help to that end. Especially the possibilities under the FDEAW will contribute to it, such as the surrender of a national temporarily for the purpose of prosecuting him with the obligation of the requesting state to return him to the country of which he is a citizen to serve his penalty, or the possibility of the requested state to undertake the execution of the sentence already imposed on its national.

The extradition in the space of the EU has been essentially simplified by the introduction of the European arrest warrant. It is a positive fact that several changes brought about by the introduction of the EAW will make its execution and the surrender of the persons sought more effective.

It is also positive that in several paragraphs of the Preamble and operative provision of the FDEAW express mention is made of the respect of human rights, either generally or specifically.

The replacement of the dual criminality principle by the regulations of Articles 2 and 3 is a jump into the unknown. It remains to be seen how well they will function, especially with respect to the rights of the person sought.

The abolition of the possibility to refuse extradition for political offences will not constitute an imporant change, in view of changes brought about by previous conventions.

Problems may occur in Greece with respect to a possible EAW concerning an alien prosecuted for his action for freedom., in view of the antinomy between Article 5, paragraph 2 of the Greek Constitution. and the provisions of the FDEAW. A practical solution would be a restrictive interpretation of Article 5, paragraph 2 Constitution. with respect to the relations between member states of the EU.

The restrictions of the speciality principle will create some practical problems in the course of their application.

The cooperation in judicial matters in the framework of the EU will improve due to the fact that now the power to control the conditions of an EAW has been entrusted exclusively to the judicial authority. The extradition between member states and certain other states belonging to the “third tier” will become easier on the basis of modern extradition treaties. modelled on the EU-US Treaty, provided that its clauses are interpreted properly, with due respect to the protection of human rights and that no attempts are made to abuse the power of the Superpower in the relevant cases.