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Conclusion of a European Convention on Extradition

Report
Committee on Legal Affairs and Human Rights
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1. Explanatory Memorandum

1.1. Introduction

1. On the 30th November, 1951, the Consulative Assembly referred to the Committee on Legal and Administrative Questions a motion tabled by Mr. J. G. Foster, Q. C., for the conclusion of a European Convention on Extradition, in accordance with the desire of all Members for commun action in the legal field[1]

2. The Assembly subsequently agreed to a recommendation sponsored by the Committee on Legal and Administrative Questions which proposed that the question should be considered by a joint committee composed of experts chosen by the Committee of Ministers and members of the Committee on Legal and Administrative Questions[2].

3. It is understood, however, that the Committee of Ministers found difficulty in agreeing to this request. The Committee on Legal and Administrative Questions therefore appointed a Sub-committee in May, 1952, the members of which were M. Kiesinger (Chairman), Mr. Geoffrey de Freitas (Rapporteur), Mr. Crosbie, M. Pernot and M. Schmal, and instructed it to explore the subject and, if possible, prepare a draft European Convention on Extradition. The Sub-Committee on Extradition held six meetings.

4. Later, in May, 1953, the Committee of Ministers appointed a Committee of Governmental Experts, which met in Strasbourg in October, 1953, for the limited purpose of studying " the possibility of laying down certain principles governing extradition, which would be acceptable to all Members of the Council, the question of whether these principles should figure in a multilateral Convention or whether they should serve merely as a basis for bilateral Conventions on extradition remaining for the time being in abeyance ". The work of the Experts has, however, been halted pending the tabling of this Committee's Report in the Assembly.

5. This Report is mainly based on a study of three documents :

a. the draft extradition convention prepared by the Harvard Research in International Law (see American Journal of International Law, vol. 29, Numbers 1 and 2, January and April, 1935, Part II — Official Documents) ;

b. the draft convention on extradition prepared by the International Penal and Prison Commission and submitted to the consideration of the International Criminal Police Commission at its 17th Session, Prague, 1948 ;

c. the extradition convention signed between France and the German Federal Republic on 29th November, 1951.

6. It is divided into an explanatory memorandum and a draft recommendation. The explanatory memorandum is divided into chapters, each dealing with a particular question. At the end of each chapter will be found a conclusion, together with the draft article proposed for the consideration of the Assembly.

7. It will be seen that only those articles which were considered by the Committee as fundamental have been drafted. It will be for the Committee of Governmental Experts to complete the convention and draft the final clauses which have not received consideration.

8. It is desired to draw attention to the importance attached by the Committee to the need to supplement national laws and bilateral treaties by general acceptance of a European convention on extradition. Several Member States of the Council of Europe have not yet concluded bilateral extradition treaties with all other Member. States. In the absence of such treaties it is sometimes difficult to obtain the extradition of a fugitive,

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1. See 3rd Session, 1951 : Doc. 82.
2. See 3rd Session, 1951 : Recommendation 16.

and there- may thus be loopholes of which criminals can take advantage. It is felt that a concerted effort should be made to remove such loopholes and that this can best be done by negotiating a multilateral rather than a series of bilateral conventions. Moreover, by perfecting and standardising the practice of extradition as between Members of the Council, a 'multilateral convention would- he of substantial benefit to the authorities and courts which have to deal with these matters.

9. The Committee wishes to emphasize that the work which it has done is of a preparatory character. It looks forward to having joint discussions with the Committee of Governmental Experts. The first aim of the Committee has been to throw some light on the problem, and it is hoped that this Report will enable the Assembly and the Committee of Ministers to form a clearer view of the position.

10. This Report was unanimously adopted by- the Committee on Legal and Administrative Questions at a meeting held in Paris on the 4th and 5th May, 1954.

1.1.1. CHAPTER I- Extraditable Acts

11. In the nineteenth century, although, in general, only serious offences could give rise to extradition, there was a growing tendency to permit extradition for lesser crimes. Members of the Council of Europe may find it appropriate that this tendency should be continued, in view of their common desire for close cooperation and also because their proximity ensures that there would be no great additional expense involved if the number of extraditable offences were increased. But there must be some limit to the number of extraditable acts because, in the case of minor offences, arrest and deportation constitute a supplementary punishment in excess of that which the offence would have deserved.

12. Paragraph 1, Article 1, of the draft Convention of the International Criminal Police Commission, states :[3]

" Individual s are subject to extradition who are found on the territory of the requested State and wanted by the competent authority of the other State for an act specified against the laws of the two States, and punishable under the existing law of the requesting State by imprisonment of which the maximum is one year or a more severe sentence, or who have been definitely condemned, for such an act, by a tribunal of the requesting State to a punishment by imprisonment of not less than three months..."

13. In the United Kingdom, the United States and Belgium, it is the usual practice to list extraditable offences in statutes or in conventions. It is now generally thought that this practice should be abandoned. Professor Brierly, in his report to a Committee of Experts of the League of Nations, says : (Publications of the League of Nations, v. legal, 1926, v. 8, page 3) :

"... On the whole, we consider that, if the States should'decide to adopt a general convention on extradition the most . convenient method of dealing with this particular matter would be to grant extradition for any act punishable with ia certain prescribed severity, either in "the two States concerned, or in the State demanding extradition, and not attempt a detailed list of crimes. "

14. The German Extradition Law of 1929 and the French Extradition Law of 1927, which are intended to operate in the absence of treaties, provided for extradition for criminal acts of certain seriousness and not for categories of offences.

15. The authors of the Harvard Draft Convention on Extradition state in their commentary after referring to these laws :

" It seems certain that a modern multi- partite extradition convention can be drafted Only in this'way. "[4]

16. The reason for this view is that it is extremely difficult to define offences in a way satisfactory to two or more countries, and capable of the same interpretation in the courts of these countries. Moreover, if a convention on this basis were signed, certain States would have to revise their list of extraditable offences, and this would involve legislation.

17. In some treaties concluded between Italy and certain European States, it was provided that'whilst, as regards the requesting State, extradition might be granted for an act punishable by á minimum penalty according to the law of ' that State, as regards the requested · State it was merely required that the offence for which extradition was sought should be punishable. The " same penalty " test was abandoned following the

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3. The English of this artiolo and of other articles of this Draft Convention is not as clear as i t could be. However, tho English is an official toxt put out by the Commission, and i t is therefore thought best to retain i t hero and elsewhere.
4. See American Journal of International Law, Vol. 29, Numbers 1 and 2, January and April , 1935, p. 77.

draft prepared in 1931 for the International Criminal Police Commission. The 1951 Treaty between France and the Germany Federal Republic provides that the contracting parties mutually undertake : " ... to surrender to each other all persons against whom proceedings are being taken or who are sought either for the execution of a sentence or « d'une mesure de sûreté... » ".

18. In the draft Convention of the International Criminal Police Commission, Article 2 states :

" The incriminating act will give rise to extradition even if it is not repressed by the law of the requested State when the absence of repression is due only to special circumstances, independent of conceptions of social morals. The requested State only will formulate laws according to the circumstances. "

19. Finally, it should be observed that in most municipal laws it is not necessary for the offence to be committed in the territory of the requesting State, for a requesting Stato can exercise jurisdiction over some crimes committed by its nationals abroad, or some crimes against it committed abroad (cf. counterfeiting). In United Kingdom law the offence must be committed in the territory or on a vessel of the requesting State.

20. Conclusion. The definition which follows marks a departure from both the " same penalty " rule and the system of listing extraditable offences. A combination of the 1951 Convention between France and the German Federal Republic and the Harvard Draft Convention solved the problem of the individual who was wanted but not yet convicted. As regards the individual who had been already convicted the Franco-German system which differentiates between these two categories of offenders was accepted.

1.1.1.1. DRAFT ARTICLE I

Extraditable Acts

The following persons shall be liable to extradition :

a. Persons claimed by a High Contracting Party for an act which is an offence in both the requested and requesting High Contracting Parties and is punishable in the requesting High Contracting Party by at least one year's imprisonment ; and

b. Persons who have already been convicted of such an offence and have already been sentenced to at least three months' imprisonment in the requesting High Contracting Party.

1.1.2. CHAPTER II - Political Offences

21. The constitutions of Prance, Italy and the Saar and the Basic Law of the German Federal Republic guarantee the right of asylum to political offenders, whose extradition is therefore refused.

French Constitution

...

Preamble

" Anyone persecuted because of his activities in the cause of freedom has the right of asylum within the territories of the Republic. "

Italian Constitution

Article 26

" Extradition of the citizen can only be granted if specifically agreed through international conventions.

In no case may it be granted for political offences. "

Saar Constitution

Article 11

" No Saar national may be extradited to a foreign Power, except under reciprocal agreements ; no Saar national may be expelled from the territory of the Saar.

Aliens who are subjected outside the territory of the Saar to persecutions incompatible with the principles recognised in the present Constitution shall enjoy the right of asylum if they seek refuge in the territory of the Saar.

A law shall regulate the 'details concerning this right. "

1.1.2.1. Basic Law of the German Federal Republic

Article 16, paragraph 2

11. (2) " No German may be extradited to a foreign country. The politically persecuted shall enjoy the right of asylum. "

12. 22. The extradition of political offenders is also contrary to the following national laws :

(a) Article 7 of the Swedish Latu of 1913 :

" Extradition may not take place for a political crime. HoAvever, in a ease where the act for which extradition is requested also includes a crune of a non-political nature, extradition may bo granted, provided the act in view of the circumstances in the special case is ftrand to have chiefly the character of a non-political crime.

In no case shall murder, attempted murder or manslaughter of a foreign Chief of State or of a person belonging to the family of a foreign sovereign be regarded as a political crime. "

(b) Article 3, of the German Law of 23rd December, 1929 :

"The extradition is not permissible if the act which would be the basis of the extradition is political, or if it is connectod with a political act iia such a manner that it was meant thereby to prepare for, secure, conceal or prevent the latter.

Political acts are those punishable offences (Angriffe) which are directed immediately against the existence or the security of the State, against the Head or a member of the Government of the State, as such, against a body provided for by the constitution, against .the rights of citizens in electing or voting or against the good relations with foreign States.

The extradition is permissible if the act constitutes a deliberate offence (Verbrechen) against life, unless committed in open combat. "

(c) The treaty signed between France and the German Federal Republic on 29th November, 1951, contains similar provisions. Article 4 provides exceptions to non-extraditable political offences a definition of which is given.

It is stated that :

" The following shall not be deemed political offences :

Offences in respect of which the Contracting Parties are obliged by international conventions to institute proceedings.

Attemps on the life of the Head of State or a member of the Government.

The political character of the offence shall not, ipso facto, preclude extradition in the ease of an attempt on the life of a person not made in open combat. "

(d) Article 5, paragraph 2 of the French Law of 10th March, 1927:

" Extradition is not granted :

...

When the crime or offence has a political character or when it is clear from the circumstances that the extradition is requested for a political end.

As to acts committed in the course of an insurrection or a civil war by one or the other of the parties engaged in the conflict and in the furtherance of its purpose, they may not be grounds for extradition unless they constitute acts of odious barbarism and vandalism prohibited by the laws of war, and only when the civil war has ended."

(e) As to the United Kingdom, the Extradition Act of 1870, Section 3, paragraph 1, provides as follows :

" A fugitive criminal shall not be surrendered if the offence iu respect of which his surrender is demanded is one of a political character, or if he proves to the satisfaction of the police magistrate or the court before whom he is brought on habeas corpus, or to the Secretary of State, that the requisition for his surrender has in fact been made with a view to try ɜr punish him for an offence of a political character. "

13. 23. The commentaries of the Harvard Research on Article 5, paragraph (a) of their Draft Convention provided the following view :

" The use of the permissive form in treaties with respect to non-extradition for political offences is decidedly the exception rather than the rule : the great majority of treaties and draft conventions examined contain provisions phrased in mandatory form either precluding the requested State from surrendering the person sought for a political offence or enjoining the requesting State from seeking the extradition of a person accused of a political offence. ... In justification of the adoption of the permissive form in paragraph (a) of this article, it may be pointed out that this formula seems to be better adapted to a multipartite convention than the peremptory terms of a mandatory prohibition ; it is also in harmony with the general tendency of this Convention. There is no reason why a State should be precluded from surrendering, if it so chooses, a person sought for a political offence. It may well be that some States, because of close association or because of the close similarity of their political institutions, would find the extradition of political offenders desirable. And there seems to be no reason why they should not be allowed to do so, especially when their discretion in this respect is in no way limited. "[5]

24. The considerations set out above refer only to purely political offences. There are also offences connected with political offences and which can be called " complex " political offences. For a definition of this second category, reference may be made to the four following examples :

(a) In Swedish law, such an offence must have a predominantly political character ; it must have been committed for purely politieal motives and it must be shown that the offence was of such.a character as to have endangered the political .and social structure of the State.

(b) Germany has adopted a second definition, which is also included in a Resolution of the Institute of International Law (October 1892). Afrticle 4 of the Treaty signed between Germany and Turkey on 3rd September, 1930, states :

1. "The Contracting Parties shall not be bound to grant extradition for a political offence or an offence connected with a political offence and committed with a view to preparing for, ensuring the commission of, concealing or preventing such an offence.
2. On the other hand, the obligation to grant extradition shall lie in the case of any act constituting a premeditated capital offence, including an attempt to commit such an offence and complicity therein, unless such act has been committed in open combat. In virtue of the present provision, an attack on the Head of a State or of the Government shall be an extraditable offence.

(c) A third definition is found in the United Kingdom Extradition Act of 1870 whereby a " fugitive criminal shall not be surrendered ... if he proves... that the requisition for his surrender has in fact been made with a view to try or punish him for an offence of a political character " (Paragraph 3, sub-parapraph (i)).

The treaty signed on 22nd December, 1931, between the United Kingdom and the United States of America uses in its Article 6 the same words as those quoted from the Act of 1870, with the addition of the words " a crime or " before the word " offence ".

(d) A fourth definition, combining the second and the third, was proposed by the International Law Association in 1928.

25. In nearly all international agreements, some exceptions have been made to the rule of the non-extradition of political offenders. First of all, there is the " attentat " or Belgian clause according to which murder, or attempt on the life of the Head of a State or a member of his family or sometimes a member of the Government, shall not be considered as a political offence. Secondly, some treaties provide that the political character of the offence shall not ipso facto preclude extradition in the case of an attempt on life not made in open combat.

26. The International Criminal Police Commission's draft Convention provides in Article 5 that

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5. See American Journal of International Law, Vol. 29, Numbers 1 and 2, January and April, 1936, pp. 109-110.

"... In the case of murder or attempted murder committed under circumstances of brutality or cruelty, the requested State can alone decide on the nature of the offence. "

27. Finally, in the following conventions, which have the character of international legislation, extradition for political offences is conceded in the sense that a requested person may be handed over even for a political offence.

a. Article 49 of the 1949 Convention for the amelioration of the condition of tho wounded and sick in armed forces in the field;

b. Article 50 of the 1949 Convention for the amelioration of the condition of the wounded, sick and shipwrecked members of armed force at sea;

c. Article 129 of the 1949 Convention relative to the treatment of prisoners of Avar;

d. Article 146 of the 1949 Convention relative to the protection of civilian persons in time of Avar ;

e. The 1948 Convention on genocide ;

f. The 1937 Convention against international terrorism.

28. Besides the problem of non-extradition of political offenders there is the equally important problem of knowing how and by whom the political character of the offence will be determined.

29. Conclusion. In view of the complexity and the variety of the circumstances in which a political offence can be committed, no attempt could be made to give a precise definition of these offences. However, it was recognized that some guidance had to be given as to the manner in which the proposed European Convention, in case of political offences, would be made applicable. On this point, it has been found that the most practical way was to adopt much of :

a. The British system which was followed by the British Extradition Act of 1870 and some treaties concluded by the United Kingdom; and of

b. The Continental system as shown in the 1951 Convention between France and the German Federal Republic. "We should mention two major departures from this Convention. First, the attempt on the life of the Head of a Government ivas not considered as precluding the granting of asylum to an offender ; secondly, the rejection of a request was made permissive so that the requested party could decline to surrender . the fugitive political offender. This is the system which has been adopted by the Harvard Draft. The special cases of murder not committed in open combat or committed in circumstances of extreme cruelty (cf. the International Criminal Commission's Draft) çan, of course, be omitted if the permissive system is adopted for the refusal of extradition for political offenders.

DRAFT ARTICLE 2

Political Offences

14. A requested High Contracting Party may decline to extradite for an act which, according to the circumstances in which it has been committed, is political or connected with a political act and committed with a view to preparing for, to ensuring the commission of, to concealing or to preventing such a political act ; or when there is reason to believe from the circumstances that the extradition is requested with a view to taking action against someone for an act of a political character.

15. The following shall not be deemed political offences :

a. Offences in respect of which the High Contracting Parties are obliged by international conventions to institute proceedings ;

b. Attempts on the life of a Head of State or Head of Government.

1.1.3. CHAPTER III - Fiscal Offences

30. In the nineteenth and twentieth centuries the practice has generally been not to consider fiscal offences as extraditable offences. To some extent economic rivalry between States resulted in their unwillingness to give aid to each other in the enforcement of customs regulations. Their reluctance to co-operate in the enforcement of internal revenue laws is more difficult to explain. (See in this connection Article 4 of the Swiss Extradition Law of 22nd January, 1892 and the views expressed in the Resolutions of the Extradition section of the 1932 Hague International Congress of Comparative Law). The modern tendency appears, however, to

be in the direction of acceptance of extradition for fiscal offences. The French Extradition Law of 1927, by omitting fiscal offences from the list of non-extraditable offences, has implicitly recognised that they can give rise to extradition proceedings. The Bustamante Code and the 1912 Rio de Janeiro Draft also favour the extradition of fiscal offenders. Among recent developments in this field, the following should be noted :

(a) Denmark, France, Germany, Greece, Ireland, Italy, the Netherlands, Norway, Sweden and the United Kingdom took part in a Conference held in 1927 under the auspices of the League of Nations. They agreed in principle that mutual assistance in the collection of taxes should be the subject of bilateral conventions between them.

(b) The authors of the Harvard Draft Convention on Extradition report that " while bipartite extradition treaties registered with the League of Nations which list extraditable offences do not appear to show a tendency to include fiscal offences in these lists, it is interesting that, of the forty no-list extradition treaties which have been registered, only fifteen except fiscal offences from their operation ".

(c) In the Harvard Draft Convention, the extradition of fiscal offenders is permitted. Fiscal offences are those " which are connected with the customs or revenue law of a State and not involving misuse of public funds ".

(d) Article 1 of the Convention for European Economic Co-operation is relevant :

" Accordingly , the Contracting Parties pledge themselves to carry out, by their efforts of self-help and in a spirit of mutual aid, the following General Obligations, and hereby set up an Organization for European Economic Co-operation, hereinafter referred to as the Organization. "

Further, among these general obligations, there is one mentioned in Article 7 of the Convention which provides that :

" Each Contracting Party will, having due regard to the need for a high and stable level of trade and employment and for avoiding or countering the dangers of inflation, take such steps as lie within its power to achieve or maintain the stability of its currency and of its internal financial position, sound rates of exchange and, generally, confidence in its monetary system. "

It might be said that these two articles, considered in relation to each other, imply that assistance in the prosecution of fiscal offenders constitutes a form of co-operation between the Powers signatory to the Convention of European Economic Co-operation. If so, it follows that the extradition of fiscal offenders could be taken to he part of the obligation on Member States not to commit any act which might be harmful to the monetary and financial stability of their partners in the organization.

(e) The Draft Convention of the International Criminal Police Commission provides in Article 7 :

" Offence s which are purely violations of fiscal laws are not extraditable unless, according to the law of the requesting State, they are subject to a penalty of imprisonment of not less than five years, or the offender has been sentenced to a term of imprisonment of not less than two years or has been actuated by a particularly disgraceful motive. Tlie requested State only can decide on tlie nature of the motives.

(f) Unlike the treaty signed 'between Germany and Turkey in 1930, which excluded fiscal offences from the list of extraditable offences {cf. Article 5, paragraph 3), the 1951 Treaty between France and the German Federal Republic permits extradition of fiscal offenders. Article 6 of this Treaty provides that extradition for offences in connection with taxes and customs and exchange regulations shall be granted, subject to a decision to this effect having been reached by exchange of letters in each particular case.

31. Nevertheless, certain difficulties arise in connection with extradition for fiscal offences. For example, according to Italian Law (Penal Code, Article 13, paragraph 2), and also the Swedish Law of 4th June, 1913 (Chapter 1), extradition may not be granted unless the offence is a crime according to the laws of both the requesting State and the requested State. However, this difficulty may be resolved if the extraditable act is defined, not in accordance with its character or nature, but in accordance with the importance of the sentence which it entails.

32. Another point which requires consideration is whether the definition of fiscal offences should be wide or restricted. It should -be noted that at a time when the U.S. customs regulations acquired a new importance, namely, during prohibition, a clause was inserted in the extradition treaties signed with Mexico (1925), with Cuba (1926), and other Latin American countries, providing for the extradition of offenders against the customs regulations.

33. In the treaty on Double Taxation signed between Canada and the United States on 12th June, 1950, provision was made for the contracting parties to give each other all administrative assistance to ascertain the income of nationals of the other party residing in their territory. (Reference ·. Executive R, 81st Congress, 2nd Session.)

34. This treaty follows the pattern of the treaties signed by the United States with Denmark, France, the Netherlands and the United Kingdom.

35. Article 44 of the Convention relating to the status of the European Defence Forces and to the Commercial and Fiscal Régime of the European Defence Community provides that the Community will on request grant every assistance in fiscal and customs matters to Member States.

36. Conclusion. It was decided that extradition should be granted for fiscal offences, this term being understood in a broad sense. The 1951 Convention between France and the German' Federal Republic was accepted as a guide, but it was simplified so as to make unnecessary the subsequent conclusion of any special agreement.

1.1.3.1. DRAFT ARTICLE 3

Fiscal Offences

Extradition shall be granted for customs offences and offences against laws, and regulations of a fiscal, financial, economic and monetary character if the penalty provided by the law in the requesting High Contracting Party is not less than a year's imprisonment or a fine of not less than the equivalent of eight thousand gold Swiss Francs (at the rate of 290.3225 milligrammes as fixed by the decision of 26th September, 1936, of the Federal Council).

1.1.4. CHAPTER IV - Military Offences

37. The exclusion of military offences from extraditable acts may be justified partly because of the specialized nature of the Courts which hear such cases, and partly because of the variations in the military law in different States. In this connection the possible attitude of Members of the Council of Europe which are not members of defensive military organizations should be kept in mind.

38. Of the Member States of the Council of Europe, only France and Sweden grant extradition of military offenders, and that is subject to certain provisions. Only one treaty between Members of the Council of Europe, namely that between Germany and Turkey signed in 1930 (Article 5), provides that the obligation to grant extradition shall not apply in respect of an offence which is punishable only under military law.

39. A jurisdictional protocol appended to the Treaty on the European Defence Community provides in Article 18 that the Member States transfer to the European Defence Community the right to try members of the European Defence Forces for offences committed by them.

40. Moreover, an agreement concerning the status of the armed forces of the North Atlantic Treaty countries while serving in the territories of other N.A.T.O. countries was signed in London on 19th June, 1951. This agreement contained, inter alia, the following provisions :

Article 7, Paragraph 5

" (a) The authorities of the receiving and sending States shall assist each other in the arrest of members of a force or civilian component or their dependents in the territory of the receiving State and in handing them over to the authority which is to exercise jurisdiction in accordance with the above provisions.

(b) The authorities of the receiving-State shall notify promptly the military authorities of the sending State of the arrest of any member of a force or civilian component or α dependent.

(c) The custody of an accused member of a force or civilian component over whom the receiving State is to exercise jurisdiction shall, if he is in the hands of the sending State, remain with that State until he is charged by the receiving State. "

41. Conclusion. It was agreed that military offences should be left outside the European Convention for the following reasons : in the first place it was felt that this question was already adequately dealt with in existing' specialised agreements. Secondly, any provisions included in the European Convention in this respect might

result in difficulties of interpretation when considered in the light of the provisions of specialised agreements. And, finally, it was possible that the validity of the latter agreements might be challenged on the grounds that they had been superseded by ai more recent, agreement, namely the European Convention on extradition.

1.1.4.1. DRAFT ARTICLE 4

Military Offences

Extradition for military offences is excluded from the field of application of the present Convention.

1.1.5. CHAPTER V - Extradition of Nationals

42. Extradition of nationals is contrary to the constitution or laws of the following members of the Council of Europe :

a. Belgium : Law of 15th March, 1874, Airtiele 1.

b. Prance: Law of 10th March, 1927, Article 5.

c. German Federal Republic : Law of 23rd December, 1929, Article 15. Basic Law of German Federal. Republic, Article 16, paragraph 2.

d. Italy : Article 26 of the Constitution[6].

e. Luxembourg : La w of 13th March, 1870, Article 1. Gode of Criminal Procedure, Article 5.

f. Sweden : Law of 4th June, 1913, Section 2.

g. Turkey : Penal Code, Article 3.

43. In British and American practice, extradition of nationals is allowed, but the reciprocity clause inserted in the agreements signed with other countries reduces the importance of this principle. However, there are a few treaties under which the United Kingdom surrenders its nationals 'although there is no reciprocity.

44. A Report from the Select Committee of the House of Commons on Extradition, 1868, contains the following account of the disadvantages of the non-extradition of nationals :

" I would suggest that whether any point could be raised or whether the matter should be considered by this Committee, about the delivery up of what are called nationals. Foreign countries refuse to deliver up their own subjects ; it is called the question of nationals. Recently, in 1863, I had the case of an Austrian subject who committed an enormous fraud in London, and fled to Hungary. The Foreign Office gave me letters to our Ambassador at Vienna and the man was arrested by the Austrian police in Hungary, and taken to Vienna. We made an application, not a demand but a request to the Austrian Government, that, under the special circumstances of the case, they would send him to England ; but after consulting their law officers they declined to do so, upon the express ground that he could bo tried in Austria for the offence committed in England... We conducted the prosecution to a great extent but we found that it was impracticable to carry it on to a conviction without taking a great many witnesses from London to Vienna, and therefore we dropped it... I think the Austrian Government would have been only too glad to have tried the man but they wanted so much evidence that I found it could only be satisfactorily done by so many witnesses going to Vienna. I give it up... ultimately he was released." (Richard Mullens, Solicitor to the Association of Bankers, in the Report of the Select Committee of the House of Commons on Extradition, 1868, page 60, paragraphs 1162/ 1166.)

45. The view that the extradition of nationals is desirable is based chiefly on the idea that the most suitable Court is always that, of the country in which the offence has been committed. Enquiries are made earlier and the proceedings are more expeditious because, for example, the witnesses can speak in their own language. The Court can make investigations on the spot, recai! witnesses as many times as is necessary, and abo summon persons accused of being accessories.

46. The resolution adopted by the Institute of International Law at Oxford on 9th September, 1880, states in paragraph 6 :

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6. This Article states : " Extradition of the citizen can only be granted i f specifically agreed .through international conventions." B y exchange of notes on A p r i l 16th and 17th, 1946, the I t a l i an Government agreed, on condition of reciprocity, to extradite Italian nationals to the United States i n conformity -with the IT .—Italian Convention of March 23rd, 1868.

" Betwee n countries whose criminal legislations rest upon similar bases and which have mutual confidence in their judicial institutions, extradition of nationals would be a means of assuring good administration of penal justice because it should be considered as desirable that the jurisdiction of the forum delicti commissi be so far as possible called upon to render judgment. "

47. The Montevideo Convention of 1953 provided some solution. First, it made the extradition of nationals optional, and, secondly, it made compulsory the prosecution of the offender in cases where he could not be surrendered to the requesting State. The text of Article 2 of this Convention is as follows :

" When the person whose extradition is sought is a citizen of the country, to which the requisition is addressed, his delivery may or may not be made, as the legislation or circumstances of the case may, in the judgment of the surrendering State, determine. If the accused is not surrendered, the latter State is obliged to bring action against him for the crime with which he is accused, if such crime meets the conditions established in sub-article (b) of the previous article. The sentence pronounced shall be communicated to the demanding State. "

48. The Draft Convention of the International Criminal Police Commission contains in Article 4 the following rule :

" The contracting States will not extradite their nationals, unless it is a question of the criminals being considered a danger to the social community. The requested State only will enact to cover the exceptions. "

49. The Treaty signed between France and the German Federal Republic on 29th November, 1951, provides in Article 2 that :

" Person s whose extradition is not authorized under the laws of the State applied to shall not be surrendered. Notwithstanding this, each of the Contracting Parties undertakes :

...

(b) to refuse, insofar as the law permits, to grant the status of nationals to persons whose extradition has been requested by the other State. "

50. In all conventions where the extradition of nationals has been left to the option of the parties, prosecution of non-extradited offenders is macle obligatory. For example, Article 16 of the International Criminal Police Commission's draft convention suggests the following clause :

" If the extradition does not take place because the individual claimed is a national of the requested State, the latter must, if possible, according to its own laws, prosecute him, and sentence him at the demand of the requesting State, which shall send to the requested State a document of prosecution supported by proofs. The requested State will inform the requesting State of the judicial decision and, should the occasion arise, of the execution of the penalty or of the measure of security. It will send them, in the original or a certified copy, the sentence that finally ends the prosecution.

When the individual has been sentenced (Article 10) or the punishment or security measure have been served or have been fixed, no new procedure will be commenced in the requesting State. New proceedings could be commenced if the individual sentence has not been punished only because of a pardon, an amnesty, or a withdrawal of the charge. "

51. There are other problems which must be studied in this connection, e. g. the question as to what date should be taken ' for ascertaining the nationality of offenders.

52. Conclusion. It appeared almost impossible to make a general ruling on the extradition of nationals. It was felt desirable that, through the progressive modification of municipal law, a uniform practice be developed giving effect to the principle of extraditability of nationals. In the meanwhile it was agreed that this principle should be considered as permissive and not mandatory. But when a requested High Contracting Party is not in a position to surrender its national, it must prosecute him. This system has already been adopted in two Drafts (reservation No. 1 in the Harvard Draft and the International Criminal Police Commission's Draft, Art. 16).

1.1.5.1. DRAFT ARTICLE 5

Extradition of Nationals

Where the person claimed is a national of a requested High Contracting Party, and for that reason cannot be extradited, the requested High Contracting Party shall, within one year of the notification to the requesting High Contracting Party of its refusal to extradite, prosecute the person concerned as if the act had been committed on its own territory.

1.1.6. CHAPTER VI - Place of Commission of extraditable Acts

53. Present trends, are well illustrated by Article 3 of the Draft Convention prepared by the International Criminal Police Commission, and the 1951 Treaty between France and the German Federal Republic. The latter- provides that extradition may be refused if the offence has been committed in the territory of the requested State.

54. However; the rule of territorial jurisdiction does not always make it possible for an offender to be prosecuted. For example, when an offence has been committed by a member of a diplomatic mission, the competence of the State of which the offender is a national has to be accepted instead of that of the State where the offence has been committed. Of course the immunity can be waived.

55. This also arises where some part of the offence is committed in one country and another part in another, for example when poison is sent from one country to another. In this case the Court of the State from which the poison has been sent may be competent, notwithstanding the fact that the poison has been consumed in the territory of another State.

56. A third example is that of the situation existing before the conclusion of the 1929 International Convention for the Suppression of Counterfeiting Currency, when States whose currency had been counterfeited abroad could not ask to exercise jurisdiction against the counterfeiters.

57. Extradition could take place in these cases by virtue of a special provision as for example in the case of the convention between France and the German Federal Republic (1951).

58. In the Harvard Draft Convention it is said :

" A requested State may decline to extradite a person claimed for an act committed wholly outside the territory of the requesting State, unless in that part of the territory of the requested State in which the person claimed is apprehended, its law would make such act' punishable under similar circumstances, though committed wholly outside the territory of the requested State. " (Article 3, para, (b).)

59. Conclusion. The Committee was of opinion that it was desirable in general to allow a requested State to refuse extradition in cases where the offence on account of which the extradition is sought has been committed in whole or in part within its territory. This is in accordance with the rmiversal acceptance of territoriality as the primary basis of competence.

1.1.6.1. DRAFT ARTICLE 6

Place of commission of extraditable acts

Extradition may be refused if the act for which it is requested was committed in whole or in part in the territory of the requested High Contracting Party.

1.1.7. CHAPTER VII - Lapse of Time

60. By the lapse of time a person claimed may become immune from prosecution or punishment. This rule is adopted in most extradition practices and laws. The question arises whether the law of the requesting State or that of the requested State, or both, should be applicable to determine whether or not a person claimed has become immune 'by the lapse of time.

61. In a number of treaties signed by the United States, it is stated that the law applicable should be that of the country to which the request was made (cf. Moore, American Law of Extradition, Vol. 1, paragraph 373).

62. The 1930 Treaty between 'Germany and Turkey, the 1951 Treaty between Prance and the German Federal Republic, and the Bustamante Code provide that extradition shall or need not be granted if immunity has been acquired through lapse of time under the law of the requested or of the requesting State. The Belgian Law concerning Extradition of 1st October, 1833 (Article 7), the German Extradition Law of 23rd December, 1929, (Article 4, paragraph 2), the Regulations of the Italian Penal Code and Code on Criminal Procedure governing Extradition, and the draft Convention Procedure governing Extradition, and the draft Convention adopted by the International Lav/ Association in 1928, provide, on the other hand, that the requested State's law should determine whether immunity has been acquired.

63. In the Harvard Draft Convention, Article 4 provides that :

" A requested State may decline to extradite a person claimed if under the law of the requesting- State such person, at the time when the requisition is received, has become immune from prosecution or punishment by reason of the lapse of time, or if under the 1aл\' prevailing in that part of the territory of the requested State in which the person is apprehended, such person, at the time when the requisition is received, would have become immune from prosecution or punishment by reason of the lapse of time, if the act had been committed within the territory of the requested State."

64. The " alternative system " has been criticized by different schools on the grounds that the requesting State alone should determine whether or not immunity has been acquired, in view of the fact that the offence for which the request för extradition is made was contrary to its laws and the offender liable to prosecution under those laws. To the second system it has been objected that the offender should not be permitted to escape punishment merely because he has fled to a country where a shorter period is in force. Moreover, it is to be observed that it will be difficult to apply in the requested State the law of the requesting State concerning the lapse of time.

65. Conclusion. The alternative system seemed more appropriate. The conclusion reached recommends the acceptance of a combination of the Harvard Draft and the 1951 Convention between Fa-ance and the German Federal Republic. The latter also had an acceptable provision concerning the effect of amnesty, following which extradition can be refused :

" If an amnesty has been declared in the applying State and the State applied to can conclusively show that this measure is applicable to the case in question, or if an amnesty is declared in the State applied to and the offence is one which could have been prosecuted in that State."

1.1.7.1. DRAFT ARTICLE 7

Lapse of time

Extradition may be refused when the person claimed has become immune, by reason of lapse of time, from prosecution or punishment according to the laws of either the requesting' or the requested High Contracting Party.

1.1.8. CHAPTER VIII - Capital Punishment

66. Most Members of the Council of Europe have abolished the death-penalty[7]. That is why many of them insert in their extradition treaties a provision to the effect that the death penalty should not be imposed on a surrendered person. That is also the solution adopted by the Bustamante Code (Article 378) and by the Central American Convention, 1934 (Article. 2). Some bilateral treaties to which Sweden and Greece are parties contain such a provision making extradition conditional upon an undertaking not to impose the death penalty.

67. In the draft of the International Criminal Police Commission and the 1951 treaty between Prance and the German Federal Republic, the non-imposition of the death-penalty is not a condition ' of surrender for the fugitive but it is recommended that the requesting State should not impose the death-penalty on the fugitive.

68. The draft convention of the International Criminal Police Commission reads as follows :

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7. The death penalty has been abolished in the following Member States of the Council of Europe : Denmark, the German Federal Republic, Iceland, Italy (except in time of war and for certain offences which are tried by military tribunals), Norway, the Saar and Sweden. In Belgium, Luxembourg and the Netherlands, the death penalty, though still statutorily i n existence, is not applied. In the following Member States, the death penalty is still applied : France, Greece, Ireland, Turkey, and the United Kingdom.

" Article 15. I f the act for which extradition has been demanded is punished according to the law of the requestmg State by the death-penalty, and this penalty is not laid down by the law of the requested State, this State may extradite him with the recommendation that the penalty of death be replaced by a penalty which, in the requesting State, approaches most closely to that provided by the requested State. "

69. The Harvard Draft Convention contains an optional provision to be found under Schedule A and entitled " Reservation Number One — Capital Punishment ". This reservation is worded as follows :

" A requested State may make the extradition of any person conditional upon the receipt of satisfactory assurance that, in case of conviction, neither the death-penalty, nor any cruel or unusual punishment, will be imposed upon him by the requesting State ".

70. But there are complications. In the United Kingdom, in the case of murder, the court has no discretion, as death is the only penalty which can be awarded on conviction for murder and it must be awarded.

71. Conclusion. It appeared that the best solution would be one which involves the least infringement of the independence of the courts of the requesting State. It was decided to agree that the executive organ of the requesting State must bind itself to recommend to the competent authority the granting of a reprieve. There are weighty reasons for believing that this recommendation would be successful because if it were not successful such a State would experience difficulty in future cases in obtaining a. person wanted for a capital offence.

1.1.8.1. DRAFT ARTICLE 8

Capital punishment

If the act for which extradition has been requested is punishable by death in the requesting High Contracting Party and there is no death-penalty in the law of the requested High Contracting Party, the requested High Contracting Party may extradite only if the requesting High Contracting Party undertakes.to recommend to the Head of State or to its constitutionally competent authority to grant a reprieve or an order setting aside the death-penalty.

1.1.9. CHAPTER IX - Non bis in idem

72. It is traditionally recognized that a State may decline to extradite a person who has already been prosecuted and convicted by the requesting State, except when the sentence has not been entirely carried out. The request may also be rejected in cases where the person claimed has already been prosecuted for the samé act by the requested or by a third State and acquitted.

73. This rule is of general application. The fifth Amendment to the United States Constitution protects individuals against ä second prosecution for the same act.

74. The requesting State may wish to try the person claimed because it is in a better position than others for obtaining the evidence, or because the other States are not in a position properly to appreciate the seriousness of the offence. It may also claim the surrender of a person already acquitted under ist laws, where, for example, important new evidence has been discovered or where the case is re-opened.

75. The German Law on Extradition of 23rd December, 1929; provides in Article 4, para. 3, as follows :

" Extradition is not permissible :

if the act, is within German jurisdiction (Gerichtsbarkeit) and a judgment has been rendered by German authorities against the person sought (Verfolgten) or if the prosecution has been discontinued before trial. "

76. The French law of 10th March, 1927, states in Article 5, paragraph 4, that " when the crimes or offences, though committed outside of France or the French colonial possessions, have been there prosecuted to final judgment ", extraditou is not granted.

77. In the treaty signed between France and the Netherlands on 24th December, 1895, it is laid down that extradition will not be granted when proceedmgs have already been started in the requested State for the same act (the same provision is to be found in the treaty signed between Germany and the United Kingdom on 14th May, 1872, Article 4), or when a requested person has been definitely convicted or acquitted.

78. In the 1951 Treaty between France and the German Federal Republic, the refusal of extradition is permissive when the case has already been heard in the requested State for the same offence ; or if judgment has been given in a third State (Article 7). But the same treaty makes mandatory the refusal of extradition when a definite verdict has been given in the requested State for the same act and in respect of the same person.

79. In the 1933 Montevideo Convention, refusal to extradite is mandatory when the accused has served his sentence in the country where the crime was committed.

80. The Harvard Draft Convention reads as follows :

"Article 9. (a) A requested State may decline to extradite a person claimed if such person has been prosecuted by the requesting State for the same act or .acts for which his extradition is sought and has been acquitted ; or if he has been convicted in such prosecution unless the extradition is sought in order that the person claimed may serve an unexpired term of the sentence imposed as the result of such conviction.

(b) A requested State may decline to extradite a person claimed if such person has been prosecuted by the requested State or by a third State for the same act or acts for which extradition is sought and has been acquitted or convicted. "

81. In the treaty signed between Germany and the United Kingdom on 14th May, 1872, extradition is deferred in eases where the proceedings are continuing (Article 4).

82. In the German-Turkish Treaty of 3rd September, 1930, Article 6 states :

" The obligation to grant extradition shall not lie :

1. ...

2. When the courts of law of the Party applied to arę shown to bave jurisdiction and there are preponderating considerations at criminal law in favour of the exercise of the jurisdiction of the party applied to, in particular when sentence has been passed against the accused by the authorities of the party applied to or when those authorities have decided not to take proceedings against the accused before a court of law. "

83. In the treaty signed between the Netherlands and the United States on 29th April, 1886, it is stated that if the person whose extradition is requested is held for trial in the country to which the request is made, the latter shall have the option either to grant extradition or to proceed with the trial.

84. In most modern treaties, this particular situation is not considered, perhaps because the option given to the requested State might lead to delay in proceedings.

85. In the 1951 Treaty between France and the German Federal Republic, another situation is envisaged. According to Article 7, paragraph '2 of that treaty, extradition shall be refused when, according to the laws of the requesting State, prosecution is possible only if requested by the victim and if such a request has not been made.

86. Conclusion. The Havard formula with one minor modification was accepted. This exception concerns the case of the individual who has been acquitted. It was agreed that in this case the judgment must be final.

1.1.9.1. DRAFT ARTICLE 9

Non bis in idem

16. A requested High Contracting Party may decime to extradite a person claimed if such person has been prosecuted by the requesting High Contracting Party for the same act or acts for which his extradition is requested and if he has been either finally acquitted, or convicted, unless, in the latter ease, the extradition is sought so that the person claimed may serve an unexpired term of the sentence imposed as the result of such conviction.

17. A requested High Contracting Party may decline to extradite a person claimed if such person has been prosecuted by the requested High Contracting Party or by a third State for the same act or acts for which extradition is sought and has been finally acquitted or convicted.

1.1.10. CHAPTER X - Pending prosecution for the same acts

87. A number of treaties contain a rule whereby extradition is refused if a person claimed is being prosecuted or apprehended with a view to prosecution, for the act or acts for which extradition is sought. This rule is based on the consideration that a requested State should not be compelled to discontinue proceeding's and surrender a person claimed for trial by another State for the same act. Also the person claimed should not be unduly harassed. In such eases rejection of the request for extradition is based neither on the nationality of the offender, nor on the fact that the offence has been committed on the territory of the requested state. As a result it might be thought that this is an anticipated application of another rule : non bis in idem. But this is not always true. The prosecution might have been dropped or the claimed person discharged before the end of the trial for a reason other than lapse of time or amnesty.

88. The Treaty signed between Germany and Turkey on September 3rd, 1930, provides in Article 6 that :

" The obligation to grant extradition shall not apply :

1. ...

2. When the courts of law of the Party applied to are shown to have jurisdiction and there are preponderating considerations at criminal law in favour of the exercice of the jurisdiction of the party applied to, in particular when sentence has been passed against the accused by the authorities of the party applied to or when those authorities have decided not to take proceedings against the accused before a court of law.

89. Consequently, one is justified in saying that the rule appears as being founded on priority given to national jurisdiction against foreign jurisdiction for reasons of fairness and convenience.

90. More important is the question whether this priority will be absolute, that is whether the refusal to grant extradition will be mandatory or permissive.

91. In some European laws, as, for example, Swiss and Dutch laws, and in some European treaties, as, for example, those signed by the Netherlands with Italy (May 28th, 1897, Art. 3), Sweden (June 26th,'1895, Art. 4) and with Finland (February 21st, 1933, Art. 4, para. 2), the refusal to grant extradition is mandatory. It is also mandatory in.the American " tradition ", as is shown by the Bustamante Code (Art. 358), the Montevideo Convention (26th December, 1933, Art. 3) and the 1931 Treaty between the United States and the United Kingdom, Art. 4, para. 1 of which reads as follows :

" The extradition shall not take place if the person claimed has already been tried and discharged or punished, or is still under trial in the territories of the High Contracting Party applied to, for the crime or offence for which his extradition is demanded. "

92. But European " tradition " is rather to make permissive the refusal of extradition. The extradition treaties signed by Germany with Greece in 1907 (Art. 4) with Turkey in 1930 (Art. 6, para. 2) and France in 1951, are examples of this. Article 7 of this last treaty provides that extradition may be refused " if proceedings have been taken in respect of the offences in the requested State applied to.... " (para. 2).

93. The Harvard Draft Convention adopts a permissive system because " there seems no reason why a requested State should not be allowed by the terms of this convention to extradite under such circumstances if it believes that thereby justice will be better served ". That is why Article 10 of the Harvard Draft Convention reads as follows :

" A requested State may decline to extradite a person claimed if he is being prosecuted for the act or acts for which extradition is sought, or if he has been 'apprehended with a view to such prosecution, either at the time of receipt of a request for provisional arrest, or, (in the absence of such request) at the time of receipt of a requisition. "

94. Whatever may be the system chosen, it is desirable not to preclude by formal provision of the proposed European Convention a High Contracting Party from requesting for the second time the surrender of the person claimed, after the first request has been rejected on the grounds of pending prosecution provided that there is no interference with the rule non bis in idem. The International Criminal Police Commission's draft convention on extraditou provides in Art. 10 a mandatory system. It reads as follows :

" Extradition will not be granted when, for the same act, the person claimed is proceeded against or has been judged in the requested State. "

95. An " ordonnance de non-lieu " (decision not to take proceedings) is considered as a judgment when the law of the requested State provides that no further enquiries shall be made.

96. Conclusion. The Harvard Draft appeared acceptable as regards conditions under which extradition may be refused. The International Criminal Police Commission's Draft Convention contains a provision on the subject of the " ordonnance dc non-lieu " (decision not to take proceedings) which was considered useful.

1.1.10.1. DRAFT ARTICLE 10

Pending Prosecution for the same acts

18. A requested High Contracting Party may decline to extradite a person claimed if he is being prosecuted for the act or acts for which extradition is sought, or if he has been apprehended with a view to such prosecution, either at the time of receipt of an application for provisional arrest, or (in the absence of such application) at the time of receipt of a request.

19. A final decision in the requesting High Contracting Party not to take proceedings (décision définitive de non-lieu) shall allow the requested High Contracting Party to refuse extradition.

1.1.11. CHAPTER XI - Postponed or Conditional Extradition

97. If the person claimed has been accused of an offence or is being punished for one in the territory of a High Contracting Party for an offence other than that for which his extradition is requested, a special situation arises which is covered by 'appropriate provisions in municipal laws and international agreements. Prance was the first country to insert a special provision in her treaties on this point. The Convention concluded by her with Sardinia on May 23rd, 1838, reads as follows :

" If the person claimed is prosecuted or convicted in the country where he fled for offences committed in that country, he should not be surrendered before having served Kis sentence. "

98. This rule has been adopted not only by Continental countries but also by the United Kingdom and the United States, (see para. 114 and 115).

99. A divergence occurred between Anglo-American and European countries when the latter made the postponement of extradition permissive instead of mandatory, as it was formerly. The extradition treaty signed between Prance and Mecldenburg-'Schwerin on January 26th, 1847, was the first which made the postponement of extradition permissive.

100. The Netherlands, in treaties concluded with Italy (May 28th, 1897) and Sweden (June 26th, 1895) took the view that postponement of extradition in such cases should be permissive — though the exercise of discretion was subject to certain limitations. Germany followed the same principle in her treaty with Greece (1907), Turkey (1930) and France (1951). The last treaty contains a provision as follows (Article 15) :

" If the individual claimed is prosecuted or condemned in the State applied to for an offence other than that which is the cause for the request for extradition, this State must nevertheless reach a decision as to the request, but the surrender of the accused may be postponed until he has satisfied the demands of justice in the State applied to.

This provision shall not stand in the way of the temporary transmission of the individual concerned for the purpose of his appearing before the legal authorities of the applying State. In this case, he shall be returned as soon as the said legal authorities have pronounced judgment, ruiless the State applied to should then renounce its claim to his return. "

101. The municipal laws of many European countries adopt the system which leaves it to the discretion of the State to defer or to grant immediately the extradition of a person who has been accused of or is being punished for another offence committed on its own territory.

102. The Swedish law of June 4th, 1913 provides in Art. 10 :

" If a person, whose extradition is requested, finally has been sentenced to punishment here in the Knxgdom for a crime other than that which is referred to in the requisition respecting extradition, extradition may not be granted until he has undergone the complete punishment to which he has been sentenced ; however, he may for the sake of being tried be extradited temporarily to a foreign State, if the latter engages to surrender him to Swedish authority immediately after he has been finally sentenced there. "

103. The French law of March 10th, 1927 provides in Article 8 :

" In the case where an alien is being prosecuted or has ben convicted in France and where his extradition is requested of the French Government because of a different offence, the surrender can be effected only after the prosecution has been terminated and, in the case of conviction, after the penalty has been executed. However, this provision does not create an obstacle to an alien being sent temporarily in order to appear before the tribunals of the requesting State on the express condition that he shall be sent back, as soon as judicial procedure abroad has been terminated. The provisions of this Article govern the case where an 'alien is subjected to a Avrit of arrest for debt (soumis à la contrainte par corps) by the application of the laws of July 22nd, 1867 and December 19th, 1871. "

104. The Italian code of criminal procedure provides in'Article 670 :

" Extraditio n is suspended if the accused or sentenced person is to be tried within the territory of the State or is to undergo punishment for crimes committed before or after that connected with his extradition, unless the Minister for Justice decides to consign him temporarily to the requesting State or to come to an arrangement with the latter whereby the punishment to have been undergone within the territory of the State will be executed abroad. "

105. The United Kingdom and the United States continue to follow the rule of mandatory postponement. The British Extradition Act, 1870, Section 3, para. 3 reads as follows :

" A fugitive criminal who has been accused of some offence within English jurisdiction, not being the offence for which his surrender is asked, or is undergoing sentence under any conviction in the United Kingdom, shall not be surrendered until after he has been discharged, whether by acquittal or on expiration of his sentence or otherwise. "

106. In the treaty concluded between the United States and the United Kingdom (December 22nd, 1931), it is provided in Article 4 that :

" If the person claimed should be under examination or under punishment in the territories of the High Contracting Party applied to for any other crime or offence, his extradition shall be deferred until the conclusion of the trial and the full execution of any punishment awarded to him ".

107. The Montevideo Convention of 1933 also accepts mandatory postponement.

108. This system of mandatory postponement is much criticised. The comments of the Harvard Research stress the necessity for providing an alternative for the postponement of extradition. They State that : " Postponement, while the person claimed serves a long-term sentence in the requested State, may greatly handicap the requesting State in the application of its criminal law, while a temporary extradition, upon condition that the extradited person be returned 'as soon as the prosecution in the requesting State is terminated', may not jeopardise any interest in the requested State. If, during the temporary extradition, the extradited person is convicted and a sentence of death or deprivation of liberty is imposed, and he is then returned to the requested State, he can be extradited again, when the requested State is through with him, so that the penalty imposed upon him by the requesting State can be exacted of him. "

109. As a conclusion, the Harvard Draft Convention proposes the adoption of a rule providing the postponement of extradition or its granting at the discretion of the requested State. This rule (Article 11) reads as follows :

" 1. A requested State may postpone the extradition of a person claimed,

a. in order that the person claimed may be prosecuted and punished by the requested State, or where he has already been convicted, in order that he may serve his sentence in the requested State, for an act other than that for which extradition is sought ; or

b. in order that a pending civil proceeding to which the person claimed is a party in the requested State may be concluded ; or

c. in order that the person claimed may testify as a witness in a judicial proceeding pending in the requested State.

But extradition and proceedings based upon a requisition shall only be postponed in favom o f the proceedings above referred to so far as is reasonably necessary.

2. As an alternative to such a postponement of extradition the requested State may extradite the person claimed upon condition that such person be returned to the requested State at the expense of the requesting State as soon as the prosecution in the requesting State is terminated, for one or more of the purposes enumerated in paragraph 1 of this article. "

110. The Bustamante Code rejects the mandatory postponement of extradition. Its Article 346 provides :

Whenever before the receipt of the request, .a person accused or convicted has committed an offence in the country from which his delivery is requested, the said delivery may be postponed until he is tried and has served sentence. "

111. The draft prepared in 1948 for the International Criminal Police Commission provides in Article 37 provisional extradition. This article reads as follows :

" When the person claimed is prosecuted or has been sentenced by the requested State for an ,act which is not referred to in the request for extradition, the extradition can nevertheless be granted in especially urgent cases, on condition tha.t the person extradited shall be returned to the requested State immediately after the end of the penal proceedings in the requesting State. "

112. Conclusion. Sub-paragraph (b) of paragraph 1 of Article 11 of the Harvard Research draft gives rise to some objections. It is considered that the postponement of extradition to permit the claimed person to appear as a party in pending civil proceedings is not sufficient reason to postpone the granting of extradition for an act which requires prompt action on the territory of the requesting State. As to the postponement of extradition in the case of a witness in a criminal proceeding, this would be acceptable provided a time-limit were set on the length of the postponement. The last sentence of paragraph 1 is open to objection, as it might be held that the absence of the words " so far as is reasonably necessary " elsewhere in the. Convention implies that this criterion cannot be applied. Paragraph 2 is acceptable, with two reservations. First, reimbursement of expenses is at variance with the provisions of Article 22 of the proposed European Convention on the question of expenses. Secondly, the last words of paragraph 2 raise difficulties for the reason that they qualify the right of the requested State to have the person concerned returned. Repayment of the " loan of the offender " must be unconditional (see the International Criminal Police Commission's Draft).

1.1.11.1. DRAFT ARTICLE 11

Postponed or Conditional Extradition

20. A requested High Contracting Party may postpone the extradition of a person claimed :

a. in order that -the person claimed may be prosecuted and punished by the requested High Contracting Party, or, where he has already been convicted, in order that he may serve his sentence in the requested High Contracting Party for an act other than that for which extradition is requested ; or

b. in order that the person claimed may testify as a witness in a criminal proceeding pending in the requested High Contracting Party, but, in this case, extradition shall only be postponed for a maximum of six months from the date of receipt of the request.

21. As an alternative to such a postponement of extradition, the requested High Contracting Party may extradite the person claimed upon condition that such person be returned to the requested High Contracting Party as soon as the prosecution in the requesting High Contracting Party is concluded.

1.1.12. CHAPTER XII - Ride of Speciality

113. According to this rule, the requesting State may not, without the consent of the requested State, either try or punish the surrendered person for any act committed prior to his extradition other than that on which the request was based. This principle is universally recognised and applied. Nearly all treaties also provide that such a person may not without the consent of the surrendering State.be re-extradited to a third State.

114. Since the publication by the Harvard Research in International Law of their Report on Extradition, most treaties provide expressly that the person surrendered may be tried or punished for another offence if the surrendering State consents thereto.

115. The 1951 treaty between Prance and the German Federal Republic contains the following provision :

" A person who has been handed over cannot be prosecuted or sentenced, for any offence previous to his extradition, other than the offence for which he has been extradited. It shall, nevertheless, be possible for the applying State, in accordance with its own legislation, to take such measures as will enable it to request extension of the extradition or the limitation of prescription. The extradited person shall in no case be made the subject of any measure whatsoever which would restrict his personal freedom..." (Article 16.)

116. Similarly, Article 23 of the Harvard Draft Convention provides that :

1. " A State to which a person has been extradited shall not, without the consent of the State which extradited such person :

   a. prosecute or punish such person for any act committed prior to his extradition, other than that for which he was extradited ;

   b. surrender such person to another State for prosecution or punishment ;

   c. prosecute such person before a court specially constituted for the trial, or to which special powers are granted for the trial.

2. Paragraph (1), sub-paragraphs (a) and (b) of this article shall not apply, if the person who was extradited voluntarily remains within the territory of the State to which he was extradited for ą period of thirty days, or voluntarily returns thereto. "

117. Another example is to be found in Article 14 of the International Criminal Police Commission's draft Convention, which reads as follows :

" As a general rule the offender should not, in the State to which he is sent, be investigated, nor sentenced, nor subjected to proceedings or to a security measure for an offence prior to extradition, other than that for which extradition has been granted, unless the request-ted State agrees thereto.

When the qualification given to the incriminating .act is modified in the course of proceedings, the offender extradited will be punished only in the measure that the new qualification allows extradition.

The rule of the first paragraph is only applicable in cases where the person extradited stays voluntarily in the country to which he has been sent more than 14 days after the end of the proceedings or after the completion of the punishment of of the security measure, or when lie has returned of his own accord.

In accordance with the rule of the first paragraph, the country to which an offender has been extradited shall only re-extradite him to another country müi the agreement of the country which first granted extradition. In the cases specified in the third paragraph, this consent is not necessary. "

118. In certain circumstances, exceptions may be made to the rule of speciality when the surrendered person agrees voluntarily thereto The Swedish Law regarding the Extradition of Criminals of 4th June, 1913 (Article 11) and the 1933 Montevideo Convention (Article 17) make such exceptions. But the Harvard Draft Convention is against this solution because it might be difficult to be sure that the surrendered person really consents freely and voluntarily to be tried for a different crime.

119. The first exception is the re-extradition of a surrendered person to a third country, with the consent of the requested State. This exception is supported by existing doctrine and practice. Article 17 of the 1951 Treaty between Prance and the German Federal Republic reads as follows :

" Except as provided in Article 16, second paragraph, the consent of the State applied to shall be necessary to allow the requesting State to hand over to a third State the individual surrendered to it. "

120. A second exception to the rule is provided when лi. surrendered person voluntarily remains within the territory of the State to which he was extradited for a period of time. In this case the surrendered person could be prosecuted for an offence other than that for which he was extradited. In most treaties this period is limited to thirty days. The Bustamante Code (Article 377) proposes three months. The International Criminal Police Commission mentions a period of fourteen days. The 1951 Treaty between Prance and the German Federal Republic provides for a period of thirty days.

121. Conclusion. The conclusion reached on this point was the same as that which was embodied in the Harvard Draft (Article 23) with one important exception. This exception concerns the case of a person who voluntarily remains within the territory of the State to which he has been extradited. It was felt that such a person should not be extradited without a new request, because it is sometimes difficult to ascertain whether he was really free to leave the country.

1.1.12.1. DRAFT ARTICLE 12

Rule of Speciality

A High Contracting Party to which a person has been extradited shall not, without the consent of the High Contracting Party which extradited such person :

a. prosecute or punish such person for an act committed before his extradition other than that for which he was extradited ;

b. surrende r such person to another High Contracting Party or to a non-High Contracting Party for prosecution or punishment ;

c. surrende r such person to another High Contracting Party or to a non-High Contracting Party for prosecution or punishment ;

d. prosecute such person before a court specially constituted for the trial or to which special powers are granted for the trial.

1.1.13. CHAPTER XIII - Conflicting Requests

122. Conflicting requisitions arise when two or more courts are concurrently competent to try a person for the same offence. The question to be decided is which court shall have priority.

123. There is the practice of British and American treaties and the Central American Convention of 1934 according to which priority is given to the requesting State whose application has been received first, provided that the two jurisdictions have territorial titles.

124. In some treaties to which Italy and C4ermany are parties, priority is given in the first place to the State of which the offender is a national, and in the second place to the State on whose territory the offence has been committed.

125. In certain treaties to which some Scandinavian countries are parties, priority is given to the country where the most serious act has been committed.

126. A solution has been suggested in the Harvard Draft Convention for eases where conflicting requests are received from two or more States for the same person but for different acts. Article 8 (b) reads as follows :

" When a requested State receives from two or more States requisitions for the same person for different acts, the requested State shall, in extraditing the person claimed decide to which State it will extradite, taking account of the seriousness of each act, the place where each act was committed, the nationality of the person claimed, the times when the requisitions were received, and engagements which may be made for re-extradition by one requesting State to another. "

127. In eases of conflicting requests for the same person and for the same act, the Harvard Draft Convention states that preference shall be given : " to that requesting State in whose territory the act was committed. If the act was committed in the territory of more than one requesting State or in the territory of a non-requesting State, the requested State shall extradite the person claimed to the requesting State whose requisition is first received. " (Article 8 (a))

128. In the 1951 Treaty between France and'the German Federal Republic this distinction between requests for different acts and requests for the same act is not made. The Harvard formula contained in Article 8 (Ď) is adopted, and Article 12 of the Treaty reads as follows :

" If extradition is requested concurrently by several States, either for the same act of for different acts, the State applied to shall be free to make a ruling, all circumstances considered and more especially the possibility of later extradition between the applying States, the respective dates of the requests, and the relative gravity and scene of the offences'. "

129. Conclusion. It was decided to follow the formula laid down in the 1951 Convention between France and the German Federal Republic and to distinguish between the case where the conflicting requests concern the same offence and where they concern different offences. That is a departure from the Harvard system. The nationality of the offender was added to the series of criteria histed in the Franco-German Convention which would have criteria to be considered by the requested State before deciding to which requesting State the priority will be given.

1.1.13.1. DRAFT ARTICLE 13

Conflicting Requests

If the extradition of the same person is requested concurrently by several High Contracting Parties, either for the same act or for different acts, the requested High Contracting Party shall, in deciding to which High Contracting Party the person claimed shall be extradited, consider all the circumstances and especially the possibility of later extradition from one requesting High Contracting Party to another, the respective dates of the requests, the relative seriousness and the place of commission of the act or acts and the nationality of ' the person claimed.

1.1.14. CHAPTER XIV - The Request and supporting documents

130. Three main problems were considered :

a. Channel by which the request should be communicated or received ;

b. Contents and form of the request ;

c. Nature of documents or objects accompanying the request.

1.1.14.1. (a) Channel by which, the request should be communicated or received

131. Nearly all existing Conventions and municipal laws provide that the request for extradition shall be communicated by diplomatic channels. Exceptions to this system are found in only a few cases (British Extradition Act, 1870, as amended by the Extradition Act, 1873, Section 7 ; Montevideo Convention of 1933 ; Art. 5 ; Central American Convention, of 1934, Art. 7 and treaties signed by the United States with Germany in 1930, Art. 10, and with Greece in 1934, Art. 11). These instruments provido that a consular official can present the request in certain circumstances. These exceptions arc irrelevant in the case of Members of the Council of Europe, all of which have extensive diplomatic missions on the metropolitan territories of Member States.

132. A second set of exceptions is found in the provisions concerning extradition from the colonies (British Extradition Act, 1870, Section 17) [8], and in the " colonial provisions " inserted, for example, by France in her extradition treaties since the conclusion of her treaty with the Netherlands on August 3rd, 1860, Art. 2, para.. 1 (see also the French extradition law of 1927, Art. 35) [9].

133. Indeed, it would take a very long time if the request had to he sent through diplomatic channels to the Foreign Office of the Administrating Power which would then send it to the responsible 'authority in the colonial territory. Moreover, the need for a special provision concerning colonial extradition will be felt only by those High Contracting Parties which have colonial possessions and which have accepted the insertion of a " colonial clause " in the European Convention on Extradition.

134. The communication of a request by diplomatic channels has only been set aside very occasionally in bilateral- treaties, for example those signed by Italy with Yugoslavia in 1922 (Art. 9) and with Czechoslovakia in 1922 (Art. 9) which provide for direct communication from the Minister of Justice of the requesting State to the Minister of Justice of the requested State as a normal procedure. The International Criminal Police Commission's draft Convention on Extradition no longer requires the use of the diplomatic channel This solution has been considered as a success from the point of view of simplification of extradition procedure. Article 20 of the above-mentioned draft Convention reads as follows :

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8. " The requisition for the surrender of α fugitive eriminal who is i n or suspected of being in a British possession may bo mado to the Governor of that British possession by any person recognised by that Governor as α consul general, consul or vice-consul, or (if tho fugitivo criminal has escaped from α colony or dependency of the foreign Stato on behalf of which tho requisition is made) as tho Governor of such colony or dependency."

9. " Th e Governors of French colonies may, on their own responsibility and under the d u t y of giving account without delay to the Minister of - Colonies, decide upon requests for extradition which are presented to them either by foreign Goverments or b y the Governors of foreign colonies. The request is formulated either by the principal consular agent of the requesting State, or by the Governor of the cojony. Th e request is entertained only on the conditions envisaged by Articles 3, 4 and б of the present law. Reciprocity may be demanded. Moreover, the Governors may exercies the rights conferred by Articles 28, 29, 30, 31, 32, 33 and 34. "

" The request for extradition is sent by the Minister of Justice of the requesting State direct to the Minister of Justice of the requested State. By common consent, the States may substitute, for the Minister of Justice, a superior administrative authority. These authorities will likewise correspond directly in extradition cases (forwarding of articles included) in the" transit " extradition procedure, and on the proceedings against a person not extradited in Iiis country of origin. "

135. At the present stage in European integration, it does not seem possible to dispense with the use of the diplomatic channel. However, in urgent cases, it will be possible for the provisional arrest of the fugitive to be requested by emergency means of communication ; that is to say, direct enquiry between the police forces of the judicial authorities of two countries concerned. But when there is no urgency the usual method of communication through diplomatic channels should be followed. This is in accordance with the practice which makes Foreign Offices entirely responsible for the conduct of relations with foreign countries.

1.1.14.2. (b) Contents and Form of the Request

136. Some treaties mention formally that the request for extradition shall be in writing. Others do not formally include such a requirement, but it is clear that the requirement of a written request is implicit in view of the fact that its transmission is made through governmental channels and in view of the provision which states that the request shall be accompanied by other documents.

137. As the requirement of a. written request does not prejudice the form to be employed in case of emergency, it might be considered as acceptable. The International Criminal Police Commission's draft provides formally that the request shall be in writing.

138. Some treaties or laws do not require that the request should state the purpose of the request (e. g. enforcement of punishment, criminal procedure, etc.) nor that it should specify the nature of the document which forms the basis for the request for extradition. The Harvard Draft and the International Criminal Police Commission's Draft both provide that the request should be supported by documents specified in the convention concerned.

139. The question arises whether other details, c. g. the description of the person clauned, particulars of the act in respect of which the request is submitted, or the statement of the punishment which may be imposed for such acts, should be mentioned in the request itself or presented as separate documents accompanying the request.

140. It is not generally held that all these data should be set out in the request. The Harvard Draft, which shares this view, on the grounds that the request should be forwarded alone and. the documents supporting the case later, differs on this point " from the International Criminal Police Commission's Report. The latter reads as follows (Art. 21, paras. 1 and 2) :

" The request for extradition is made in writing and shows the object of extradition (criminal proceedings, including security measures ; enforcements of punishment, including security measures).

It is accompanied by an arrest warrant, or an equivalent document, or by a sentence, or. a decision relative to the measure of security. The relevant documents should be drawn up in accordance with the regulations of the requesting State and attached to the demand, either in the original or in a certified copy. "

1.1.14.3. (c) Nature of documents or objects accompanying the request

141. Form. — Documents to be furnished in support of the request must be drawn up in accordance with the regulations of the requesting State. This rule is generally accepted in all international treaties and is maintained in such modern drafts as those of Harvard and of the International Criminal Police Commission. It is an application of the well-known principle of law : locus regit actum.

142. The draft Convention prepared by the International Criminal Police Commission provides the same requirement in the following terms (Article 21, para. 2) :

" The relevant documents should be drawn up in accordance with the regulations of the requesting State and attached to "the demand, either in the original or in a certified copy. "

143. The Conventions concluded by the Netherlands with Italy (1895) and with Sweden (1897) state formally (Art. 7 and 8) that " the supporting documents will he issued in conformity with the legislation of the requesting State ". Nevertheless, it is the international responsibility of the requesting State to ensure that the documents supplied are satisfactory.

144. Content and number of the accompanying documents

The following should be included :

description of the offender for the purpose of identification, in cases where the request will not contain the necessary details on this point:

certified copies of documents on the basis of which the arrest of the offender is claimed, that is to say, warrant of arrest or decision of the court including an order of punishment (in case of prosecution in absentia) ;

details concerning the offence (including description and date of commission) and a statement of the relevant provisions of the criminal law of the requesting State ;

details of the property the delivery of which is requested to help in the investigation or for the conduct of the trial.

145. There is an important difference between the drafts prepared by the Harvard Research and the International Criminal Police Commission, on the one hand and, on the other hand, the Anglo-American system whereby the documents to be sent in support of the request which relate to the evidence, depositions or equivalent must establish to the satisfaction of the requested High Contracting Party that the requesting High Contracting Party would be justified in committing the prisoner for trial. The statement of the law, copy of the warrant of arrest or of the judgment of conviction are, according to the Harvard Draft (Art. 12, para. 3), the only documents to be forwarded in support of the request. Even the International Criminal Police Commission's Draft (1948) requires no evidence of the kind required under the Anglo-American system (See Art. 21).

146. Treaties signed by the United Kingdom with different States exemplify the Anglo-American system. Article 9 of the Treaty between the United Kingdom and the United States (December 22nd, 1931) reads as follows:

" The extradition shall take place only if the evidence be found sufficient, according to the laws of the High Contracting Party applied to, either to justify the committal of the prisoner for trial, in case the crime or offence had been committed in the territory of such High Contracting Party, or to prove that the prisoner is the identical person convicted by the Courts of the High Contracting Party who has made the requisition, and that the crime or offence of which he has been convicted is one in respect of which extradition could, at the time of such conviction, have been granted by the High Contracting Party applied to. "

147. The Convention signed by France and the United Kingdom (August 14th, 1876) also adopts the Anglo-American system.

148. On the other hand, the Convention concluded between France and the German Federal Republic (November 29th, 1951) provides in Article 8, para. 2 that :

" It (the request) shall be accompanied by a- decree or enforcement order or by a warrant for arrest or by any other document having the same force and issued by the Legal Authority. These documents shall contain precise details of the acts in respect of which they are submitted and of the date and place at which these acts were committed."

149. The Conventions signed by the Netherlands and Italy (May 28th, 1897, Art. 7) and Sweden (June 26th, 1895, Art. 8) provide that the requesting party must furnish the necessary details concerning the offence so as to satisfy the requested party that there is a case for the application of the convention. Nevertheless, the Harvard Draft Convention contains a provision (Art. 13) which makes possible the communication of, or a request for, supplementary documents on the initiative of either of the High Contracting Parties concerned. This Article, reads as follows :

a. "After communicating its requisition to the constituted authority of the requested State, and before a final decision on the requisition has been made, a requesting State may present supplementary documents in support of, or in amplification of, such requisition.

b. Before or after apprehension of the person claimed, the recļuested State may invite the requesting State to present supplementary documents i n support of, or i n amplification of, its requisition. "

150. A corresponding provision is found in the International Criminal Police Commission's draft , Article 22 of which reads as follows :

" The requested State may demand additional information that i t considers necessary in the estimation of the request for extradition. I f these particulars are not received in a suitable period fixed by the requested State,' unless there are sufficient reasons f o r exceeding this period, the arrest of the offender or any other measure taken to secure h im ceases to be valid.

The requesting State may reserve the right , in the request for extradition, to furnish subsequent information. If these particulars do not follow w i t h i n the stipulated period reckoning from the despatch of the request, aruling may be taken without them. "

151. But, generally speaking, the conventions concluded among the States contain no provision as to supplementary documents. Such documents contain data relating to the offence or to the connection between the offence and the offender. They do not contain information relating to the trial in the requesting High Contracting Party or justification for the prosecution of the offender (cf. paragraphs 143 and 144).

152. Conclusion. It seemed advisable to maintain the principle of using the diplomatic channel or occasionally the consular channel as a normal means of communication. I t was also considered possible to lay down that the request should contain a statement that a warrant of arrest or other document of equivalent import has been issued. I t seemed unnecessary to require supporting documents i n their original or certified copies.

DRAFT ARTICLE 14

The Request and supporting documents

22. The request shall be in writing and shall be communicated by a diplomatic or consular officer of the requesting High Contracting Party to the competent authority of the requested High Contracting Party.

23. The request shall contain :

a. a description for the purpose of identification of the person claimed;

b. a statement that a warrant of arrest, or other document of equivalent import in the prosecution of the person claimed, has been issued.

24. The request shall be supported by :

a. a copy of the warrant of arrest or other document of equivalent import in the prosecution of the person claimed, or a copy of the judgment of conviction against the person claimed, and of any sentence imposed in execution of such judgment;

b. a statement that a warrant of requesting High Contracting Party under which it iş intended, to prosecute or to punish the person claimed, which shall show, in cases where it is intended-to prosecute, that such law was in force when the act was committed for which extradition is requested.

25. The documents mentioned in (a) and (b) of paragraph 3 of this Article should be drawn up in accordance with the law of the requesting High Contracting Party.

1.1.15. CHAPTER XV - Supplementary Information

153. We have already seen, when examining the question of the accompanying documents to be forwarded in support of the requests for extradition, that supplementary information may be sent by the requesting party on its own initiative or on the initiative of the requested party. It is worth noting that the treaty concluded between Turkey and Germany (September 3rd, 1930) provides in Article 10, paragraph 2, that :

" If the information contained in the documents communicated is insufficient to enable the wanted person to be identified or to establish the circumstances of the offence with which lie is charged or the wording of the penal provisions applicable to the case or any other circumstances required to be known for the consideration of the application for extradition, such information shall immediately be supplemented on request. "

154. The requested High Contracting Party must not be precluded from asking for such additional information as it might consider necessary to enable it to take a well-considered decision on the request. On the other hand, the extradition proceedings should not be submitted to undue delay. The Harvard Draft Convention which contains a provision whereby the requesting High Contracting Party may forward supplementary information on its own initiative in support of its request (Art. 13, paragraph (»)), presents practical difficulties.

155. Conclusion. The provision of Article 10, paragraph 2, of the 1930 Treaty between Turkey and Germany, was considered as satisfactory, subject to some small modifications.

1.1.15.1. DRAFT ARTICLE 15

Supplementary Information

If the information communicated by the requesting High Contracting Party is insufficient to enable the person claimed to be identified or to establish the circumstances of the offence with which he is charged or the wording of the penal provisions applicable to the case, such supplementary information as is required shall be forwarded by the requesting High Contracting Party immediately on request.

1.1.16. CHAPTER XVI - Application for provisional arrest

156. Provisional arrest must be distinguished from the apprehension and detention of a person claimed upon the receipt of a request for extradition. It should take place as soon as possible after .the application for provisional arrest has been received and before a formal decision on the request- for extradition, unless the surrender of the person claimed, does not appear a priori admissible.

157. The International Criminal Police Commission's Draft (1948) contains the following provision (Article 24) :

" If, by reason of an immediate provisional examination it does not appear that extradition cannot be granted, the requested state is empowered to take, without delay, the measures necessary to prevent the offender from escaping extradition, should the case arise. "

158. In general, conventions and treaties do not impose an obligation on the requested state to apprehend the person claimed immediately after receiving an application. There are two reasons. First, it is unnecessary to mention apprehension because this follows from the obligation to surrender the person concerned. Second, this obligation is not different from other international obligations as to the way in which the responsibility of States is involved or relinquished. One cannot put in a convention all the rules of interpretation and application which are part of general international law.

159. As far back as 1868, Sir Thomas Henry, Chief Metropolitan Magistrate in London, was complaining about long delays taken by the formal communication of the request and the accompanying documents and the possibility of flight thus offered to the wanted person, who generally obtained some intimation of the request[10]. The situation today is even worse because of the possibilities of flight offered by modern air communications. Not only the collection of necessary documents, but also communication by diplomatic channel take time, and this may jeopardise the ultimate arrest of the wanted person. Many international conventions now provide for the possibility of asking for provisional arrest of the fugitive without sending a formal request and without using diplomatic channels. Municipal laws enable the appropriate authorities to arrest the fugitive without awaiting the receipt of a formal request for extradition, as soon as they are asked to do so by direct application from the appropriate authorities of another State. The relevant provisions in the laws of some Members of the Council of Europe are as follows :

160. Sweden, Law of June 4th, 1913 :

" After an agreement with a foreign state, and subject to recprocity, the King is empowered to prescribe that such a request which is made by an authority in the foreign State directly to a police authority here in the Kingdom may also be acted upon by it.

A requisition for the extradition of the person arrested shall be made in the usual way within a certain period, which, when not mentioned in the treaty with the foreign State, shall be determined by the Minister for Foreign Affairs. If this is not done, the arrested person shall be set at liberty. Such a period, as referred to above, may not be fixed at more than six weeks or in the case of extradition to a non-European State, or of otherwise undergoing trial or punishment at a place outside Europe, at more than three months from the date when the foreign State received information of the arrest. " (Section 24, paras. 2 et 4.)

161. Italy, Code of Criminal Procedure (Art. 671) :

" In case of urgency, the courts of the Republic may order tho preliminary arrest of a foreigner in compliance with the direct request of the judicial authorities of a country having an extradition treaty with the Republic, provided that tho existence of a sentence or of a warrant of arrest be established, and provided the nature of the crime for which the person in question has been sentenced or is sought be clearly determined.

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10. Report of the Select Committee of the House of Commons on Extradition (1868), page 19, para. 331.

The demand may be made by mail or telegraph, and at the same time notice shall be given through the diplomatic channel to the Minister for Foreign Affairs.

The Courts that have caused the arrest to be made shall immediately give notice thereof to the Minister for Foreign Affairs, through the Minister of Justice. "

In the United Kingdom there is no provision for provisional arrest in advance of information in support of the charge, but a fugitive may be arrested on information similar to that which would justify the issue of a warrant for arrest i f the crime had been committed in the United Kingdom.

162. United Kingdom, Extradition Act of 1870 :

" A warrant for the apprehension of a f u g i t i ve criminal, whether accused or convicted of crime, who is i n or suspected of being i n the United Kingdom, may be issued by a police magistrate or any Justice of the Peace i n any part of the United Kingdom, on such information or complaint and such evidence or after such proceedings as would i n the opinion of the person issuing the warrant j u s t i f y the issue of a warrant i f the crime had been committed or the criminal convicted i n that part of the United Kingdom i n which he exercises jurisdiction. " (Section 8, paragraph 2).

A memorandum of the British Home Office of September 1932, is instructive :

" 2. Application for steps to be taken to obtain extradition of a fugitive criminal should be addressed by the prosecutor or, preferably, by the Chief Officer of the police force concerned in the.case to the Secretary of State for the Home Department, who w i l l communicate through the- proper diplomatic channels, w i t h the authorities of the place where the accused is believed to be.

3. The police i n this country may communicate direct w i t h the police of foreign countries for the purpose of giving or obtaining information, but in no circumstances should direct application be made by them for the arrest of a fugitive.

6. Where the apprehension of the accused is a matter of urgency, the Secretary of State may cause His Majesty's representative i n the country where the accused, is to be instructed by telegram to apply for provisional arrest i n anticipation of the claim for extradition. Where a treaty provides for the provisional arrest of a f u g i t i ve i n a foreign country, i t usually fixes a period (varying f r om 14 to 60 days) f r om the date of arrest w i t h i n which the formal claim for extradition must be presented to tlie foreign government.

7. ...In a ease of urgency, the evidence to support the claim for extradition may be sent later.

9. Police officers may, by arrangement made by the Home Office, be sent out in special cases to help the foreign police in tracing the accused or in supporting the claim for extradition after his arrest. "

163. Germany, Extradition Law of December 23rd, 1929 :

" The arrest for extradition may be ordered under the conditions set forth in para. 1 even before the receipt of the requisition for extradition, if a competent authority of a foreign State so requests, or if an alien appears under strong suspicion of having committed an act for which extradition is permissible. " (Provisional arrast for extradition ·— vorläufige Auslief c-rungsliaft, Art. 10, para. 2).

164. France, Law of March 10th, 1927 :

" Article 19. In an urgent case and upon the direct request of the judicial authorities of the requesting country, the procurators of the Republic may order a provisional arrest of the alien upon a simple notice of the existence of one of the documents indicated by Article 9, communicated either by mail, or by any more rapid means of communication leaving a written record (ime trace écrite).

A regular notice of the request shall be at the same time communicated through diplomatic channels by mail, telegraph or any means of communication leaving a written record, to the Minister for foreign Affairs.

The procurators of the Republic must give notice of this arrest to the Minister of Justice and to the Procurator-General.

Article 20. The person arrested provisionally, under the conditions provided for by Article 12, may, if there is no ground for applying to him Articles 7, 8 and 9 of the Law of December 3rd, 1849, be set at liberty, if the-French Government does not receive, within a period of twenty days from the date of his arrest, one of the documents mentioned in Article 9, and if his arrest was effected upon the request of the Government of a bordering country.

The aforesaid period of twenty days may be extended to one month, if the territory of the requesting State is not bordering and to three months if the territory is outside Europe.

The liberation shall be pronounced upon a request adressed to the Chambre des mises en accusation, not subject to an appeal, within eight days. If eventually the aforementioned documents reach the French Government, the procedure is re-opened in accordance with Article 10 and those following. "

165. Belgium, Law of March 15th, 1874, Article 5 :

" In urgent cases the foreigner may be arrested temporarily in. Belgium for one of the acts mentioned in Article 1 upon presentation of a warrant for arrest issued by the examining magistrate of the district in which he resides or the district in which he may be found, and based upon an official statement given to the Belgian authorities by the authorities of the country in which the foreigner shall have been sentenced or prosecuted.

However, in such a case, he shall be set. at liberty if, within a period of three weeks dating from the time of his arrest, he is not served with any warrant for arrest issued by the competent foreign authority.

This period may be extended to three months if the country which requests the extradition is outside Europe.

After the order for arrest, the examining magistrate is authorised to proceed in accordance with the regulations prescribed by Articles 87 to 90 of the Code for enquiry in criminal cases.

The foreigner may request temporary freedom in the cases in which a Belgian enjoys the same privilege and under the same conditions. The request shall be submitted to the advisory council of judges. "

166. In certain systems of municipal law wli ere there is an application for provisional arrest, the normal extradition procedure is waived to the following extent: First, the application need not he in writing. It may be made by telegraph or telephone. Second, it need not be accompanied by supporting documents. An application for provisional arrest need contain only a description for the purpose of identification of the fugitive, a statement of the offence committed, of the punishment which may be or has been imposed and of the existence of the warrant of arrest or other equivalent document. It may also be accompanied by a further request for the provisional seizure of property.

167. The Harvard Draft contains on this point tho following provision (Article 15, para, (c)) :

" The request for provisional apprehension and detention shall contain a description for the purpose of identification of the person whose apprehension and detention are sought, a statement of the act or acts for which it is intended to prosecute or punish such a person, and the punishment or correctional measures which may be or which have been imposed for such act or acts by the law of the requesting state, and a statement of the existence of a warrant or other document constituting the first step in the prosecution of such person or of a judgment of conviction against such person ; it may also be accompanied by a further request for the provisional seizure and detention of property. "

168. The International Criminal Police Commission's Draft provides a very similar system. Its Article 26 reads as follows :

" Every request for preventive arrest must contain reference to an arrest warrant or equivalent document, to a definite conviction, or to a decision requiring that a measure of safety be taken. The request will also indicate the nature of the offence alleged and the circumstances under which it was committed ; and will contain as exact a description as possible of the wanted person, and will state that a formal request for extradition is being forwarded.

Every request for preventive arrest may contain a request that property of use to the prosecution in the requesting State be seized. "

169. It is interesting to see that as modern a treaty as that concluded between Prance and the German Federal Republic of Novembr 29th, 1951 provides that " this request must at the same time be confirmed through diplomatic channels. " But the Harvard Draft does not require this. The International Criminal Police Commission's Draft provides (Article 25, para. 5) that notification of the application shall be sent by the Minister of Justice of the requesting State to the Minister of Justice of the requested State, it being understood that such an application has already been made by telephone or telegraph to the police authorities.

Third, this procedure permits direct contact between the police or judicial authorities of the interested countries and leaves aside the diplomatic channel. The International Criminal Police Commission's Draft offers these comments on this point in its report :

" This article is one of the greatest importance to the international criminal Police. It would be as well bring to1 notice that usually when the request for extradition reaches the judicial authority which has competence to institute proceedings, the central national offices of the police forces of the two States have already been in contact concerning the individual to be extradited. They have also prepared the method of extradition. It is they who often locate the hiding-place of the offender. "

Communications and exchanges of views are made by postal, telegraph and wireless communication means, and through central national, offices in the International Bureau of the International Criminal Police Commission.

The discovery of the person wanted for extradition can also be made through the bulletin circulated by the International Bureau, of which mention is made in the International Review. In fact, while, on the one hand, the International Bureau is in close liaison with the central national offices, delegates in the respective countries, through central national offices, are for their part in direct contact either with the local authorities of their countries or with their corresponding central national offices. As this has been shown to be efficacious in practice for several years, and as the speed of this means of comimuiication has been responsible for the arrest of many international offenders, it would be desirable to bring this fact tp notice in writing, and to state that the Central National Offices and the International Bureau should be included amongst the competent authorities. Consequently paragraph 2 of Article 25 [of the International Penal and Prison Commission's Draft] had to be modified [by the International Criminal Police Commission] as follows :

" This request may be forwarded directly by any competent authority of the requesting State to any competent authority in the requested State.

The States concerned must be notified as to who these authorities are.

The text must also state that the insertion in the International Review of a descriptive notice constitutes an official notification for detention, adding a supplementary phrase to the fourth paragraph of Article 25 as follows : " A request for arrest appearing in the Bulletin, and repeated in the International Review, the official gazette of the International Criminal Police Commission, shall constitute an official notification. ' "

In view of the above observations, Article 25 [of the International Criminal Police Commission's Draft] will read as follows :

" Article 25. In cases of urgency, the countries have the right to demand, even before forwarding a request for extradition, the provisional custody of the wanted offender. This request, may be forwarded directly by any competent authority of the requesting State to any competent authority of the requested State. Tho countries concerned will announce the identities of these authorities.

The request shall be sent by post or by any other means whatever which provides evidence in writing.

A request for arrest appearing in the Bulletin, and repeated in the International Criminal Police Review, the official gazette of the International Criminal Police Commission, will constitute an official notification.

Communication by thelephone or by wireless is also permitted ; in this case the requested authority must assure itself forthwith of the authenticity of the demand by immediate enquiry of the requesting authority.

Notification of the request shall be sent forthwith by the Ministry of Justice of the requesting State to the Ministry of Justice of the requested State.

As soon as the provisional arrest has been carried out, the requested State must inform the requesting State. "

170. The Harvard Draft Convention states in Article 15 :

a. " A State may ask for the provisional apprehension and' detention of a person, if it indicates at the same time its intention promptly to request the extradition of that person.

b. A request for provisional apprehension and detention, based upon instructions and information obtained from his Government by any means of communication, may be made by a diplomatic or consular officer or other authorised agent of the one State, to the Government of the other State, or directly to aai official of the other State who is competent to order such apprehension and detention.

c. The request for provisional apprehension and detention shall contain a description for the purpose of identification of the person whose apprehension and detention are sought, a statement of the act or acts for which it is intended to prosecute or punish such person, and the punishment or correctional measures which may be or which have been imposed for such act or acts by the law of the requesting

State, and a statement of the existence of a warrant or other document constituting the first step in the prosecution of such person, or of a judgment of conviction against such person ; it may also be accompanied by a further request for the provisional seizure and detention of property. "

171. Article 9 of the 1951 Treaty between France and the German Federal Republic contains a provision which reads as follows :

" On request from the judicial authorities of the applying- State, the person claimed shall be put raider provisional arrest, when there is reason to fear that such person may attempt to escape extradition or make the establishment of the true facts more difficult.

This measure shall be taken on receipt of notification offering evidence, written or having substantially equivalent force, of the existence of one of the documents specified in the second paragraph of the preceding Article.

This request must at the same time be confirmed through diplomatic channels.

The applying State shall be informed of the provisional arrest or of the reasons for which it was not possible to carry it out. "

172. Sometimes the competent judicial authorities are specified in the Convention. On this point the International Criminal Police Commission's Draft states that the High Contracting Parties, must state the police or judicial authorities entitled to deal directly with all the questions of provisional arrest. In this respect the treaties signed by the Netherlands with Italy (1895), Sweden (1897) and Finland (1933) designate as the competent authority " any officer of justice or examining magistrate " (juge d'instruction ou juge commissaire).

173. It is important to consider the position where the request for extradition is not forwarded within a certain time. On this matter, we have in the Harvard Draft Convention a provision which reads as follows (Article 16) :

" A State which has received a request for the provisional apprehension and detention of a person made in confirmity with the provisions of Article 15, shall endeavour to apprehend such person, and if such person is apprehended it shall detain him until the receipt of a requisition, provided that a requisition is received within a reasonable time; it shall also endeavour to seize and detain the property to which the request may have referred, and which appears to fall within the categories specified in Article 24 of this Convention. "

174. The International Criminal Police Commission's Draft also contains a provision on this point which reads as follows (Article 28) :

" When a wanted person has been put under preventive arrest, the request for extradition must be handed to the requested State within 14 days of the date of arrest, failing which the preventive arrest will be discontinued.

If the requested State asks for further information (Art. 22) this must be forwarded to it sufficiently quickly so that the length of the preventive arrest does not exceed twice the length of the delay laid down in the first paragraph, failing which the preventive arrest.will be discontinued.

The time may be extended to one month where the two 'States are not frontier States, and must not exceed three where their, territory is situated on different continents.

Where the preventive arrest is discontinued because the requesting State has failed to keep to the time-limits laid down in the preceding paragraph, this failure will not affect the extradition. "

175. The treaty between France and the German Federal Republic (November 29th, 1951) provides in its Article 10 that :

" Releas e from provisional arrest may be granted if, within a period of twenty days after the arrest, the Government applied to has not received ohe of the documents mentioned in the second paragraph of Article 8.

The period shall be extended to two months if the request originates from a judiical authority outside Europe.

Release of the individual from custody does not preclude arrest or extradition if the request for extradition is subsequently received."

176. The time-limit is eight weeks in the Turkish-German Treaty (1930) and 20 days in the treaties signed by the Netherlands with Italy, Sweden and Finland.

177. As to municipal law, the time at the expiration of which the provisionally arrested man should be released if a formal and satisfactory request is not received varies very much from one country to another. For example, in Sweden this time is six-weeks (maximum, except in cases of extradition to colonial territories), in Belgium three weeks, in Italy 25 days, and in France 20 days. In Germany it is left to the discretion of the Superior Provincial Court to fix the time-limit which cannot, however, exceed one month. If a person claimed is released at the expiration of such a time, his extradition on a request received later will not be jeopardised. But no further application for provisional arrest of the claimed and released person can be made by the same requesting State to the same requested State in respect of the same offence.

178. Conclusion. The International Criminal Police Commission's Report and proposals (Articles 25, 26, 27 and 28) apparently reflect the most modern opinion of men concerned with these problems in their day to day life. However, it was found necessary to make some changes to the draft proposed by this Commission. In the first place, the authorities competent in each High Contracting Party to make or receive applications for provisional arrest will be listed in an appendix to the proposed European Convention. The fifth paragraph of Article 25 was deleted, as an application for provisional arrest to a Ministry of Justice might be confused with a formal request for extradition.

179. The mention of a " mesure de sûreté " in Article 26 might be prejudicial in cases where it would allow the provisional arrest not only of lunatics, but also of political opponents or other persons in whose cases no regular judicial proceedings could be instituted. The provisions of Article 27 were supplemented by a clause specifying that, if the charges mentioned in the application for provisional arrest appear to be without foundation, a wanted person should not be put under provisional arrest and, if he is detained, he must be released at once.

180. Article 27 does not add anything to the smooth operation of the extradition procedure. Article 28 fixed at 14 days the time-limit at the expiration of which an arrested person must be released if a request for extradition has not been received. This time-limit falls short of that provided by the 1951 Treaty between France and the German Federal Republic (20 days) or by many "international agreements or municipal laws. It is intended to operate when a shorter time-limit is not provided for in existing agreements between the High Contracting Parties or in the law of the requested High Contracting Party. It was not considered that this limit should be extended where supplementary information has been asked for. The question arises whether the person concerned should be released automatically or whether the requested High Contracting Party should have the right to keep him under arrest for a further reasonable period. On this point, the 1951 /Treaty between France and the German Federal Republic and the International Criminal Police Commission's draft do not contain mandatory provisions. But the Harvard Draft does.

181. As regards the definition of urgency, the Harvard Draft is silent. The 1951 Treaty between France and the German Federal Republic, on the other hand, lays down that an application for provisional arrest shall be acceptable when there is reason to fear that, the wanted person may attempt to escape extradition or make the establishment of the facts more difficult. (Art. 9, para. 1). Such a provision was thought to be of value in the proposed European Convention.

1.1.16.1. DRAFT ARTICLE 16 - Application for Provisional Arrest

26. In cases where there is reason to suspect that the person claimed may attempt to escape or make the establishment of the facts more difficult, a High Contracting Party shall have the right to apply for his provisional arrest, even before forwarding a request for extradition.

27. Such application for provisional arrest :

a. may be made by diplomatic or consular channels, as appropriate ; or

b. may be forwarded by the competent authority of thé requesting High Contracting Party direct to the competent authority of the requested High Contracting Party. [A list of competent authorities will be appended to this Convention] ; or

c. may appear in the official notices of the International Criminal Police Commission which shall constitute an official notification.

28. Such application for provisional arrest shall be made :

a. by post or by any other means affording evidence in writing ;

b. by telephone, wireless telegraphy, radio or television. In these cases, the requested authority must exercise the right of assuring itself forthwith of the authenticity of the application by immediate enquiry of the requesting authority.

29. An application for provisional arrest must identify either a particular warrant for arrest or a document of equivalent import, or a certificate of final conviction. It must set out the nature, the time and the place of the offence and as detailed a description as possible of the wanted person. It must also state that a formal request for extradition will be sent forthwith.

30. As soon as the provisional arrest has been made, the requesting High Contracting Pary shall be informed.

31. An application for provisional arrest may contain a request for the provisional seizure of property which is essential to the proper conduct of the proceedings in the requesting High Contracting Party and which appears to fall within the categories mentioned in Article 18.

32. As soon as a requested authority finds a person who is believed to be the subject of an application for provisional arrest, it will seek to establish his identity without, delay. If it is clear from the nature, time and place of the offence that the person could not have committed it, the requesting High Contracting Party shall be informed of the reasons which preclude provisional arrest, and if the person is detained, he shall be released immediately.

33. When a wanted person has been put under provisional'arrest, the request for extradition must be handed to the requested High Contracting Party within 14 days of the date of arrest. If this period is exceeded, the provisional arrest, shall be discontinued.

34. Where provisional arrest is discontinued because the requesting High Contracting Party has failed to keep, to the time-limit laid down in the preceding paragraph, such failure Shall not prejudice the request for extradition.

1.1.17. CHAPTER XVII - Procedure

182. The Harvard Draft Convention contains a number of provisions (Articles 17 and 18) which establish precise rules of judicial hearing for the benefit of wanted persons and uniform regulations as to the effect of a decision taken, by the judicial authority on the request for extradition. This is an isolated case, and it may be said that treaties do not normally lay down such rules and regulations. However, some treaties (e. g. those between the United Kingdom and the United States, 22nd December, 1931 and between the United Kingdom and Denmark, 15th April, 1862) provide that a person should be surrendered only if the evidence be found sufficient, according to the laws of the requested State, to justify the committal of the prisoner for trial. The treaty of 1931 provides that :

" The extradition shall take place only if the evidence be found sufficient, according to the laws of the High Contracting Party applied to, either to justify the committal of the prisoner for trial, in case the crime or offence had been committed in the territory of such High Contracting Party, or to prove that the prisoner is the identical person convicted by the courts of the High Contracting Party who makes the requisition, · and that the crime or offence of. which he has been convicted is one in respect of which extradition could, at the time of such conviction, have been granted by the High Contracting Party applied to (Art. 9). "

183. The International Criminal Police Commission's Draft leaves it to the legislation of the requested State to determine whether the granting of extradition should be decided by judicial authorities or by executive authorities. Article 30 of the Draft reads as follows :

" Except where the treaty ordains otherwise, rules of procedure as to extradition are subject to the prerogative of the requested State. "

184. The question arises whether it is appropriate in the proposed European Convention to have uniform rules of procedure in cases where extradition is requested by another High Contracting Party.

185. First, it should be noted that all the Members of the Council of Europe now provide in their municipal law that extradition can only be made after judicial hearing. The system whereby the surrender of the person claimed is a matter of exclusive jurisdiction for the Executive is no longer applied by any Member of the Council of Europe.

186. Secondly, in all member countries except in Belgium and the Netherlands, a judicial determination is a pre-requisite for the granting of extradition. In Belgitim, the Chambre de la mise en accusation de la Cour d'Appel does not lake any decision but gives an opinion with reasons (avis motivé) which is not binding on the Minister of Justice who takes the decision (Art. Ill of the law concerning extradition, March 15th, 1874). The

situation is the same in the Netherlands (Law of August 13th, 1849). In France also the Chambre de la mise en accusation is called upon to give an opinion which is only binding on the Government in cases where it is against the granting of the extradition (Art. 17 of the law of 1927).

187. In the Anglo-American system the practical results of the judicial hearing are the same. In the United Kingdom a decision in favour of the person arrested results in his immediate discharge. An unfavourable decision does not bind the executive authority to grant extradition. After the decision of the police magistrate who commits such a criminal to prison " it shall ị be lawful for a Secretary of State, by warrant under his hand and seal, to order the fugitive j criminal (if not delivered by decision of the i Court) to be surrendered to such person as may in his opinion be duly authorised to receive the fugitive criminal by the foreign state ", (Section 11 of the Extradition Act, 1870). The technical difference between the British and the French systems is that the legal nature of the conclusions of the French court is considered as a judicial one only in the case where the findings are against the granting of extradition. If the court considers that the extradition should be granted, its ruling is only an opinion, without any binding effect on the executive. In the British system it rests with the court to decide ' whether or not the arrested person shall be committed to prison to await surrender, but with the Secretary of State to decide whether, if committed to prison, he shall be surrendered.

188. The German extradition law of 1929 makes determination as to extradition wholly judicial. In the German system the decision, whether it be in favour or against the granting of extradition, is equally final and not subject to the exercise of any discretion on the part of the executive (Arts. 8, 28, .29, paras. 2 and 30).

189. Luxembourg (Law of March 13th, 1870, Art. 2), Greece (Law of February 7th, 1904, Arts. 5 and 6) and Turkey (Penal Code, Art. 9) have a system which is almost the same as that followed in the United Kingdom. In Şiveden according to the provisions of the law regarding the extradition of criminals (June 4th, 1913) extradition " may not be granted if, through a decision of the supreme court, obstacles to extradition have been declared to exist. " (Art. 23). 'If the person claimed " declares that he has no exception to take to a requisition ", judicial hearing is waived and the matter is submitted to the King (Art. 17). The Norwegian system is very similar to that of Sweden (see Extra-' dition Law of June 13th, 1908).

190. In Italy, the French system is followed in the sense that the Executive is competent to grant extradition (Art. 661 of the Code of Criminal Procedure) when the Section of Investigation finds that extradition simuld be granted. (These findings may be subject to confirmation by the Court of Cassation). In the contrary case the Attorney General of the Court of Appeal orders the arrested person to be released and the Minister of Justice is notified. The order for release is also given when the Minister of Justice has decided not to proceed with extradition (Article 669), but the extradition of a criminal person cannot be made without a favourable decision to that effect by the Section of Investigation (At. 662, para. 1). The Italian system borrows something from what may be called the Scandinavian system, according to which the extradition of the claimed person may be granted with the consent of this person and without a judicial hearing (Art. 662, para. 2). The French system is similar to the Italian (see Art. 15 of the French law). In the Saar the German Extradition system is followed even when the request is made by France (Art. 22 of the Convention of 3rd January, 1948, between France and the Saar).

191. It appears from this general survey that judicial hearings are held in all European countries before the surrender to a requesting State of a person claimed who is unwilling to be sent to the country concerned. If the European Convention on Extradition were to provide uniform rules of procedure for hearings, this would certainly help with the unification of the law of Members of the Council of Europe, but in practice it would not add to existing safeguards for human rights, and it would entail important changes in the law of every country. States might perhaps be reluctant to make the necessary changes, all the more as in every country the rules of procedure are intimately linked with each particular national system of law and judicial organization. Besides, there is the question of which standard will be taken as the new uniform system, whether it should be the German system as established by the law of 1929, which is the most modern one, or the French, British or Italian-Scandinavian system.

192. Some would wish to see the British give up their requirement of evidence on depositions from the requesting country in order to enable their own judge to examine the culpability of the offender. In all other European countries a sentence of conviction or a warrant for arrest sent by the requesting State is sufficient to justify the arrest of the claimed person. The rule of the prima facie case provided by Section 10 of the Extradition Act of 1870 stands as an obstacle to the general harmonisation of the European system. Are the British ready to sacrifice this rule in favour of European unification of law ? That would need great confidence in the decisions of police and judicial authorities of one country by those of other countries. It must be remembered that in 1852 an elaborate treaty was drafted between Prance and the United Kingdom under which the latter gave up the requirement of a prima facie case. But this proposal, among others, encountered such opposition in the House bf Lords that the bill was withdrawn and never even reached the House of

Commons. As a result, a new treaty had to be negotiated and concluded between the two countries (August 14th, 1876 and February 13th, 1896) in which the rule of prima facie case had to be accepted by Prance (Article 7, paragraph 1). There is no evidence that parliamentary opinion has changed on this point in the last hundred years.

193. Conclusion. It appeared unnecessary to include in the European Convention such elaborate rules of procedure as are proposed in the Harvard Convention. It will be difficult to obtain acceptance of uniform procedural regiv lations concerning the granting of extradition. The Committee found there were strong reasons for adopting the system proposed by the International Criminal Police Commission's Draft (Art. 30). It is suggested that this article combined with the rule concerning the list of documents to bè submitted in support of the request (see Chapter XIV) should result in no further evidence of guilt of the person claimed being-required by, the judicial authorities of the requested High Contracting Party. The Harvard Report makes a very strong plea for the acceptance on a universal basis of the warrant of arrest as presumptive evidence of guilt sufficient to justify the granting of extradition without further hearing (see pages 194 and 195 of the Harvard Comments). As between European States, and, in particular, Members of the Council of Europe, there should be confidence in the order delivered by the police or judicial authorities, and the requirement of proof of guilt should be abandoned. Por the remaining points, it would be advisable to leave it to municipal law to regulate both the procedure for surrendering requested persons and the circumstances in which the decision to surrender is to be taken.

1.1.17.1. DRAFT ARTICLE 17

Procedure

Except where the Convention provides otherwise, the procedure and the decision regarding extradition shall be in accordance with the law of the requested High Contracting Party.

1.1.18. CHAPTER XVIII - Delivery and Return of Property requested

194. Some propertymay have such an intimate link with the offence that it is obvious that it would be sent at the same time as the offender.

195. The following are the relevant provisions in the three Conventions or Draft Conventions which we have already examined in connection with other questions.

196. Articles 18 and 19 of the International Criminal Police Commission's Draft provide that :

" Article 18

a. Articles which may be of importance for the proof of a criminal offence or a security proceeding being investigated by the other contracting State, or

b. which are found in the possession of the offender claimed and which he or an accomplice has procured by an act which is the grounds for extradition, or other articles received in exchange for such objects, shall, on request, be seized and forwarded in connection with the extradition.

Money and objects of value belonging to the person claimed should be seized and forwarded in a manner guaranteemg, should the case arise, the recovery of expenses incurred by the proceedings and the indemnification of the plaintiff.

When extradition has been granted by means of transit, the articles should be forwarded by the extraditing State with the offender.

Article 19

The articles mentionnée! in Article 18, para. 1 (a) shall be returned by the requesting State without delay as soon as they are no longer necessary to the proceedings.

The articles designated in Article 18, paragraph 1 (a), are subject to the rights which the third State acquires over them in the requesting State. In this case they should be immediately returned at the conclusions of the proceedings.

The articles designated in Article 18, para. 1 (b) and para. 2, will only be returned when a third State considers it not worth while exercising the rights acquired by them against the offender in the requested State. (Article 19). "

197. Article 24 of the Harvard-Draft Convention reads as follows :

1. When a person claimed is extradited, a requested State shall deliver to the requesting State the following categories of property, if requested, and if such delivery will not. work an injustice to any other person, and will not interfere with the administration of justice by the requested State :

   a. property which appears to have been acquired by the person claimed or by an accomplice of such person by means of the act for which extradition is made;

   b. property which may serve as evidence in the prosecution of the person extradited.

2. The requested State may make delivery of such property, subject to the condition that it be returned to the requested State:

   a. when, the property having been delivered in accordance with paragraph 1 (a) of this Article, the person claimed is not put on trial, or is acquitted, or such property is proved not to have been acquired by means of the act for which extradition is made;

   b. when the property having been delivered in accordance with paragraph 1 (b) of this Article, it is no longer required for the purpose for which delivered. "

198. Article 13 of the 1951 Convention between France and the German Federal Republic, which seems to be a reproduction of the provision contained in Article 22 of another Convention signed by Prance on May 7th, 1928, with Czechoslovakia, reads as follows :

" In any proceedings for extradition, the authorities of the Contracting Parties shall provide each other, on request, with articles :

which may be produced as evidence ;

which a person extradited or his accomplice may have acquired as a result of the offence, outside the territory of the State applied to, or which he may have acquired in exchange outside the said territory,

and this shall remain the case even when the said objects would be liable to seizure of confiscation in the State applied to.

As far as is practicable, these objects shall be delivered at the time of extradition.

If discovered at a later date, the objects shall be provided as soon as possible. They shall be provided even in cases where extradition had already been granted but cannot be carried out owing to the death or escape of the person claimed.

Nevertheless, the right which third parties may have acquired to the objects in question shall be reserved. Should such rights exist, the objects shall be surrendered to the State applied to as soon possible and without charge, at the end of the trial, unless the latter renounces its claim to them.

The State which has been requested to deliver these objects may temporarily retain them for the purpose of preliminary criminal investigation or it may transmit them on condition that they be returned for the same purpose, undertaking at the same time to restore them in turn at the earliest opportunity. "

199. A comparison between these provisions shows some important differences.

200. First, the Harvard Draft provides for the return of property, when it was delivered subject to this condition, in case of acquittal or where the property is no longer required. In the 1951 Treaty between France and the German Federal Republic, the return of delivered property is to be effected in cases where a third person has acquired rights to this property. The International Criminal Police Commission's Draft seems to be a partial combination or these two systems.

201. Second, the Harvard Draft. and the Montevideo Convention (Article 15), contrary to the International Criminal Police Commission's Draft, do not require that the property acquired as a result of the offence be found in the possession of the claimed person. The 1951 Treaty between France and the German Federal Republic does not provide such a requirement either.

202. The third main difference lies in the fact that, should the administration of justice in the requested Statė require the non-delivery of property, this will not take place, according to the provisions of the Harvard Draft; it will be temporarily delayed or made conditional in the ease of the 1951 Convention between France and the German Federal Republic. The International Criminal Police Commission's Draft does not provide any rule on this for the reason that all the property delivered is to be returned without delay as soon as it is no longer necessary for the proceedings (Article 19, par. 1). The 1951 Convention between France and the German

Federal Republic sets forth a rule following which the delivery would have to be made even in cases where extradition has been granted but could not be implemented owing to the fact that the claimed person had escaped or died. On this matter, the Harvard Draft is at variance with the International Criminal Police Commission's Draft, and with the general practice and conventions between states. No such provision has been included in the Harvard Draft on the grounds that it concerns rather judicial assistance agreements than extradition convention. (See comments,' American Journal of International Law, 1953, Official Documents-, Section II, p. 219).

203. Conclusion. The provisions of the 1951 Treaty between France and the German Federal Republic seemed to be more satisfactory than the International Criminal Police Commission's Draft or the Harvard Draft. In favour of that Treaty there are several points:

interference with the administration of justice does not constitute a complete bar to the delivery of property. The bar is only temporary (cf. the first paragraph of Article 24 of the Harvard Draft v/ith the last paragraph of Article 13 of the 1951 Convention between France and the German Federal Republic);

the 1951 Convention between France and the German Federal Fepublic excludes property acquired on 'the territory of the requested State but includes that acquired in exchange for the property liable to delivery ;

the International Criminal Police Commission's Draft establishes some additional obligations which make it too comprehensive and too restrictive. It is too comprehensive because it provides for the seizure of money and objects of value belonging to the person claimed, even if they have not been acquired as a result of the offence. This may turn out to be an unjustified hardship. It is also too restrictive because it requires that the property related to the offence for which extradition is requested be found in the possession of the offender, so that, had the articles been stolen by- a third person, tliey would not be liable to delivery.

1.1.18.1. DRAFT ARTICLE 18

Delivery and return of property requested

1. The authorities of the High Contracting Parties shall provide each other, on request, with property :

a. which may be required as evidence;

b. which a person claimed or his accomplice may have acquired as a result of the offence outside the territory of the requested High Contracting Party or which he may have acquired in exchange for that property outside the territory,

and this shall remain the case even when the said property would be liable to seizure or confiscation in the requested High Contracting Party.

2. This property shall be delivered as soon as possible.

3. The rights which third parties may have acquired in the property in question shall be preserved. The property shall be returned to the requested High Contraeting Party as soon as possible and without charge, at the end of the trial.

4. When requested property is needed for preliminary criminal investigation, the requested High Contracting Party may temporarily retain it or may deliver it on condition that it be. returned for such investigation.

1.1.19. CHAPTER XIX - Language to be used and translations

204. When the request for extradition and the accompanying documents áre sent to the competent authorities of the requested State a translation of these documents must be provided in the language of the requested State (see Article 23 of the Treaty between Turkey and.Germany, September 3rd, 1930, and Article 5 of the Montevideo Convention of 1933). This is .in conformity with the principle whereby, unless otherwise provided, the extradition procedure shall be in accordance with the municipal law of the requested State, That is why the Harvard Draft contains an Article 19 which reads as follows :

" In so far as the requisition and other documents referred to in Articles 12 and 13 of this Convention and written evidence to be offered in the extradition proceedings are not in the official language of the requested State, the requesting State shall' communicate to the requested State translations of the same into an official language of the requested State. "

205. The translation of documents into some languages which are not widely used may present difficulties. The treaties signed by the Netherlands with Sweden (1897, Art. 12), with Italy (1895, Art. 11) and Finland (1933, Arts. 9 and 14) provide that a translation in French shall accompany the request. The treaty between Austria and Latvia signed in 1932 requires that " the documents produced shall be in French or accompanied by a certified translation in that language.. " (Art. 17.)

206. The question arises whether it would not be appropriate to provide that the translation of documents should be in one of the official languages of the Council of Europe. Such a measure would contribute to the simplification and unification of the procedure. It could not be said that this would be for the benefit of those Members of the Council of Europe whose official languages are French or English, since these Members would lose, with such a provision, the right automatically to receive a translation in their own language when documents are forwarded in the other official language of the Council of Europe.

207. Conclusion. The Committee decided that the documents should be translated into either an official language of the requested High Contracting Party or one of the official languages of the Council of Europe.

1.1.19.1. DRAFT ARTICLE 19

Languages to be used and translations

Insofar as the request for extradition and other documents mentioned in this Convention and written evidence to be offered in the extradition proceedings are not in an official language of the requested High Contracting Party, the requesting High Contracting Party shall send to the requested High Contracting Party translations either in an official language of the requested High Contracting Party or in one of the official languages of the Council of Europe.

1.1.20. CHAPTER XX - Transit through the Territory of a High Contracting Party

208. The meaning of transit of an extradited person through the territory of a third State varies from one school of thought to another.-Is it a new act of extradition presenting the same requirements as in the ease of ordinary extradition, or is it a limited contribution to the execution of an extradition proceeding between two other States ?

209. Existing treaties differ on this point. According to the municipal law of a number of Member States of the Council of Europe, authorization of transit amounts to the granting of extradition (see the Luxembourg Law of March 13th, 1870, Art. 3; the Belgian Law of March 15th, 1874, Art. 4; and the German Law of December 23rd, 1929, Art. 33). Others take the second view (see the French Extradition Law of 1927, Art. 28, and the Greek Law of February 7th, 1904, Art. 8). But those Members of the Council who take the first view have accepted obligations in treaties which represent a notable departure from their municipal law. For example, Belgium and Luxembourg have agreed in their conventions with France (August 15th, 1874, Art. 16; September 12th, 1875, Art: 17) to authorize the transit through their territories of their own nationals when they are extradited to or from France.

210. On the other hand, the rules governing authorization for transit are never exactly the same as for the granting of extradition. In the German law, for example, many conditions which must be fulfilled before authorization of transit is granted are the same as in the case of extradition. This does not apply, however, to conditions regarding procedure. Article 33 of the law of 1929 reads as follows :

" (a) An alien, who is sought by the authorities of a foreign Statė for, or has been convicted of, a punishable act, may, upon request of a competent authority of that State, be extradited in transit through the territory of Germany, if the extradition of the person sought would be permissible under Articles 1 to 6.

(b) As regards procedure Articles 8, 32, paras. 1 and 3, apply correspondingly with the following modifications :

(i) A judicial decision as to the permissibility of the extradition is not required. The Superior Provincial Court, upon request of the State's attorney, determines as to the permissibility of the extradition. Articles 26 to 31 apply correspondingly; the questioning or appearance of th'e person sought may only be ordered with the consent of the State's attorney.

...

(iii) The extradition in transit may not be granted if the court declares that the extradition would not be permissible. "

211. The 1951 Convention between Prance and the German Federal Republic makes some concessions of substance as regards the conditions governing authorization for transit as compared with the conditions governing extradition as stated in that Convention. Article 20 of the Convention states that the provisions of Article 3 relating to the severity of the penalty shall not be applicable.[11]

212. When considering what is to be done, one must distinguish between extradition from one Member to another Member of the Council of Europe, and extradition from a non-Member of the Council to a Member. In the first ease, the granting of transit authorization should be extremely easy, because the country of transit would not have any fear or objection as regards the procedure or the decisions taken by the authorities of the requesting and of the requested States. In fact, extradition would have taken place in accordance with the very provisions to which the third Member of the Council (the transit country) had agreed. Transit facilities could not, however, be granted automatically, that is to say, without any restriction, as is very nearly the case in American multilateral conventions (cf. Pan-American Convention of 1902, Art. 11 ; South America Convention of 1911, Art. 19 and Montevideo Convention of 1933). Article 18 of the last-mentioned Convention reads as follows :

" The signatory States undertake to permit the transit through their respective territories of any person whose extradition has been granted by another State in favour of a third, requiring only the original or an authentic copy of the agreement by which the country of refuge granted the extradition. "

213. The same rule could not be laid down in the case of a European extradition convention in view of the permissive provisions which might be included and which would leave some discretion to Members to refuse or to grant extradition in cases where the practice of States differs (e. g. extradition of nationals, non-extradition of political offenders, etc.).

214. "Where the requesting State only is a Member of the Council, the requirements for the transit authorization may be less extensive than when only the requested State is a Member.

215. These considerations apply only, to transit through the territory of a State. The situation is different in eases where the claimed person is merely conveyed by an aircraft or a vessel flying the flag of a third State or when the aircraft is due to fly over the territory of a third State. As regards the use of vessels for ! transit, it would be wise to consider it as transport through the territory of the Statę whose flag the vessel is flying.

216. When it.comes to air .transport, we have few precedents. Article 20 of the 1951 Convention between Prance and the German Pederal Republic .may be mentioned as the most , modern and elaborate one existing in this matter. The Article reads as follows :

" In cases where air transport is used, the following provisions shall apply :

> *When no landing, is envisaged, the applying State shall advise the State over whose territory the flight is to be made and shall certify the presence of one of the documents provided for in the second paragraph of Article 8. In the case of forced landing, this notification shall bring into force the request for provisional arrest under Article 9, and the petitioning State shall submit a request for transit in the circumstances provided for in the preceding paragraph.*
>
> *When a landing is envisaged, the applying State shall submit a request for transit. "*

217. The Harvard Draft Convention envisages only the ease of an aircraft flying the flag of a third State which will not fly over the territory of such a State. Article 22 of the Harvard Draft reads as follows :

" If a State to which extradition of a person has been granted desires to transport the extradited person through the territory of another State or on a private vessel or aircraft having the national character of another State for the purpose of bringing him to his own territory, it shall notify such other State and present an original or an authenticated copy of a decree of extradition, and the latter shall permit and facilitate such

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11. Article 3 of the 19Ö1 Convention botween Franco and tho German Federal Eopublio states : The following persons shall bo Hablo to extradition : 1. porsons sought for crimes or misdemeanours punishable undor tho laws of the Contracting Parties by at least ono year's imprisonment ; 2. persons who for crimes or misdomeanours punishable under the laws of the petitioned Stato havo been sentenced, after full arguments havo been givon by both sides or b y default, by tho Courts of tho petitioning Stato : (a) to at least three months' imprisonment or to α deprivation of liberty for security reasons for α period of at least six months, or : (b) to sentences totalling at least tlireo months' imprisonment, on condition that ono of the offences committed is punishable under tho laws of the Contract i ng Parties by at least ono year's imprisonment.

transportation. The State to which a person has been extradited shall reimburse the State through whose territory or on whose vessel or aircraft such person is transported for any expenses incurred by the latter in connection with such transportation. "

218. Conclusion. In view of the different ways in which States might exercise their discretion (e. fir. in the extradition of nationals) it would be difficult to provide uniform rules for granting transit. However, the procedure applicable in the case of transit could be the same as that for extradition. In case of extradition to or from a non-Member State of the Council, the fulfilment of the conditions concerning the extraditability of the offender may be required from the other Members of the Council by the transit country. The International Criminal Police Commission's Draft imposes the same conditions for extradition from a contracting party as those for extradition to a contracting party. In cases where a person is also wanted by the transit country, it would be advisable to provide for negotiations to be opened on the initiative of the requested State with a view to determining whether the proceedings or the execution of the penalty should take place first in the transit country or in the requesting country. Draft Article 21 endeavours to meet this situation. Subject to the considerations and modifications mentioned above, a solution has been found which combines the relevant provisions of the Harvard Draft with those of the 1951 Convention between Prance and the German Federal Republic.

1.1.20.1. DRAFT ARTICLE 20

Transit through, the territory of a High Contracting Party

35. A High Contracting Party shall grant, upon request through diplomatic or consular channels, the necessary permission and facilites for the transit through its territory, or in a private aircraft or ship flying its. flag, of a person requested or extradited by another High Contracting Party for an , offence which is extradited under this Convention.

36. In cases where air transport is used, the following provisions shall apply :

a. When no landing is envisaged, the requesting High Contracting Party shall notify the High Contracting Party over whose territory the flight is to be made and shall certify the presence of one of the documents provided for in Article 14, paragraph 3, sub-paragraph (a). In the case of a forced landing, this notification shall be deeemed to be an application for provisional arrest and the requesting High Contracting Party shall submit a request for transit in accordance with the provisions of paragraph 1 of this Article.

b. When a landing is envisaged, the requesting High Contracting Party shall submit a request for transit.

37. When the person concerned is also wanted in a High Contracting Party which has received a request for transit, negotiations shall take place with the requested High Contracting Party in order to decide, in accordance with the principles mentioned in Article 13, whether proceedings, or, in appropriate cases, the execution of the sentence, shall take place first in the High Contracting Party of transit or in the requesting High Contracting Party.

1.1.21. CHAPTER XXI - Expenses

219. The question arises whether the requesting or the requested State should bear the expenses incurred in examination proceedings.

220. States have usually agreed that a requesting State sliould not be charged with such expenses as any part of the salaries of judicial and other officers who, in the requested State, participate in the extradition proceedings, which would not have been paid if such proceedings had not been instituted. 'Divergencies arise about the special expenses occasioned by the extradition proceedings such as witness fees, gaol board, transport and the like. Article 21 of the Harvard Draft says:

" A requesting State shall reimburse the requested State for special expenses occasioned by the extradition proceedings up to the time of the surrender of the person claimed to an agent of the requesting State. "

221. A number of treaties — mostly those to which the United States is a party — provide that all expenses shall be borne by the requesting State (see Harvard Commentaries Survey, American Journal of International Law, 1935, Section II, Official Documents, footnote No. 7 on pages 207 and 208). This view is based on the fact that the surrender of the person claimed' is principally in the requesting State's interests. In practice, however, reimbursement involves so many inconveniences that, generally, each party bears the cost of extradition incurred on its own territory.

The 1951 Treaty between France and the German Federal Republic contains the following provisions :

" The expenses incurred in connection with proceedings for extradition in the State applied to shall, apart from provisions to the contrary made in this Convention or by special agreement, be borne by the State applied to.

Nevertheless, in cases of extradition from a territory outside Europe, the expenses incurred between this territory and the European territory of tho State applied to shall be chargeable to the applying State on the basis of the most economical form of transport. " (Art. 19.)

" The transit expenses shall be refunded by the applying State. " (Art. 20.)

222. The International Criminal Police Commission's Draft adopts the same system, with some exceptions in case of withdrawal of request and of provisional arrest. Article 38 reads as follows :

" Subjec t to Articles 23, 24 and 38, the requested State has no right to reimbursement of the expenses of the extradition. It will nevertheless inform the requesting State of the amount of the expenses which the extradition procedure and the conveyance to the frontier of the person have occasioned, with a view to recovering these expenses from the person extradited, should the case arise. The sums reimbursed will be sent, on demand, to the requested State,

In the case of provisional extradition, the requesting State will reimburse the requested State with the expenses incurred by it in the extradition and the capture of the fugitive.

The expenses of an extradition by 'transit' (transport, escort and cost of maintenance) will be reimbursed by the requesting State to the State through which transit is made. "

223. Conclusion. The Committee was satisfied that, as between Members of the Council of Europe, each High Contracting Party concerned should bear the cost of extradition incurred on its own territory, except perhaps in the case of transit and in the case of extradition from an overseas territory, This view was acceptable even in cases of application for provisional arrest and when a request for extradition has been withdrawn.

1.1.21.1. DRAFT ARTICLE 21

Expenses

Except where the Convention provides otherwise, no reimbursement of expenses shall be required from a High Contracting Party.

1.1.22. CHAPTER XXII - Other Agreements

224. Another problem connected with the 'conclusion òf a multilateral convention is its effect on existing extradition treaties between Members of tlie Council of Europe. In fact, it would not be a good policy to cancel existing agreements between Members which, owing to their proximity, to the particularly friendly and close relations between them, or to the similarity of their judicial systems have been willing for a long time to co-operate more closely and to grant extradition with fewer restrictions or conditions subject, of course, to their desire to safeguard human rights and fundamental freedoms. The Harvard Draft Convention contains a provision inspired by these motives. Its Article 27 reads as follows :

" Nothin g in this Convention shall effect the provisions of any agreement in force between any of the parties concerning extradition for acts for which extradition is not required by this Convention ; nor shall this Convention preclude any of the parties from entering into such an agreement. "

225. The extradition convention signed at Montevideo by the American States (December 26th, 1933) contains a provision to the same effect (Article 21):

" The present Convention does not abrogate or modify the bilateral or collective treaties, which at the present date are in force between the signatory States. Nevertheless, if any of the said treaties lapse, the present Convention will take effect and become applicable immediately among the respective States, if each of them has fulfilled the stipulations of the preceding article. "

226. The Draft Convention on the reciprocal treatment of nationals adopted by the Consultative Assembly of the Council of Europe in Majr, 1951, includes a special provision concerning the effect of the multilateral convention on existing or future bilateral agreements or arrangements between the Members of the Council of Europe. Article 12 of this Draft Convention reads as follows :

" Nothing in the present Convention shall prejudice the provision of any other convention, treaty or agreement, concluded or to be concluded between certain High Contracting Parties by the terms of which the nationals of the other High Contracting parties are or may be accorded greater equality with native citizens than under the terms of the present convention. "

227. Conclusion. It was decided that the Convention should in no way prejudice the application of existing agreements which provide wider possibilities of extradition or a less complicated procedure, as is the case for example between the United Kingdom and Ireland and between France and the Saar.

1.1.22.1. DRAFT ARTICLE 22

Other Agreements

Nothing in this Convention shall affect the provisions of any other agreement concluded between certain High Contracting Parties providing wider opportunities or facilities for extradition.

1.1.23. CHAPTER XXIII - Final Clauses

228. The Committee did not consider it necessary to draft the final clauses of the proposed European convention on extradition.

229. Nevertheless, it was thought useful to include a clause whereby. a European State which is not a Member of the Council of Europe can be invited to accede to the Convention.

230. Other Council of Europe Conventions contain similar clauses. For example, the European Convention on the Equivalence of Diplomas leading to admission to universities contains the following clause:

"The Committee of Ministers, of the Council of Europe may invite any State which is not a Member of the Council to accede to this Convention. Any State so invited may accede by depositing its instrument of accession with the Secretary-General of the Council, who shall notify all the Contracting Parties thereof. As regards any acceding State, this Convention shall come into force on the date of the deposit of its instrument of accession. " (Article 6.)

231. The European Convention relating to the formalities required for patent applications states :

" After it has come into force, this Convention shall be open to accession by all States which are Members of the International Union for the Protection of Industrial Property. " (Article 9.)

232. Conclusion. As the Committee decided that the proposed Convention might be the subject of a partial agreement, it was felt that the High Contracting Parties and not the Committee of Ministers as a whole should have the right, by a unanimous decision, to invite any non-Member State to accede to the convention.

1.1.23.1. DRAFT ARTICLE 23 (for insertion in final clauses)

The High Contracting Parties may, by a unanimous decision, invite any State which is not a Member of the Council of Europe to accede to this Convention.

Any State so invited may accede by depositing its instrument of accession with the Secretary-General of the Council of Europe. Accession shall take effect on the date of deposit of the instrument.

2. Draft Recommendation

The Assembly,

Having regard to the motion tabled in the Assembly by Mr. J. G. Foster, Q. C, for the conclusion of a European Convention on Extra^ dition in accordance with the desire of all Members for common action in the legal field, which was referred to the Committee on Legal and Administrative Questions on 30th November, 1951 [see Document 82 (1951)] ;

Considering that it is desirable, in view of the close relations which are developing between the Members of the Council of Europe, to concliide a European Convention on Extradition in order to secure the punishment of those committing crimes within the jurisdiction of a Member of. the Council of Europe and taking refuge on the territory of another Member State, and to simplify, s.o far as possible, extradition procedure ;

Having been informed that a Committee of Governmental Experts met m Strasbourg in October, 1953, " to study, the possibility of laying down certain principles governing extradition which would be acceptable to all Members of the Council, the question as to whether these principles should figure in a multilateral'convention or whether they should serve merely as a basis for a bilateral convention on , extradition remaining for the time beingg m abeyance " but that their report has not yet been examined by the Committee of .Ministers, and no decisions has been taken as to whether they should continue their work ;

Having approved, in principle, the articles for inclusion in a European Convention on Extradition contained in the. report of the Committee on Legal and Administrative (Questions which is hereby transmitted to the Committee of-Ministers (Document 234),

Recommends to the Committee of Ministers,

1. that it should instruct the Committee of Governmental Experts on Extradition to continue their work with a view to the conclusion of a European Convention, on Extradition and to the inclusion therein of the articles drafted by the Committee on Legal and Administrative Questions and approved by the Assembly, which are appended to this Recommendation ;

2. that, in view of the Resolution adopted by the Committee of Ministers during their Ninth Session in August, 1951, for the signature of partial agreements, this work should continue even if it were to appear subsequently that certain Member States find themselves unable to become parties to such a convention ;

3. that, should the Committee of Experts find it necessary to make important changes of substance in these articles, such proposed changes should be discussed at joint meetings to be convened between the appropriate subcommittee of the Assembly's Committee on Legal and Administrative Questions, on the one hand, and the Committee of Governmental Experts or a sub-committee thereof, on the other hand, for the purpose of reaching a solution acceptable to both sides ;

4. that the text of the proposed European convention should be communicated to the Assembly for an Opinion before being finally approved by the Committee of Ministers.

Appendix APPENDIX

Articles for inclusion in a European Convention on Extradition

ARTICLE 1 - Extraditable Acts

The following persons shall be liable to extradition :

a. Persons claimed by a High Contracting Party for an act which is an offence in both the requested and requesting High Contracting Parties and is punishable in the requesting High Contracting Party by at least one year's imprisonment ; and

b. Persons who have already been convicted of such an offence and have already been sentenced to at least three months' imprisonment in the requesting High Contraoting Party.

ARTICLE 2 - Political Offences

1. A requested High Contracting Party may decline to extradite for an act which, according to tho circumstances in Avhieh it lias been committed, is political or connected with a political act and committed with a view to preparing for, to ensuring the commission of, to concealing or to preventing such α politica! act ; or when there is reason to believe from tho circumstances that the extradition is requested with α view to taking action against someone for an act of a political character.

2. The following shall not be deemed political offences :

a. Offences in respect of which the High Contracting, Parties are obliged -by- international conventions to institute proceedings ;

b. Attemps on the life of a Head of State or Head of Government.

ARTICLE 3 - Fiscal Offences

Extradition shall be granted for customs offences and offences against laws and regulations of a fiscal, financial, economic and monetary character if the penalty provided by the law in the requesting High Contracting Party is not less than a year's imprisonment or a fine of not less than the equivalent of eight thousand gold Swiss Francs (at the rate of 290.3225 milligrammes as fixed by the decision oi 26th September, 1936, of the Federal Council).

ARTICLE 4 - Military Offences

Extradition for military offences is excluded from the field of application of the present convention.

ARTICLE 5 - Extradition of Nationals

Where the person claimed is a national of a requested High Contracting Party, and for that reason cannot be extradited, the requested High Contracting Party shall, within one year of the notification to the requesting High Contracting Party of its refusal to extradite, prosecute the person concerned as if the act had been committed on its own-territory.

ARTICLE 6 - Place of Gommission of extraditable acts

1. Extradition may be refused if the act for which it is requested was committed in whole or in part in the territory of the requested High Contracting Party.

ARTICLE 7 - Lapse of Time

Extradition may be refused when the person claimed has become immune, by reason of lapse of time, from prosecution or punishment according to the laws of either the requesting or the requested High Contracting Party.

ARTICLE 8 - Capital Punishment

If the act for which extradition has been requested is punishable by death in the requesting High Contracting Party and there is no death-penalty in the law of the requested High Contracting Party, tho requested High Contracting Party may extradite only if the requested High Contracting Party undertakes to recommend to the Head of State or to its constitutionally competent authority to grant a reprieve or an order setting aside the death-penalty.

ARTICLE 9 - NON BIS IN IDEM

1. A requested High Contracting Party may decline to extradite a person claimed if such person lias already been prosecuted by the requesting High Contracting Party for the act or acts for which his extradition is requested and if he has been either finally acquitted or convicted, unless, in the latter case, the extradition is sought so that the person claimed may servo an unexpired term of the sentence imposed as the result of such conviction.

2. A requested High Contracting Party may decline to extradite a person claimed if such jierson has been prosecuted by tho requested High Contracting Party or by a third State for tho same act or acts for which extradition is sought and has been finally acquitted or convicted.

ARTICLE 10 - Pending Prosecution for the same acts

1. A requested High Contracting Party may decline to extradite a person clauned if ho is being prosecuted for the act or acts for which extradition is sought, of if he has been apprehended with a view to such prosecution, either at the time of receipt of an application for provisional arrest, or (in the absence of such application) at the time of receipt of a request.

2. A final decision in the requesting High Contracting Party not to take proceedings {décision définitive de non-lieu) shall allow the requested High Contracting Party to reif use extradition.

ARTICLE 11 - Postponed or Conditional Extradition

1. A requested High Contracting Party may postpone the extradition of a person claimed:

a. and punished by the requested High Contracting Party, or, where he has already been convicted, in order that he may serve his sentence in the requested High Contracting Party for an act other than that for which extradition is requested ; or

b. in order that the person claimed may testify as a witness in a criminal proceeding pending in the requested High Contracting Party, but, in this ease, extradition shall only be postponed for a maximum of six months from the date of receipt of tho request.

2. As an alternative to such a postponement of extradition the requested High Contracting Party may extradite the person claimed upon condition that such person be returned to the requested High Contracting Party as soon as the prosecution in the requesting High Contracting Party is concluded.

ARTICLE 12 - Rule of Speciality

A High Contracting Party to which a person has been extradited shall not, without the consent of the High Contracting Party which extradited such person :

a. prosecute or punish such person for an act committed before his extradition other than that for which he was extradited ;

b. surrender such person to another High Contracting Party or to a non-High Contracting Party for prosecution or punishment ;

c. prosecute such person before a court specially constituted for the trial or to which special powers are granted for the trial.

ARTICLE 13 - Conflicting Requisitions

If tbe extradition of the same person is requested concurrently by several High Contracting Parties, either for the same act or for different acts, the requested High Contracting Party shall, in deciding to ЛУЫС High Contracting Party the person claimed shall be extradited, consider all the circumstances and especially the

possibility of later extradition from one requesting High Contracting Party to another, tho respective dates of the requests, tho relative seriousness and the place of commission of the act or acts and the nationality of the person claimed.

ARTICLE 14 - The Bequest and supporting documents

1. The request shall be in writing and shall bo communicated by a diplomatic or consular officer of tho requesting High Contracting Party to tho competent authority of tho requested High Contracting Party.

2. The request shall contain :

a. a description for the purpose of identification of the person claimed ;

b. a statement that a warrant of arrest, or other document of equivalent import in the prosecute of the person claimed, has been issued.

3. The request shall bo supported by :

a. a copy of the warrant of arrest or other document of equivalent import in tho prosecution of the person claimed, or a copy of the judgment of conviction against the person claimed, and of any sentence imposed in execution of such judgment ;

b. a statement of tho law of the requesting High Contracting Party under which it is intended to prosecute or to punish the person claimed, which ehall show, in cases where it is intended to prosecute, that such law was in forco when the act was committed for which extradition is requested.

4. The documents mentioned in (a) and (b) of paragraph 3 of this Article should be drawn rip in accordance with the law of the requesting High Contracting Party.

ARTICLE 15 - Supplementary Information

If the information communicated by the requesting High Contracting Party is insufficient to enable the person to be identified or to establish the circumstances of the offence with which he. is charged or the wording of the penal provisions applicable to the case, such supplementary information as is required shall be forwarded by the requesting High Contracting Party immediately on request.

ARTICLE 16 - Application for provisional arrest

1. In cases where there is reason to suspect that the person claimed may attempt to escape or make the establishment of the facts more difficult, a High Contracting Party shall have the right to apply for his provisional arrest, even before forwarding a request for extradition.

2. Such application for provisional arrest :

a. may be made through diplomatic or consular channels, as appropriate ; or

b. may be forwarded by the competent authority of the requesting High Contracting Party direct to the competent authority of the requested High Contracting Party [A list of competent autho-rithies will be appended to this Convention] ; or

c. may appear in the official notices of the International Criminal Police Commission which shall constitute an official notification.

3. Such application for provisional arrest shall be made :

a. by post or by any other means affording evidence in writing ;

b. by telephone, wireless telegraphy, radio or television. In these cases, the requested authority must exercise the right of assuring itsef forthwith of the authenticity of the application by immediate enquiry of the requesting authority.

4. An application for provisional arrest must identify either a particular warrant for arrest or a document of equivalent import, or a certificate of final conviction. It must set out the nature, the time and the place of the offence and as detailed a description as possible of the wanted person. It must also state that a formal request for extradition will be sent forthwith.

5. As soon as the provisional arrest has been made the requesting High Contracting Party shall bo informed.

6. An application for provisional arrest may contain a request for the provisional seizure of property winch is essential to the proper conduct of the proceedings in tho requesting High Contracting Party and which appears to fall within the categories mentioned in Article 18.

7. As soon as a requested authority finds a person who is believed to be the subject of an application for provisional arrest, it will seek to establish bis identity without delay. If it is clear from the nature, time and place of the offence that the person could not have committed it, the requesting High Contracting Party shall be informed of the reasons wliich preclude provisional arrest, and if the person is detained he shall be released immediately.

8. When a wanted person has been put under provisional arrest, the request for extradition must be handed to tho requested High Contracting Party within 14 days of the date of arrest. If this period is exceeded, the provisional arrest shall be discontinued.

9. Where provisional arrest is discontinued becauso the requesting High Contracting Party has failed to keep to tho time-limit laid down in tho preceding paragraph, failure shall not prejudice the request for extradition.

ARTICLE 17 - Procedure

Except where the Convention provides otherwise, tho procedure and tho decision regarding extradition shall be in accordance with the la;v of the requested High Contracting Party.

ARTICLE 18 - Delivery and return of property requested

1. The authorities of the High Contracting Parties shall provide each other, on request, with property :

a. which may be required as evidence ;

b. which a person claimed or his accomplice may havo acquired as a result of the offence outside the territory of the requested High Contracting Party or which he may have acquired in exchange for that property outside the said territory,

2. and this shall remain the case even when the said property would be bable to seizure or confiscation in the territory of the requested High Contracting Party.

3. This property shall be delivered as soon as possible.

4. The rights which third parties may have acquired in the property in question shall be preserved. The property shall be returned to the requested High Contracting Party as soon as possible and without charge, at the end of the trial.

5. When requested property is needed for-preliminary criminal investigation, the requested High Contracting Party may temporarily retain it or may deliver it on condition that it be returned for such investigation.

ARTICLE 19 - Language to be used and translations

Insofar as the request for extradition and other documents mentioned in this Convention and written evidence to be offered in the extradition proceedings are not in an official language of the requested High Contracting Party, the requesting High Contracting Party shall send to the requested High Contracting Party translations either in an official language of the requested High Contracting Party or in one of the official languages of the Council of Europe.

ARTICLE 20 - Transit through the territory of a High Contraeting Party

1. A High Contracting Party shall grant, upon request through diplomatic or consular channels, the necessary permission and facilities for the transit either through its territory, or in an aircraft or ship flying -its flag, of a person requested or extradited by another High Contracting Party for an offence which is extraditable tinder this Convention.

2. In cases where air transport is used, the following provisions shall apply :

a. When no landing is envisaged, the requesting High Contracting Party shall notify the High Contracting Party over whose territory the flight is to be made and shall certify the presenco of one of the documents provided for in Article 14, paragraph 3, sub-paragraph (α). In the ease of a forced landing this notification shall be deemed to bo a request for provisional arrest and the requesting High Contracting Party shall submit a request for transit in accordance with the provisions of paragraph 1 of this Article.

b. When a landing is envisaged, the requesting High Contracting Party shall submit a request for transit.

3. When the person concerned is also wanted in a High Contracting Party which has received a request for transit, negotiations shall take place with the requested High Contracting Party in order to decide, in accordance with the principles mentioned in Article 13, whether proceedings, or, in appropriato cases, the execution of the sentence, shall take place first in the High Contracting Party of transit or in the requesting High Contracting Party.

ARTICLE 21 - Expenses

Except where the Convention provides otherwise, no reimbursement of expenses shall bo required from a High Contracting Party.

ARTICLE 22 - Other Agreements

Nothing in this Convention shall affect tho provisions of any other agreement concluded between certain High Contracting Parties providing wider opportunities or facilities for extradition.

ARTICLE 23 - (for insertion in final clauses)

The High Contracting Parties may, by a unanimous decision, invite any State which is not a Member of the Council of Europe to accede to this Convention.

Any State so invited may accede by depositing its instrument of accession with the Secretary-General of the Council of Europe. Accession shah take effect on the date of deposit of the instrument.