

Michał Plachta *

Recent Developments in the Extradition Law Within the European Union, and the New Polish Domestic Legislation

1. Ideas and needs underlying the recent developments

Arguably, extradition is not the most effective and efficient process by which a person is surrendered by one state to another, although it is the most desirable and, presumably, the only fair and safe legal means to achieve this goal.¹ More importantly, among the Member States of the European Union it has been recognised that extradition plays a fundamental role in facilitating the exercise of criminal jurisdiction and the enforcement of the domestic penal law of each and every country.

This assertion has proved to be true in all of Europe. The European extradition system, largely based on the 1957 European Convention on Extradition,² has become cumbersome, and has made its procedures complicated, difficult, lengthy, and expensive.³ Several factors have significantly contributed to this unsatisfactory result; among them, the following should be mentioned: the definition of an extraditable offence, re-extradition to a third state, the channels of communication, the authentication of documents, and the rule of speciality.⁴ By and large, however, the defences, exceptions and exemptions, such as the nationality of the Reator, the political and fiscal character of the offence, the possibility of being granted amnesty, and the circumstances created by a lapse of time, represent a group of the most serious obstacles to the smooth functioning of extradition

* Prof. **Michał Plachta**: Department of Criminal Procedure, Faculty of Law, Gdańsk University.

¹ I.Sheraer, *Extradition in International Law*, London 1971, p.67.

² E.T.S., no. 24.

³ See: Council of Europe, *Legal Aspects of Extradition Among European States*, 1970, p.29-66.

⁴ See: P.Gully-Hart, *Loss of Time Through Formal and Procedural Requirements in International Cooperation*, "Revue internationale de droit pénal", no. 62 1991, p.245-266.

between the signatory states.⁵ All of these considerations bear heavily upon decision-makers and contribute to the making of the extradition process an unattractive one in terms of the attainment of a swift result accomplished in an efficient manner. The alternatives to the legitimate extradition process, therefore, have become tempting, and thus the regular procedure has evolved into various deviant forms, such as irregular extradition,⁶ informal rendition,⁷ disguised extradition,⁸ and, above all, kidnapping and abduction.⁹

The Council of the European Union has always perceived the problems inherent in the process of extradition as a challenge, and thus in the early 1990s, it decided to take effective measures in an effort to confront the problematic aspects of the issue. Beginning in 1993, a work programme was outlined. This programme provided for the examination of both the formal extradition procedures and the substantive conditions of extradition, with a view to making them simpler, faster and therefore to facilitate the granting of extradition. The European Ministers of Justice declared the improvement of extradition arrangements between EU states a priority.¹⁰ So far, two steps have been taken towards this goal. On March 10, 1995, the Convention on Simplified Extradition Procedure, concerning the extradition of consenting persons, was drawn up by the Council and signed by all of the Member States (hereinafter, the 1995 Convention).¹¹ The aim of this Convention was to speed up extradition where persons consented to be delivered up. After further discussions concerning other aspects of extradition, the Council recommended that Member States adopt far

⁵ To fully appreciate the magnitude of the exemptions and exceptions to extradition and the extent to which they may frustrate this process, it has to be recalled here that the European Convention on Extradition contains no less than ten different grounds for refusal (Articles 3–11). Moreover, another seven circumstances of this kind can be found in reservations and declarations to the Convention; two of them have later been included in the First and Second Additional Protocols (final judgment in a third state and judgments *in absentia*). See also B.Swart, *Refusal of Extradition and the United Nations Model Treaty on Extradition*, "Netherlands Yearbook of International Law", no. 23 1992, p.175-219.

⁶ P.O'Higgins, *Unlawful Seizure and Irregular Extradition*, "British Yearbook of International Law", no. 36 1960, p.279-320.

⁷ D.Lanham, *Informal Extradition in Australian Law*, "Criminal Law Journal", no. 11 1987, p.3-10.

⁸ S.Coren, *Disguised Extradition and Abuse of Process*, "Law Quarterly Review", no. 110 1994, p.393-399.

⁹ B.Homrig, *Abduction as an Alternative to Extradition - A Dangerous Method to Obtain Jurisdiction Over Criminal Defendants*, "Wake Forest Law Review", no. 28 1993, p.671-704.

¹⁰ J.Vermeulun, D.Van der Beken, *Extradition in the European Union: State of the Art and Perspectives*, "European Journal of Crime, Criminal Law and Criminal Justice", no. 4 1996, p.207-208.

¹¹ *Convention on Simplified Extradition Procedure between Member States of the European Union*, adopted on 10 March 1995, "Official Journal", 1995 C 78/1.

more radical procedures. On September 27, 1996, the Convention Relating to Extradition between the Member States of the European Union was drawn up by the Council and signed by all of the Member States (hereinafter, the 1996 Convention).¹²

The new Conventions make several alterations to the process, and are in fact regarded as legitimate guidelines according to which established extradition procedures and standards are set. The new conventions give a relative degree of legal protection to the fugitive offender. This was done according to the premise that the considerable similarities in the criminal policies of Member States, and, above all, their mutual confidence in the proper functioning of national justice systems and, in particular, in the ability of Member States to ensure that criminal trials respect the obligations stemming from the European Convention for the Protection of Human Rights and Fundamental Freedoms, justified a revision also of the fundamental aspects of extradition.

In dealing with extradition, one has to bear in mind that the process is “*founded on the concepts of reciprocity, comity and respect for differences in other jurisdictions*”.¹³ Thus, as Ognall noted, the law of extradition proceeds upon “*fundamental assumptions that the requesting state is acting in good faith and that the fugitive will receive a fair trial in the courts of the requesting state*”.¹⁴ The question remains as to whether the two new EU conventions have been drawn up according to these precepts.

2. The 1995 Convention on Simplified Extradition Procedure

Simplified extradition is not an entirely new idea invented by the drafters of the 1995 Convention.¹⁵ One of the earliest domestic enactment authorising the use of such a procedure is the French Law on Extradition, passed in 1927. The 1957 European Convention on Extradition did not include a rule in such a respect, and maybe, it was due to this that the Committee of Ministers of the Council of Europe recommended in 1980 that “*with a view of expediting extradition and keeping the period of provisional arrest as short as possible, consideration should be given to the use of a summary procedure enabling the rapid surrender of the person sought without following ordinary extradition*

¹² Convention drawn up on the Basis of Article K.3 of the Treaty on European Union, Relating to Extradition between the Member States of the European Union, adopted on 27 September 1996, “*Official Journal*”, 1996 C 313/11.

¹³ *Kindler v. Canada*, D.L.R., 1995, p.438,488.

¹⁴ *R. v. Governor of Pentonville Prison, ex parte Lee*, 3 All. E.R., 1993, p.504,509.

¹⁵ See e.g. D.Poncet, P.Gully-Hart, *Extradition: The European Model* in: “*International Criminal Law*”, ed. M.C.Bassiouni, Cambridge 1986, p.461,500.

procedures, provided that the person concerned consents to it".¹⁶ By adopting this Recommendation, the Committee of Ministers merely drew the attention of the signatories of the 1957 Convention to the fact that the simplified procedure of surrender would not be incompatible *per se* with the rules laid down in the said convention. On the other hand, since no specific provisions on simplified extradition were included in the Recommendation, the burden of its implementation falls on the shoulders of signatory states.

Although simplified extradition is a fairly recent development in the international system of surrendering fugitive offenders from one system of jurisdiction to another, it is a highly desirable one. Many fugitives are quite willing to return to the requesting state and would prefer not to be put to the trouble of participating in an extradition hearing with the time and expense that this is likely to entail. Arguably, if the fugitive wants to return because, for example, he is convinced that he has a better opportunity to defend himself in the state of the *loci delicti commissi*, where exculpatory evidence is more readily available, why should the time and expense of the formal, full-fledged extradition procedure be incurred? Therefore, as a matter of principle, simplified extradition is a positive and welcome form of international co-operation in criminal matters. It has been included in both the domestic legislation of some states and in treaty practice. The question remains, however, of how this procedure is being shaped and formulated in treaty stipulations, including the 1995 EU Convention.

The drafters of the 1995 Convention having noted that, in a large number of extradition cases the person sought either for prosecution or for the enforcement of a final sentence, consents to his surrender, were convinced that there is room for some modifications within the extradition system and framework as conventionally adopted by the Member States. Specifically, they believed that there is both a need and a possibility to simplify extradition procedures to the extent that this is compatible with the fundamental legal principles existing within Member States, including the principles of the European Convention on Human Rights. The most desirable result of such changes would be a reduction to a minimum of the time necessary for extradition and of the period of detention for extradition purposes. Having this in mind, the drafters elaborated the 1995 Convention in an effort to facilitate extradition between Member States by supplementing the 1957 Convention (Article 1). The change is aimed at increasing the efficiency of current procedures without affecting the application of other more favourable arrangements already in force between some Member States.

¹⁶ Recommendation No. R (80) 7 of the Committee of Ministers of the Council of Europe Concerning the Practical Application of the European Convention on Extradition, adopted by the Committee of Ministers on 27 June 1980.

Provided that the conditions laid down in the 1995 Convention are complied with, contracting parties undertake to apply the simplified provisions for the surrender of fugitives. The simplified process begins once the request for provisional arrest is received or, if the Schengen Agreement applies, when a person has been reported in the Schengen information system.¹⁷ In any case, the surrender carried out according to the provisions of this scheme is not subject to the submission of a request for extradition or of the documents required by Article 12 of the European Convention on Extradition (Article 3). Instead, the following information will be regarded as adequate for the purpose of simplified extradition:

- the authority requesting the arrest; (c)
- the existence of an arrest warrant or of an enforceable judgement; (d)
- the nature and legal description of the offence; (e)
- the description of the circumstances under which the offence was committed;
- the consequences of the offence (Article 4). This information should be communicated both to the competent authorities of the requested state and to the person sought. Upon his arrest, the person wanted for the purpose of extradition should be informed of the request relating to him, and of the option to consent or not to consent to his surrender to the requesting state, under the 1995 Convention (Article 6).

Such a person must be further informed of the simplified procedure and its consequences.¹⁸ To ensure that the arrested person has been adequately informed and his or her consent obtained voluntarily, the signatory states are under obligation to adopt the measures necessary to provide the person in question with access to legal representation. While making his statement, the person sought has the following option: he can either give only his consent to being surrendered to the requesting state (what is known as “*simple consent*”), or he can at the same time waive his protection under the rule of speciality (“*consent with renunciation*” in Article 7).¹⁹ What is significant

¹⁷ *Schengen Convention 1990*, Article 96, no. 30, I.L.M. 1991, p.68.

¹⁸ The duty to provide the extradite with the relevant information is in keeping with the requested state’s obligation in this respect under the 1957 European Convention. This obligation was confirmed by the Committee of Ministers of the Council of Europe which, in its Recommendation No. R (80) 7, stated, *inter alia*, that the person sought: “(a) *should be informed, promptly and in a language which he understands, of the extradition request and the facts on which it is based, of the conditions and the procedure of extradition, and where applicable, of the reasons for his arrest; (b) should be heard on the arguments which he invokes against extradition*” (emphasis added).

¹⁹ The commonly recognized principle of speciality limits the power that the requesting state has over the person surrendered. Basically, under this rule, the extradited offender can be neither proceeded against, not sentenced, nor detained, nor re-extradited to another state, nor subjected to any other restriction of personal liberty for any offence other than the one for which extradition

about this provision is that this is most likely the first treaty stipulation on speciality which empowers the extradite himself to renounce it. It has traditionally been held that the requested state alone may consent to the surrendered person being prosecuted, tried, sentenced or detained in view of the carrying out of a sentence or of a detention order for other offences.²⁰ A similar stipulation was also included in the 1957 European Convention on Extradition, whose Article 14 provided that the rule of speciality could be waived only with the consent of the requested state. The most important consequence of the provisions on the renunciation of the speciality rule, as adopted in the 1995 Convention, is the ability which each Member State has to declare that the rules laid down in Article 14 of the European Convention on Extradition do not apply where the person, in accordance with the 1995 Convention either consents to extradition or consents to extradition and expressly renounces his entitlement to protection offered under the rule of speciality (Article 9).

Once recorded, the consent and, where appropriate, renunciation may not be revoked. However, upon the deposit of their own instruments of ratification, acceptance, approval or accession, signatory states may declare that consent and renunciation may be revoked, in accordance with the rules applicable under their national law (Article 7). If the person sought consents to being extradited, the requested state must notify the requesting state of the statement made by that person so that a request for extradition can be submitted. However, notwithstanding the consent of the person in question, once an arrest is effected, the request for extradition must be received within ten days (Article 8). Notification of the decision to extradite should be communicated directly to the competent authorities of both of the states involved, and the surrender of the fugitive must fall within 20 days of the notification of the decision (Article 10).

Re-extradition to a third state is yet another important matter treated in the 1995 Convention. It is here that the drafters of the convention went too far in speeding up and simplifying the extradition procedure. The rule of speciality and re-extradition are two distinct issues within the extradition system, although the 1995 Convention establishes an automatic link between these two separate problems. Once the person sought consents to his surrender to the requesting state to face trial for a specific and specified offence (or offences) or to serve his

was requested and granted. See e.g. K.E. Levitt, *International Extradition, The Principle of Speciality, and Effective Treaty Enforcement*, "Minnesota Law Review", no. 72 1992. Note, *Toward a More Principled Approach to the Principle of Speciality*, "Cornell International Law Journal", no. 12 1979, p.309.

²⁰ See H.Ching, *Du principe de la specialité en matière d'extradition*, Paris 1950, p.57; A.Zairi, *Le principe de la specialité de l'extradition au regard des droits de l'homme*, Paris 1992, p.125.

sentence there, he may not only be deprived of protection under the rule of speciality if he further renounces this rule, and become subject to the declaration made by the requested state, pursuant to Article 9 of the 1995 Convention, but he may automatically be deprived of the protection that normally derives from the treaty stipulation on re-extradition. Article 13 states that derogation by the signatory state, by virtue of a declaration based on Article 9 of the Convention, from the speciality rule outlined in Article 14 of the European Convention on Extradition, extends to derogation from Article 15 of the 1957 Convention, to the effect that the person surrendered under the simplified extradition scheme can be freely re-extradited by the requesting state to another Member State of the European Union without the need to seek the consent of the requested state. To avoid the exposure of the surrendered person to being further re-extradited without notification of the requesting state, the Member State would have to include an appropriate proviso in its declaration made under Article 9 of the 1995 Convention.

3. The 1996 Convention Relating to Extradition

3.1. Introduction

The drafters of this Convention were most concerned with the most serious and dangerous forms of criminality, most notably terrorism and organised crime, and therefore, were determined to formulate an instrument that would bring about a significant improvement of international co-operation in the suppression of such criminality. Based on this premise, they developed new solutions with respect to dual criminality, political offence, the extradition of nationals and the rule of speciality, which progress makes the Convention a genuine innovation.

The 1996 Convention is unique in at least two respects. First and foremost, most of its significant solutions are based on what can be described as “*the mechanism of inversion*”, for they have been created by the simple negation of traditional rules as embodied in the 1957 European Convention on Extradition. For example, while the latter fully acknowledges the “*political offence exception to extradition*”, in Article 3²¹, the 1996 Convention declares bluntly that “*for the purposes of applying this Convention, no offence may be regarded by the requested Member State as a political offence, as an offence connected with a political offence or an offence inspired by political motives*” (Article 5). Consequently, while the 1957 Convention makes some exceptions to the general rule, legitimising the refusal of extradition for political offences, the drafters

²¹ Article 3 of the European Convention on Extradition provides: “*Extradition shall not be granted if the offence in respect of which it is requested is regarded by the requested Party as a political offence or as an offence connected with a political offence*”.

of the 1996 Convention have somewhat restricted the general provision abolishing the “*political offence exception*”. The same technique has been used in other instances, such as the extradition of nationals (Article 7), the presumption of the consent of the requested state (Article 11) and re-extradition to another Member State (Article 12).

Moreover, the Convention offers a very curious interpretation of the term “*to supplement*” by also including “*derogation*” in it. Both the Preamble Article 1 of the Preamble declare that the purpose of the 1996 Convention is to “*supplement and facilitate the application between the Member States of the European Union*”, of the 1957 European Convention on Extradition, among other instruments. However, on

a number of occasions, the drafters of the 1996 Convention have clearly derogated from the rules embodied in the 1957 Convention,²² although according to literal interpretation “*derogation*” can hardly be reconciled with to “*supplement*”.

3.2. The notion of an extraditable offence

The contemporary practice of extradition has adopted, as the criterion for establishing the extraditable offence, the minimum penalty provided for it under national law. Traditionally, two rules have been recognised in this respect. First, the same threshold applies without variation to both the requesting and the requested states. Second, the typical threshold is a twelve-month imprisonment period, designed to ensure that extradition is not used for minor offences. Under the 1957 Convention, extradition is allowed in respect of offences punishable by deprivation of liberty, by a detention order for a maximum period of a least one year, or by a more severe penalty (Article 2). The same solution was adopted in the Convention applying the Schengen Agreement (Article 61). The drafters of the 1996 Convention have modified both rules, first, by differentiating between the requesting and the requested state, second, by lowering the threshold for the latter from twelve to six months (Article 2).²³ Another option discussed during the drafting of the 1996 Convention, was the removal of the requirement for an imprisonment threshold in the requested state, while the requirement that the offence should carry a custodial penalty in that state was maintained.²⁴

As far as accessory extradition is concerned, the 1996 Convention has adopted a provision similar to that of Article 1 of the Second Additional Protocol to the

²² One example of such a derogation is the lapse of time as a ground for refusal (Article 8), another is re-extradition to the third state (Article 12).

²³ It is noteworthy that the Benelux Convention on Extradition and Mutual Assistance in Criminal Matters of 1962, as one of the “*mother conventions*” to which the 1996 Convention is applicable, provides for a threshold of six months in relation to the law of the requesting state (Article 2).

²⁴ *Report to the Council (Justice and Home Affairs)*, 23 March 1994, Doc. 5366/94 JUSTPEN p.13, at 4.

1957 Convention.²⁵ On the basis of Article 2, paragraph 3, the requested state has the right to grant extradition for offences which do not fulfil the conditions for extradition under paragraph 1 of the said Article but which are punishable by fines.

3.3. Dual criminality

One of the most significant and far-reaching innovations introduced in the 1996 Convention, is derogation, to a considerable extent, from the rule of dual (or double) criminality as a classical standard within the framework of international cooperation in criminal matters,²⁶ including extradition.²⁷ This was accomplished by the introduction of the concept of “*conspiracy and association to commit offences*”, in order to prevent the impunity of the perpetrators of the most serious and dangerous crimes, and thereby the frustration of criminal justice through its inability to call upon the concept of dual criminality. Article 3 of the 1996 Convention is intended to remedy this difficulty by providing that where the offence for which extradition is requested is classified by the law of the requesting state as an association to commit offences or a conspiracy, extradition may not be refused on the sole ground that the law of the requested state does not provide for the same conduct to be an offence.

However, this exception is subject to two conditions. First, the offence must meet the threshold set for the extraditable offence in Article 2 (minimum twelve months of imprisonment or a detention order under the law of the requesting state). Second, derogation from the requirements of dual criminality has been restricted *ratione criminis* to the effect that the criminal association or the conspiracy must have as its objective the commission of:

- (a) one or more of the offences referred to in Articles 1 and 2 of the European Convention on the Suppression of Terrorism;²⁸

²⁵ E.T.S., no. 98.

²⁶ See: M. Plachta, *The Role of Double Criminality in International Cooperation in Penal Matters*, in: *Double Criminality. Studies in International Criminal Law*, ed. N. Jareborg, London 1989, p.84-134.

²⁷ L. Gardocki, *Double Criminality in Extradition Law*, “*Israel Law Review*”, no. 27 1993, p.288.

²⁸ E.T.S., no. 90. In its Article 1, the Conventions lists the following offences: (a) an offence within the scope of the Convention for the Suppression of Unlawful Seizure of Aircraft, signed at The Hague in 1970; (b) an offence within the scope of the Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, signed at Montreal in 1971; (c) a serious offence involving an attack against the life, physical integrity or liberty of internationally protected persons, including diplomatic agents; (d) an offence involving kidnapping, the taking of a hostage or serious unlawful detention; (e) an offence involving the use of a bomb, grenade, rocket, automatic firearm or a letter or parcel bomb if this use endangers persons; (f) an attempt to commit any of the foregoing offences or participation as an act of accomplice of a person who commits or attempts to commit such a offence. Additionally, Article 2 stipulates two more types of offences: (a) serious offence involving an act of violence, other than one covered by Article 1, against the life, physical integrity or liberty of a person; (b) serious offence involving an acts

- (b) any other offence with respect to drug trafficking and other forms of organised crime or other acts of violence against the life, physical integrity or liberty of a person, or creating a collective danger for persons.

Interestingly, Article 3 does not contain a definition of an “*association to commit offences*” nor of “*conspiracy*”, thus leaving the whole problem to the domestic legislation of the requesting state, although these terms are not yet familiar to many Member States.

However, in anticipation of strong resistance to the abolition of the concept of dual criminality, one of the fundamental principles of extradition law, the drafters of the 1996 Convention provided an alternative solution which consists of the combination of a reservation made by a signatory state to the concept proposed in paragraph 1, and an obligation to make a behaviour described in paragraph 4 an extraditable offence. Although no concepts such as criminal association or conspiracy are mentioned in paragraph 4, there is a close and inseparable link between this paragraph and paragraph 1. In describing the obligation of a state under paragraph 4, a set of objective elements has been used. First, the behaviour must through its nature contribute to the commission by a group of persons acting with a common purpose, of one or more specific offences.²⁹ Second, the contribution may be of any nature; specifically, the behaviour need not consist of the participation of the person in question in the actual execution of the offence considered. Third, the contribution must be intentional and made in light of having knowledge either of the purpose and the general criminal activity of the group or of the intention of the group to commit the offence or offences considered.

3.4. Grounds for refusal

Grounds for refusal, also called exceptions, exclusions, exemptions and defences to extradition, represent a particularly important and sensitive issue, for, where liberally drafted, interpreted and applied, they are capable of frustrating the extradition process to the point of bringing it to a halt. Serious concerns have been expressed regarding the grounds for refusal in the context of the 1957 European Convention on Extradition.³⁰ Aware of the numerous disadvantages that the

against property, other than one covered by Article 1, if the act created a collective danger for persons.

²⁹ These offences include: offences stipulated in Articles 1 and 2 of the European Convention on the Suppression of Terrorism (see the preceding note), offences in the field of drug trafficking and other forms of organized crime or other acts of violence against the life, physical integrity or liberty of a person, or creating a collective danger for persons.

³⁰ See e.g., P.Wilkitzki, *Exceptions and Exemptions in the Extradition Law and Practice and the Criminal Policy of the Federal Republic of Germany*, “*Revue internationale de droit pénal*”,

traditional exceptions create for the entire system of the efficient surrender of fugitives, the drafters of the 1996 Convention decided to address the following circumstances: the nationality of the person sought, the nature of the offence (political and fiscal offences), the possibility of amnesty, and the circumstances created by a lapse of time.

Political offences

In view of the similarities manifest in the political concepts existing within the legal codes of the individual European Union Member States, and of the basic trust in the functioning of criminal justice systems in these countries on the one hand, and given the inability to produce a coherent and commonly acceptable definition of a political offence on the other hand, the drafters of the 1996 Convention decided to abandon the whole concept of the “*political offence exception to extradition*” altogether, thereby making one of the most serious inroads into the traditional system of extradition.³¹ Article 5, paragraph 1, envisages the total abolition of this extradition standard by the complete removal of the possibility of invoking the political offence exception. It provides that, for the purposes of applying the 1996 Convention, no offence may be regarded by the requested state as a political offence, as an offence connected with a political offence or an offence inspired by political motives. Although the signatory states may make a reservation, based on Article 5, paragraph 2, regarding the application of the general rule adopted in paragraph 1, they cannot completely derogate from it. By virtue of such a reservation, the signatory state can merely limit the application of paragraph 1 to two categories of offences:

- (a) those specified in Articles 1 and 2 of the European Convention on the Suppression of Terrorism,
- (b) offences of conspiracy or criminal association to commit one or more of the offences referred to in the preceding paragraph (a).

Fiscal offences

Article 5 of the 1957 European Convention and Article 4 of the 1962 Benelux Convention provide that extradition for fiscal offences shall be granted only if the state parties concerned have so decided in respect of any such offence or category of offences. Article 2 of the Second Additional Protocol to the European Convention lifts the restriction set out in Article 5 of that same

no. 62 1991, p.281-290; M.D.Wims, *Re-Examining the Traditional Exceptions to Extradition*, *ibidem*, p.325-334.

³¹ Ch.Van den Wijngaert, *The Political Offence Exception to Extradition: How to Plug the Terrorist's Loophole Without departing from Fundamental Human Rights?*, “*Revue internationale de droit pénal*”, no. 62 1991, p.291-310.

Convention, but the protocol has not been ratified by all Member States for whom extradition arrangements other than the European Convention are in force. Article 63 of the Convention Applying the Schengen Agreement partly lifts the restriction for fiscal offences. Article 6 of the 1996 Convention imposed upon all Member States of the European Union the same legal regime as that envisaged in the Second Additional Protocol to the 1957 Convention, thus prevailing over the relevant provisions of the 1957 Convention, the 1962 Benelux Convention and the Convention Applying the Schengen Agreement.

Extradition of nationals

The surrender of nationals has always been an extremely sensitive issue in extradition law.³² Very few European states deliver up their citizens. Article 6 of the 1957 Convention provides for a discretionary refusal on the grounds of nationality. As with other extradition rules, the drafters of the 1996 Convention decided to reverse the existing system by providing in Article 7 that extradition may not be refused on the ground that the person sought is a national of the requested state, as defined in Article 6 of the 1957 Convention. Obviously, this provision was designed to encourage the signatory states to make efforts towards removing this traditional bar to extradition. However, given that the prohibition of the extradition of nationals is established in constitutional law³³ or in national law which are based on long-standing legal traditions, the change of which appears to be a complex matter, the drafters of the 1996 Convention rightly decided to give the signatory states the right to make a reservation with respect to the general rule. At the same time, the 1996 Convention establishes a special procedure regarding the renewal and expiration of such reservations, made under Article 7, paragraph 2. Finally, the declaration of the Council on the concept of “nationals” should be mentioned.³⁴ The concept of national used in the 1996 Convention will not affect any different definitions operating or prescribed by the 1983 Convention on the Transfer of Sentenced Persons.³⁵

Lapse of time

Under the existing system (Article 10 of the 1957 Convention and Article 9 of the Benelux Convention), lapse of time as a bar to extradition has been

³² M. Płachta, “To Extradite or Not to Extradite” (a National): An Old Dilemma in a New Setting, „Polish Yearbook of International Law”, no. 23 1997.

³³ Such a prohibition appears in the newly adopted Constitution of the Republic of Poland which was passed by the National Assembly on April 2nd, 1997, Article 55. See M. Płachta, *Extradition and Asylum in the New Constitution of 1997* (in Polish), “Studia Naukowe Uniwersytetu Gdańskiego”, nr 3 1998, p.49.

³⁴ O.J. C 313/22 1996, annex.

³⁵ E.T.S., no 112. See: M. Płachta, *Transfer of Prisoners under International Instruments and Domestic Legislation. A Comparative Study*, Gdansk 1993, p.235-239.

referred to the domestic law of either the requesting or the requested state. The drafters of the 1996 Convention restricted the scope of the application of this ground for refusal to the national legislation of the requesting state. However, the law of the requested state may be taken into account when the offence is one for which that state has jurisdiction to prosecute or to enforce a sentence (Article 8).

Amnesty

The solution to the problem of amnesty as a ground for refusal (“*extradition shall not be granted in respect of an offence covered by amnesty in the requested Member State*”, Article 9) is not entirely new, as it has been adopted in Article 4 of the Second Additional Protocol to the 1957 Convention. However, under the 1996 Convention, amnesty impedes extradition only when the requested state has jurisdiction over the offence.

3.5. Rule of speciality

Under traditional extradition law, the extraditatus himself has been the beneficiary of the rule of speciality, although, somewhat paradoxically, he did not have the standing to raise this issue and, more specifically, to renounce it.³⁶ The waiver of speciality was considered to lie within the discretionary powers of the government. The drafters of the 1996 Convention went further than the 1995 Convention in altering the traditional system of extradition. The solutions adopted in the 1996 Convention are aimed at modifying the rule of speciality in three ways; first, by drastically expanding the scope of the situations in which the consent of the requested state is not required for the prosecution and trial of the surrendered offender, and for the enforcement of a sentence on the territory of the requesting state on account of offences committed before his surrender other than those upon which the extradition was granted; second, by enabling the extradite himself, that is, the person whose important interests and rights are involved in the process, to have his say with respect to the rule of speciality;³⁷ third, by introducing a new and peculiar presumption, *presumptio iuris tantum*, which, if commonly adopted by the signatory states, would amount to the total abolition of the rule of speciality.

As for the first modification, Article 10 provides that the requesting state may proceed with prosecution, trial and/or enforcement against the offender delivered, without previously having to ask for and obtain the consent of the requested state in the following situations:

- (a) where the offences are not punishable by deprivation of liberty;
- (b) where the criminal proceedings do not necessitate the application of measures restricting the personal liberty of the offender;
- (c) where the offender would be subject to a measure not involving deprivation of liberty, including a financial penalty, or a measure in lieu thereof, even if it may restrict his personal liberty.

³⁶ T. Vogler, *The Rule of Speciality in Extradition Law*, “*Revue internationale de droit pénal*”, no. 62 1991, p.231-250.

³⁷ The Model Treaty on Extradition which was adopted by the U.N. General Assembly in 1990, in the note annexed to Article 14, paragraph 1(b) also envisaged an active role of the extradite in the context of the rule of speciality. See G.A. Res. 45/116, 14 December 1990, Annex.

Article 10, paragraph 1(b), authorises the requesting state to carry out the criminal proceedings against the person surrendered as long as his liberty is not restricted. The drafters of the Convention, however, stopped short of allowing the requesting state to enforce a penalty or a measure involving deprivation of liberty as an outcome of such a trial, without the consent of the requested state. If such a sanction has been imposed, the requesting state has to obtain the consent of either the requested state, or the offender himself in order to enforce it.

Paragraph 1(c) should be given a strict interpretation. Particularly, this provision does not cover deprivation of liberty ordered as a consequence of the revocation of a conditional sentence (probation or parole). Consequently, this provision applies only to situations where the payment of the sum is not obtained.

The role of the extradition in the context of the rule of speciality has been strengthened through Article 10, paragraph 1(d), which provides that he may be prosecuted, tried, detained with a view to the execution of a sentence or of the carrying out of a detention order, or subjected to any other restriction of his personal liberty, if after his surrender he has “expressly waived the benefit of the rule of speciality” with regard to specific offences preceding his surrender. Moreover, the drafters of the Convention have afforded two important safeguards to the offender who has been delivered to the requesting state. First, unlike the renunciation as regulated in Article 9 of the 1995 Convention, the waiver of the rule of speciality under Article 10, paragraph 1(d) of the 1996 Convention, must refer to “*specific offences*”. Therefore, a general waiver for all offences or facts prior to surrender is not acceptable. Second, the person extradited has to make a relevant statement before the competent judicial authorities of the requesting state; he is entitled to legal representation.

In their attempt to derogate from the traditional rule of speciality, the drafters of the 1996 Convention took one more step in adopting the “*presumption of consent*” of the requested state for the competent authorities of the requesting state to “go ahead” with prosecution, trial, detention and/or enforcement on account of offences not covered by the decision to extradite the person concerned. Article 11 of the Convention represents yet another example of what can be called a mechanism of “inversion”. While traditional extradition practice has been based on the assumption that there is no consent on the part of the requested state, and consequently, such a consent has to be obtained in each case, the direction of this presumption has been reversed. Acting under Article 11 of the 1996 Convention, each signatory state may declare, on the basis of reciprocity, that its consent to prosecution, trial, detention and enforcement of the person surrendered in the territory of the requesting state “*is presumed to have been given*”, unless it indicates otherwise when granting extradition in a particular case.

The mechanism set out in Article 11 is based on two different types of statements that have to be made by the signatory states: first, a general declaration in the “*presumption of consent*”; second, a statement included in the decision to grant extradition whereby the requested state suspends its previous declaration “in a particular case”. It should be noted that Articles 10 and 11 are mutually exclusive to the effect that the former is not applicable as long as the “*presumption of consent*” is in force.

3.6. Re-extradition to another Member State

Under some international codes, re-extradition to a third state is subject to the same procedure as that applicable to the rule of speciality.³⁸ Article 15 of the 1957 Convention provides that the requesting state cannot surrender a person to a third state without the consent of the state which has granted the extradition of the person to it. The drafters of the 1996 Convention decided to depart from this established extradition standard by excluding the application of the said provision from requests for re-extradition from one Member State of the European Community to another (Article 12). As an effect, the requesting state which has received a request for re-extradition from a third state is not required to ask for the consent of the requested state; re-extradition is, therefore, allowed “*at free will*” among the Member States.

Each signatory state can derogate from the mechanism described above through a declaration made under Article 12, paragraph 2. The declaration states that Article 15 of the 1957 Convention will continue to apply. However, this derogation has been limited in two ways and remains inapplicable to two situations: first, where the person surrendered consents to re-extradition; second, where Article 13 of the 1995 Convention provides otherwise, that is, where the person has consented to extradition and, at the same time, the rule of speciality does not apply pursuant to a declaration made by the signatory state under Article 9 of the said convention.

³⁸ See e.g. the *U.N. Model Treaty on Extradition*, Article 14, the preceding note.

4. Extradition under the new Polish legislation

4.1. Constitution of the Republic of Poland

On April 2, 1997, the Polish National Assembly adopted an entirely new Constitution which shows almost no resemblance to the previous Constitution of 1952³⁹. The pertinent pronouncement reads as follows:

“Article 55.

1. *The extradition of a Polish national is prohibited.*
2. *The extradition of a person suspected of having committed an offence out of political reasons and without the use of violence is prohibited.*
3. *A court decides on the admissibility of extradition”.*

These three provisions have no precedent in the long history of Poland. None of the several Polish constitutions had ever addressed the problems of extradition, not to mention the ban on the surrender of Polish nationals. This is not to say that the extradition of Polish nationals was allowed in the past. On the contrary, it wasn't. But the relevant norm was embodied either in the criminal code or in the code of criminal procedure. This tradition began with the laws which were in force on the territory of Poland after the First World War until 1928 (criminal procedure) and 1932 (substantive criminal law). Both the Austrian Criminal Code of 1852 (§36) and the German Criminal Code of 1871 (§9) expressly and categorically prohibited the extradition of nationals. Similarly, the Russian Criminal Code of 1903 (Article 13) allowed only for the surrender of “foreigners”⁴⁰. The Polish Criminal Code of 1932 did not address the problem; its drafters considered extradition a matter linked to the realm of criminal procedure, and not substantive law. The problem was, however, that the Code of Criminal Procedure adopted in 1928 contained no provisions outlining grounds for refusal, and consequently, was also silent on the question of the extraditability of Polish nationals.

Therefore, between 1932 and 1969, there was no legislative enactment in the domestic legal system that would make nationality a bar to extradition. Nonetheless, the non-extradition of Polish nationals was always considered as an axiom by legal writers and commentators. This attitude was reflected in treaty practice: out of many bilateral extradition treaties signed and ratified by Poland between 1932 and 1969 not one departed from the „sacrosanct” rule of the non-extradition of nationals⁴¹. In 1969 when the new codes were adopted, the Polish legislature

³⁹ *Constitution of the Republic of Poland, adopted on April 2, 1997; in force since October 17, 1997; „Dziennik Ustaw” (“Journal of Laws”), no. 78 1997, item 483.*

⁴⁰ Similar provision appeared in the Russian Code of Criminal Procedure of 1864, Article 852, paragraph 1.

⁴¹ M. Plachta, *Development and Main Tendencies of the Bilateral Treaties on Extradition: 1925–1989*, “*Revue internationale de droit pénal*”, no. 62 1991, p.635-668.

appeared to be somewhat “overzealous” on this point: an absolute bar to extradition based on nationality was included in both the Criminal Code (Article 118) and in the Code of Criminal Procedure (Article 534, paragraph 1).

The Constitution of 1997 marks the next step in the development of Polish domestic legislation with respect to extradition. It is for the first time that the non-extradition of nationals has been elevated to the rank of “supreme law” (Article 8, paragraph 1 of the Constitution). All of the seven official drafts of the new Constitution, submitted to the National Assembly by the President⁴², the Senate⁴³, and the major political parties⁴⁴ in 1994, were unanimous on a number of points; the non-extradition of Polish nationals was one of them. This, coupled with the lack of any discussion on the merits of this pronouncement, both in the Constitutional Commission preparing the final draft⁴⁵ and during the debates of the National Assembly, seems to indicate that Article 55, and especially its paragraph 1, are an expression of the *vox populi* and clearly point to the rebirth of nationalism (or patriotism) as its true root. Warnings expressed by experts, as well as calls for the careful consideration of other options, fell on a dead ear.

The Constitutional prohibition is absolute and unconditional to the effect that every extradition request must be denied; there is no room for any discretion that could be exercised by the Minister of Justice who makes the final decision. This prohibition is also “universal” (or “global”) in the sense that it applies not only to “foreign states” (or “governments”) but extends *mutatis mutandis* to any organ, organisation, tribunal, etc. as long as the procedure to surrender a Polish national abroad is called “extradition”. Previous stipulation to this effect which was embodied in the Criminal Code of 1969 (Article 118), and which referred to a “foreign state”, led, through a literal interpretation to conclusion that the prohibition of the extradition of Polish nationals did not extend to surrender to an international organ, organisation, tribunal, or court as long as its power did not emanate from the government of any specific foreign state. In order to leave no doubts as to what the intention of the legislature regarding the scope of paragraph 1 of Article 55 of the 1997 Constitution was, a new provision was added to the new Code of Criminal Procedure of 1997 (Article 615, paragraph 3).

⁴² *Chart of Rights and Freedoms*, published in “*Rzeczpospolita*”, 19.05.1994.

⁴³ Published in “*Rzeczpospolita*”, 22.08.1994.

⁴⁴ The parties were: Solidarność (draft published in “*Rzeczpospolita*”, 08.09.1994), UW (draft published in “*Rzeczpospolita*”, 15.07.1994), SLD (draft published in “*Rzeczpospolita*”, 25.08.1994), PSL (draft published in “*Rzeczpospolita*”, 09.08.1994), and KPN (draft published in “*Rzeczpospolita*”, 22.08.1994).

⁴⁵ Constitutional Commission of the National Assembly, “*Bulletin*”, no. 16 1995.

4.2. The Code of Criminal Procedure⁴⁶

Polish domestic legislation on extradition and other forms of international co-operation in criminal matters

The role of the Code of Criminal Procedure in international co-operation in criminal matters cannot be overestimated. Its importance stems from the fact that Poland has never had a separate law on extradition nor any other legislation concerning international co-operation in penal matters. Therefore, the Code itself is the chief source of legal authority within this sort of framework. Part XIII: Proceedings in Criminal Matters in International Relations, is divided into the following chapters:

- Chapter 61: Diplomatic and Consular Immunities (Articles 578-584),
- Chapter 62: Legal Assistance and Service of Documents in Criminal Matters (Articles 585-589),
- Chapter 63: Transfer of Criminal Proceedings (Articles 590-592),
- Chapter 64: Requests for Extradition and Transit to Foreign Countries (Articles 593-601),
- Chapter 65: Requests Submitted by Foreign Countries for Extradition and Transit (Articles 602-607),
- Chapter 66: Transfer of Sentenced Persons (Articles 608-611),
- Chapter 67: Final Provisions (Articles 612-615).

The following features of the new legislation should be pointed out. First, extradition is possible without a treaty; the surrender of offenders may be requested from other countries, and the requests submitted by foreign states may be granted based on the provisions of Chapter 64 and Chapter 65, respectively. Second, the Code establishes the priority of an international treaty or convention over its own regulation to the effect that the provisions of the Code are not applicable if the treaty resolves the matter otherwise (Article 615, paragraph 1). Third, the provisions of Part XIII of the Code are to be applied *mutatis mutandis* to matters, such as extradition or judicial assistance, arising in the relationships between Poland and international tribunals and their organs as established on the basis of international treaties or conventions ratified by Poland (Article 615, paragraph 3). It follows that at present, no international criminal court or tribunal, including the International Criminal Tribunal for the Former Yugoslavia, can expect to have its request for the extradition of a Polish national granted.

Duty to extradite

⁴⁶ *Code of Criminal Procedure, Act of June 6, 1997*; in force since 1 September 1998; „*Dziennik Ustaw*”, no. 89 1997, item 555.

Usually, the duty to extradite is stipulated in clear and unequivocal language. This practice is commonly adopted by all international instruments which deal with extradition. The typical formula provides that “*the Contracting Parties undertake to surrender to each other (...) all persons against whom the competent authorities of the requesting Party are proceeding for an offence or who are wanted by the said authorities for the carrying out of a sentence or detention order*” (European Convention on Extradition, Article 1). Unlike all the bilateral treaties on extradition signed by Poland and which contain such a duty, the provision addressing this effect is absent from the Code of Criminal Procedure. And rightly so, for countries are neither required nor expected to undertake *sua sponte* to grant extradition requests that may be submitted by any state in the world. The only appropriate place for such a duty to be spelled out is a bilateral treaty or multilateral convention. Although for a few centuries, there has been a controversy as to whether international law actually does impose an obligation to extradite in the absence of an extradition treaty,⁴⁷ most authorities of international public law contend that the duty to extradite is, at best, an “*imperfect obligation*”⁴⁸ present only in the moral sense, without being enforced by positive law. As an “*imperfect obligation*”, the duty to extradite is not legally binding unless incorporated into an extradition treaty. Modern practice follows this view. It is generally agreed that, at least in the case of ordinary crimes, there is no obligation to extradite in the absence of a treaty prescribing such an obligation.⁴⁹

However, an interpretation of the provisions of Chapter 65 of the new Code of Criminal Procedure, brings one to the conclusion that any competent Polish authorities are under a similar obligation. First and foremost, if it were otherwise then the division of the grounds of refusal into distinct categories (see *infra* 3), most notably within the field of optional refusal, would simply be superfluous. Moreover, instead of declaring that extradition is mandatory (“*unless...*” or “*subject to the provisions...*” etc.), the Polish legislature imposed on the competent authorities a duty to act upon and process any request submitted by another state. The language used in Article 602 leaves no doubt that proceedings in the matter of such a request are mandatory. After the request for surrender has been received, the public prosecutor is under an obligation to do the following:

- to examine (interrogate) the requested person,

⁴⁷ I. Shearer, *op.cit.*, p.23-24.

⁴⁸ K. Doehring, *New Problems of the International Legal System of Extradition with Special Reference to Multilateral Treaties*, “*Institute of International Law Yearbook*”, no. 59 1981, p.183; L. Shachor-Landau, *Extra-territorial Penal Jurisdiction and Extradition*, “*International and Comparative Law Quarterly*”, no. 29 1980, p.274-279.

⁴⁹ H. Schultz, *The Classic Law of Extradition and Contemporary Needs*, in *Treatise on International Criminal Law*, ed. M.C. Bassiouni, V.P. Nanda, London 1973, p.310.

- to secure the evidence available on the territory of Poland, if there is a need for this, and
- to submit the case to the Higher Court (*Sąd Wojewódzki*) for an opinion regarding the admissibility of extradition.

Similar language is used in Article 603 to describe proceedings before the court.

By including the grounds for the refusal of extradition in the Code of Criminal Procedure (see *infra* 3), and by modelling them on an international treaty, especially by making a distinction between grounds for mandatory and optional refusal, the Polish legislature has decided to continue the existing tradition traceable to the 1969 Code of Criminal Procedure (Article 534). The solution adopted in the present Code is unique in several respects. First, if interpreted literally, Article 604, paragraph 2 (7), allows for extradition to a country with which Poland neither has a treaty nor with which there is reciprocity. Second, the scope of the grounds for mandatory refusal has been drastically limited, although at the same time, a new exemption has been added which, given its vague formulation, significantly expands the power to deny the extradition request (Article 604, paragraph 1 (5)). In this respect, it should be noted that the wording of this provision resembles the clause which has become a standard within the framework of international mutual assistance in criminal matters. Therefore, its propriety in the context of extradition is more than doubtful⁵⁰. Third, Article 604, paragraph 2 (6), is rather unusual in allowing extradition for political offences without any qualification or restriction⁵¹.

Grounds for refusal

“Article 604.

§1 Extradition is not allowed if:

- 1. the person requested is a Polish national or has been granted the right of asylum in the Republic of Poland;*
- 2. an act described in the request does not constitute an offence under Polish law, or if the law stipulates that an act does not constitute an offence,*

⁵⁰ Only a few domestic extradition laws have incorporated this clause. See e.g. the Austrian Law on Extradition and Mutual Assistance in Criminal Matters, Article 2; the Swiss Law on International Assistance in Criminal Matters, Article 1, paragraph, 2; the Spanish Law on Extradition, Article 6, paragraph 2.

⁵¹ Very often the scope of application of the political offence exception to extradition is limited by excluding certain acts from the notion of the political offence. This tendency can be regarded as a standard in contemporary treaty practice. See e.g. Annex 1 to the Commonwealth Scheme for the Rendition of Fugitive Offenders (as amended in 1990); Convention relating to Extradition between the Member States of the European Union, 27 September 1996, Article 5 (1); European Convention on the Suppression of Terrorism, 27 January 1977, Articles 1 and 2; Agreement for the Surrender of Fugitive Offenders, United States – Hong Kong, 20 December 1996, Article 6, paragraph 2.

or that the perpetrator does not commit an offence, or that the perpetrator shall not be punished for his act(s);

- 3. an offence is not punishable under the statute of limitation;*
- 4. the final decision has been handed down in the criminal proceedings carried out against the same person in respect of the same offence;*
- 5. it would be contrary to Polish law.*

§2 Extradition may be refused, in particular, if:

- 1. the requested person is domiciled in the Republic of Poland;*
- 2. the offence was committed on the territory of the Republic of Poland, or aboard a Polish ship;*
- 3. criminal proceedings in respect to the offence described in the request are pending against the requested person;*
- 4. the offence undergoes private prosecution, that is, where only the victim himself is empowered to lay the charges against the accused before the court and to file the charge document;*
- 5. under the law of the requesting state, an offence in respect of which the extradition is sought, is punishable by a deprivation of liberty for a period not exceeding one year or by a milder punishment, or in the case where such a sentence has already been imposed;*
- 6. the offence in respect of which extradition has been requested is of political, military, or fiscal character;*
- 7. the requesting state does not guarantee reciprocity”.*

It should be noted that while the refusal of extradition based on §1 is mandatory, the refusal under §2 is optional. More importantly, while the catalogue of grounds for mandatory refusal is meant to be exhaustive and, therefore, “closed”, the grounds for optional refusal are listed by way of an example, and their catalogue is „open”. The ground for refusal stipulated in §1, section 5, may give rise to serious concerns, for, if interpreted literally, this provision would enable the Polish Minister of Justice to deny the request for extradition on the grounds of any discernible discrepancy between the extradition case and any legal norm or legislative pronouncement contained within the Polish legal system. It remains to be seen just what line of interpretation will be adopted by the Polish Supreme Court.

There is a considerable discrepancy between Article 55, paragraph 2, of the Constitution and Article 604 §2, paragraph 6, of the Code of Criminal Procedure: while the former contains an absolute and unconditional bar to extradition in all cases, the latter lists grounds for optional refusal. When interpreted in conjunction, these provisions warrant the following conclusions:

1. In the absence of a treaty, and notwithstanding any treaty stipulations, extradition will be refused if the Polish court finds that the offence was committed out of political motives, and that no violence was used in its commission.

2. In the absence of a treaty, or where the treaty does not address the issue, the Polish authorities may grant extradition with respect to an “*offence of a political character*” only after it has been established that either it was not committed for “*political reasons*” or that its perpetrator resorted to violence in the course of its commission.

On July 29, 1997, the Supreme Court handed down an opinion⁵² which sets a precedent within the Polish jurisprudence: the Supreme Court announced that the European Convention on the Protection of Human Rights and Fundamental Freedoms is applicable *ex proprio vigore* to extradition, and that the competent authorities in Poland, as the requested state, are bound to its provisions. Specifically, in ruling on the non-admissibility of extradition pursuant to the request submitted by the government of the Chinese People’s Republic for the surrender of a couple (Mandugeqi) suspected of having committed offences against property (most notably fraud) the Supreme Court pointed to Article 3 of the European Convention. Following the judgement of the European Court of Human Rights handed down in the Soering case,⁵³ the Supreme Court ruled that extradition is not allowed if there is a probability that the suspects will be subjected to inhuman or degrading treatment or punishment upon their surrender to the requested state. In the case at hand, the suspicion was substantiated by the reports of Amnesty International.

4.3. Implementation of the new EU Conventions

The 1995 Convention

Since, unlike some other European countries,⁵⁴ existing domestic law in Poland does not provide for simplified extradition, the implementation of legislation is necessary in order to enable this simplified procedure to be used. Such legislation would provide that if the extradition consents to his surrender, there is no need to examine whether the formal requirements have been complied with. It should be also stipulated *expressis verbis* that the consent needs to be given voluntarily and

⁵² *Judgment of the Supreme Court of July 29, 1997*, II KKN 313/97, OSNKW 1997, no. 9-10, item 85.

⁵³ *Soering v. the United Kingdom, July 7, 1989*, European Court of Human Rights, Ser. A, no. 161.

⁵⁴ See e.g. the Portuguese Law on International Cooperation in Criminal Matters of 1990, Article 39, “*Documnetação e Direito Comparado*”, no. 51/51 1992; the German Law on International Assistance in Criminal Matters (IRG) of 23 December 1982, Section 41, BGBl. I S. 2071 1982; the Austrian Law on Extradition and Mutual Assistance in Criminal Matters (ARHG) of 4 December 1979, Section 32, BGBl. 529/1979; the Swiss Law on International Judicial Assistance in Criminal Matters (IRSG) of 20 March 1981, Article 54, “*Sammlung Eidgenössischer Gesetze*”, no. 846 1982.

that the person sought needs to understand the circumstances and the consequences. Such consequences may imply that the person can no longer rely on the protection granted under the rule of speciality. There should be a requirement for a judicial officer to provide the extradition with necessary explanations before consent can be given, and to provide the person in question with the right to be assisted by a lawyer in consent procedures. Moreover, since it can be anticipated that the persons sought will be foreigners who neither speak nor understand Polish, the use of an interpreter should be mandatory.

The 1996 Convention

There are two major sources of difficulties in implementing the 1996 Convention. The first is the elevation of two fundamental principles of extradition to the level of constitutional norms: the non-extradition of nationals and the political offence exception (discussed *supra* in section IV.A). The second derives from the adherence of the Polish legislature to the most traditional rules of extradition; this attitude is clearly demonstrated throughout the provisions contained in Chapters 64 and 65 of the Code of Criminal Procedure. Therefore, the most innovative solutions proposed in the 1996 Convention are hardly reconcilable with the concepts underlying the Polish domestic legislation on extradition. However, there are some exceptions.

The drafters of the new Criminal Code of 1997 made several attempts to elaborate effective and efficient measures in the fight against organised criminality in Poland. Several proposals have been discussed. One of them was to consider the commission of an offence as part of an organised crime to be an aggravating factor. In such a case, the criminal code would consider the commission of a crime by an organised group as a qualifying feature. A distinction should be made between participation in criminal activities carried out under the auspices of organised criminal groups, and participation in organised criminal activity. The former relates to activities traditionally conducted by organised crime groups. In the latter case, membership in an organised crime group is penalised. The drafters came up with two distinct solutions. The first one is embodied in the „general part” of the Criminal Code: Article 65 provides that the commission of an offence by a person acting in an “*organised group or an association aimed at committing offences*” constitutes an aggravating factor in sentencing. It is noteworthy that the scope of the application of this provision has not been limited *ratione criminis* to the effect that it is applicable to any criminal behaviour which is defined as an offence under Polish legislation. This provision should facilitate the implementation of the 1996 Convention in view of its Article 3: “*Conspiracy and association to commit offences*”. Moreover, a separate and sui generis offence has been created by Article 258 which penalises mere participation in an organised group or an association aimed at committing offences.

Much more serious difficulties are expected to arise with respect to other matters, such as the rule of speciality and the role of the extradite in its context, the “*presumption of consent*” of the requested state and re-extradition to another Member State.

5. Conclusions

The drafters of extradition policies, whether on a national or international level, have always experienced a dilemma between two divergent processes upon which the surrender of a subject can be based: the first being a process based on means, the second, one based on results. While the former focuses more on the way in which the surrender is accomplished, the latter is preoccupied itself with achieving the goal of extradition in the most effective and efficient way. The two new extradition conventions elaborated within the European Union clearly shift the balance towards the second approach. They effectively remove or reduce several traditional restrictions and limitations on the return of a fugitive offender. It remains to be seen to what extent the new and, to a certain degree, “revolutionary” ideas and concepts adopted in these instruments are also taken up in the practices of individual Member States of the European Union.⁵⁵

⁵⁵ As of 31 December 1997, the 1995 Convention was ratified by Denmark, Sweden and Portugal, while the 1996 Convention was ratified by Denmark and Spain.