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Legal and practical considerations regarding indicative extradition issues in light of the anticipated work under the Mechanism for the Review of the Implementation of the United Nations Convention against Transnational Organized Crime and the Protocols thereto

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Background paper prepared by the Secretariat

I. Introduction

1. The present background paper was prepared by the Secretariat to facilitate the discussions under item 3 of the provisional agenda of the fifteenth meeting of the Working Group on International Cooperation. It contains an overview of legal and practical considerations regarding indicative extradition issues in light of the anticipated work under the Mechanism for the Review of the Implementation of the United Nations Convention against Transnational Organized Crime and the Protocols thereto.

2. Such indicative extradition issues include the following:

(a) The handling of multiple extradition requests for the same person;[1]

(b) The sharing of experiences regarding the issue of dual nationality of individuals who are under a request for extradition;[2]

* CTOC/COP/WG.3/2024/1.

[1] Suggested at the fourteenth meeting of the Working Group, in September 2023, as a topic for consideration at future meetings of the Working Group (CTOC/COP/WG.3/2023/4, para. 44).

[2] Suggested at the eighth meeting of the Working Group, in October 2017, as a topic for consideration at future meetings of the Working Group (CTOC/COP/WG.2/2017/4-CTOC/COP/WG.3/2017/4, para. 38).

(c) Detention conditions in the requesting State and their impact on extradition.[3]

II. Handling of multiple extradition requests for the same person

A. Working Group background discussions and United Nations model instruments

3. The Working Group discussed for the first time the issue of concurrent requests for the extradition of the same person at its ninth meeting, held in Vienna from 28 to 31 May 2018, under its agenda item entitled "Discussion of challenges faced in the course of extradition proceedings", and more specifically, the sub-item entitled "Consultations between the requested and the requesting State". During the meeting, many speakers referred to the main challenges encountered in extradition proceedings, including concurrent extradition requests and criteria to be taken into account when deciding which of them to prioritize.[4] Many speakers underlined the importance of informal consultations in extradition proceedings as a means of exchanging information on legal requirements and standards. This was considered particularly pertinent for competing requests and in cases where difficulties were encountered in fulfilling the dual criminality requirement.[5]

4. In the relevant background paper prepared by the Secretariat for the same meeting of the Working Group, it had been highlighted – with reference to article 16 of the Model Treaty on Extradition[6] and its Revised Manual – that the requested State determines, at its discretion, to which of the requesting States the person is to be extradited, taking into account certain criteria, including the following: (a) whether the requests have been made pursuant to a treaty; (b) the interests of the requesting States; (c) whether the requests relate to different offences; (d) the relative seriousness of the offences; (e) the time and place of commission of each offence; (f) the dates of the requests; (g) the nationality of the person and of the victims; and (h) the chronological order in which the requests were received. Each criterion serves as a reminder of interests that may be present in a particular case and needs to be considered by the requested State, often in consultation with the requesting State. Reliance on such consultations may also be useful for the purpose of explaining the reasons for the final decision of the requested State.[7]

5. Further, the Model Law on Extradition (2004) includes a specific provision on concurrent requests (sect. 18), which refers to many of the aforementioned criteria but also includes the following ones: the ordinary place of residence of the person sought and the victims; the possibility of re-extradition of the person sought; whether extradition is requested for the purposes of prosecution or of imposition or enforcement of a sentence; and whether, in the judgment of the competent executive authority of the requested State, the interests of justice are best met through a decision to grant a specific extradition request. The reference in section 18 of the Model Law to the circumstances that may be taken into account when considering concurrent requests is contained within brackets because it is up to the competent national authorities to decide whether a relevant legislative provision is necessary or whether the circumstances can be treated as policy guidelines in extradition practice.

[3] This issue has attracted the attention of practitioners in a growing number of extradition cases and has also gained importance in recent jurisprudence of regional judicial bodies.

[4] CTOC/COP/WG.2/2018/3-CTOC/COP/WG.3/2018/3, para. 16.

[5] Ibid., para. 18.

[6] Available at www.unodc.org/.

[7] CTOC/COP/WG.3/2018/2, para. 20.

B. Regional approaches

1. Organization of American States

6. The Inter-American Convention on Extradition of 1981 stipulates, in its article 15 (Requests by more than one State) that, when the extradition is requested by more than one State for the same offence, the requested State shall give preference to the request of the State in which the offence was committed. If the requests are for different offences, preference shall be given to the State seeking the individual for the offence punishable by the most severe penalty, in accordance with the laws of the requested State. If the requests involve different offences that the requested State considers to be of equal gravity, preference shall be determined by the order in which the requests are received.

2. London Scheme for Extradition within the Commonwealth

7. According to section 19 (1) (Priority where two or more requests made) of the London Scheme for Extradition within the Commonwealth,[8] where the requested country receives two or more requests from different countries for the extradition of the same person, the competent executive authority will determine which request will proceed and may refuse the other requests. Further, section 19 (2) specifies that, in making a determination under paragraph 1, the authority will consider all the circumstances of the case and, in particular, (a) the relative seriousness of the offences, (b) the relative dates on which the requests were made and (c) the citizenship or other national status and ordinary residence of the person sought.

3. Southern African Development Community

8. According to article 11 (Concurrent requests) of the Southern African Development Community Protocol on Extradition of 2002, where requests are received from two or more States for the extradition of the same person either for the same offence or for different offences, the requested State shall determine to which of those States the person is to be extradited and shall notify those States of its decision.

9. In determining to which State a person is to be extradited, the requested State shall have regard to all the relevant circumstances, and, in particular, to (a) if the requests relate to different offences, the relative seriousness of those offences, (b) the time and place of commission of each offence, (c) the respective dates of the requests, (d) the nationality of the person to be extradited, (e) the ordinary place of residence of the person to be extradited, (f) whether the requests were made pursuant to the Protocol, (g) the interests of the respective States and (h) the nationality of the victim.

4. League of Arab States

10. In its article 46 (Multiplicity of extradition requests), the Riyadh Arab Agreement for Judicial Cooperation of 1983 provides that, if extradition is requested by several contracting parties for the same crime, priority of extradition shall be accorded to the contracting party whose interests were damaged by the crime, followed by the contracting party in whose territory the crime was committed, followed by the contracting party of which the person whose extradition is requested was a national at the time of committing the crime.

11. Further, the same article clarifies that, if circumstances converge, preference shall be accorded to the first contracting party to submit the extradition request, but if extradition requests pertain to several crimes, weighing them one against the other shall be based on the circumstances of the crime, its seriousness, and the place in which it occurred.

[8] See Commonwealth Secretariat, *Commonwealth Schemes for International Cooperation in Criminal Matters* (2017).

12. Moreover, article 46 shall not prejudice the right of the requested party to freely decide on the requests submitted to it from various contracting parties taking into consideration all relevant circumstances.

5. Council of Europe

13. The European Convention on Extradition of 1957 includes in its article 17 a clause on conflicting requests that in essence leaves the decision on priorities to the discretion of the requested State; the clause provides that, if extradition is requested concurrently by more than one State, either for the same offence or for different offences, the requested party shall make its decision having regard to all the circumstances and especially the relative seriousness and place of commission of the offences, the respective dates of the requests, the nationality of the person claimed and the possibility of subsequent extradition to another State.

6. European Union

(a) Normative framework and guidelines

14. Article 16 of the Council of the European Union framework decision on the European arrest warrant and the surrender procedures between member States [9] regulates the decision-making process for the competent authority of the executing member State that receives multiple requests for surrender or extradition of the same person. It covers both the situation of multiple European arrest warrants (art. 16, para. 1)[10] and the situation of conflicts between a European arrest warrant and a request for extradition presented by a third country (art. 16, para. 3).[11]

15. To support the decision-making process in the event of multiple European arrest warrants, the European Union Agency for Criminal Justice Cooperation (Eurojust) published guidelines for deciding on competing European arrest warrants in its 2004 annual report.[12] Since their publication, the guidelines have assisted competent national executing authorities in taking informed decisions on competing requests for surrender or extradition. The guidelines include the criteria mentioned in article 16 of the framework decision on the European arrest warrant, but complement and further elaborate and analyse the criteria in light of different scenarios.

16. In 2019, Eurojust published a revised version of the guidelines.[13] The revised guidelines enlarge the scope of the original guidelines by including scenarios not only for article 16, paragraph 1, but also for article 16, paragraph 3, of the framework decision. Moreover, the revised guidelines further elaborate and analyse the criteria to be considered in the decision-making process. They also address coordination and follow-up measures that could be relevant before and after the decision of the executing authority as to which request is to be prioritized for execution. In this regard, the revised guidelines constitute a flexible tool to provide guidance and facilitate an informed decision. They do not constitute binding rules and are without prejudice to applicable national, European Union and international law.

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[9] *Official Journal of the European Communities*, L. 190, 18 July 2002.

[10] "If two or more Member States have issued European arrest warrants for the same person, the decision on which of the European arrest warrants shall be executed shall be taken by the executing judicial authority with due consideration of all the circumstances and especially the relative seriousness and place of the offences, the respective dates of the European arrest warrants and whether the warrant has been issued for the purposes of prosecution or for execution of a custodial sentence or detention order."

[11] "In the event of a conflict between a European arrest warrant and a request for extradition presented by a third country, the decision on whether the European arrest warrant or the extradition request takes precedence shall be taken by the competent authority of the executing Member State with due consideration of all the circumstances, in particular those referred to in paragraph 1 and those mentioned in the applicable convention."

[12] See Eurojust, *Annual Report 2004* (2005), annex II.

[13] Eurojust, *Guidelines for Deciding on Competing Requests for Surrender and Extradition: Revised 2019* (The Hague, 2019).

17. The revised Eurojust guidelines identify five main scenarios, as follows: (a) two or more European arrest warrants against the same person for prosecution of the same offence or offences; (b) two or more European arrest warrants against the same person for prosecution of different offences; (c) two or more European arrest warrants against the same person, of which one or more are for prosecution and one or more are for the execution of a custodial sentence or a detention order in relation to different offences; (d) two or more European arrest warrants against the same person for the execution of two or more custodial sentences or detention orders in relation to different offences; and (e) one or more European arrest warrants and one or more requests for extradition.

(b) Case law

18. Contrary to the first four of the preceding scenarios, the fifth scenario addresses situations where one or more European arrest warrants compete with one or more requests for extradition. In this scenario, the revised Eurojust guidelines recommend that the executing authority should give, in principle, due consideration to all relevant factors rather than automatically prioritizing a request from a European Union member State. However, in some specific cases, the nationality or European Union citizenship of the requested person can be a predominant factor, as highlighted in the jurisprudence of the Court of Justice of the European Union, which was developed in the *Petruhhin* judgment and subsequent cases.

19. In 2016, the Court of Justice of the European Union introduced in the *Petruhhin* judgment[14] specific obligations for European Union member States that do not extradite their own nationals when they receive an extradition request from a third State for the prosecution of a European Union citizen who is a national of another European Union member State and who has exercised his or her right to free movement under article 21, paragraph 1, of the Treaty on the Functioning of the European Union.[15]

20. The *Petruhhin* case[16] was the first case in which the Court of Justice held that a European Union member State faced with an extradition request from a third State concerning a national of another European Union member State is obliged to initiate a consultation procedure with the member State of nationality of the European Union citizen (the *Petruhhin* mechanism), thus giving the latter the opportunity to prosecute its citizens by means of a European arrest warrant. The rationale for the specific obligations imposed on member States that do not extradite their own nationals is to ensure non-discriminatory treatment between their own nationals (that are not extradited) and other European Union citizens.

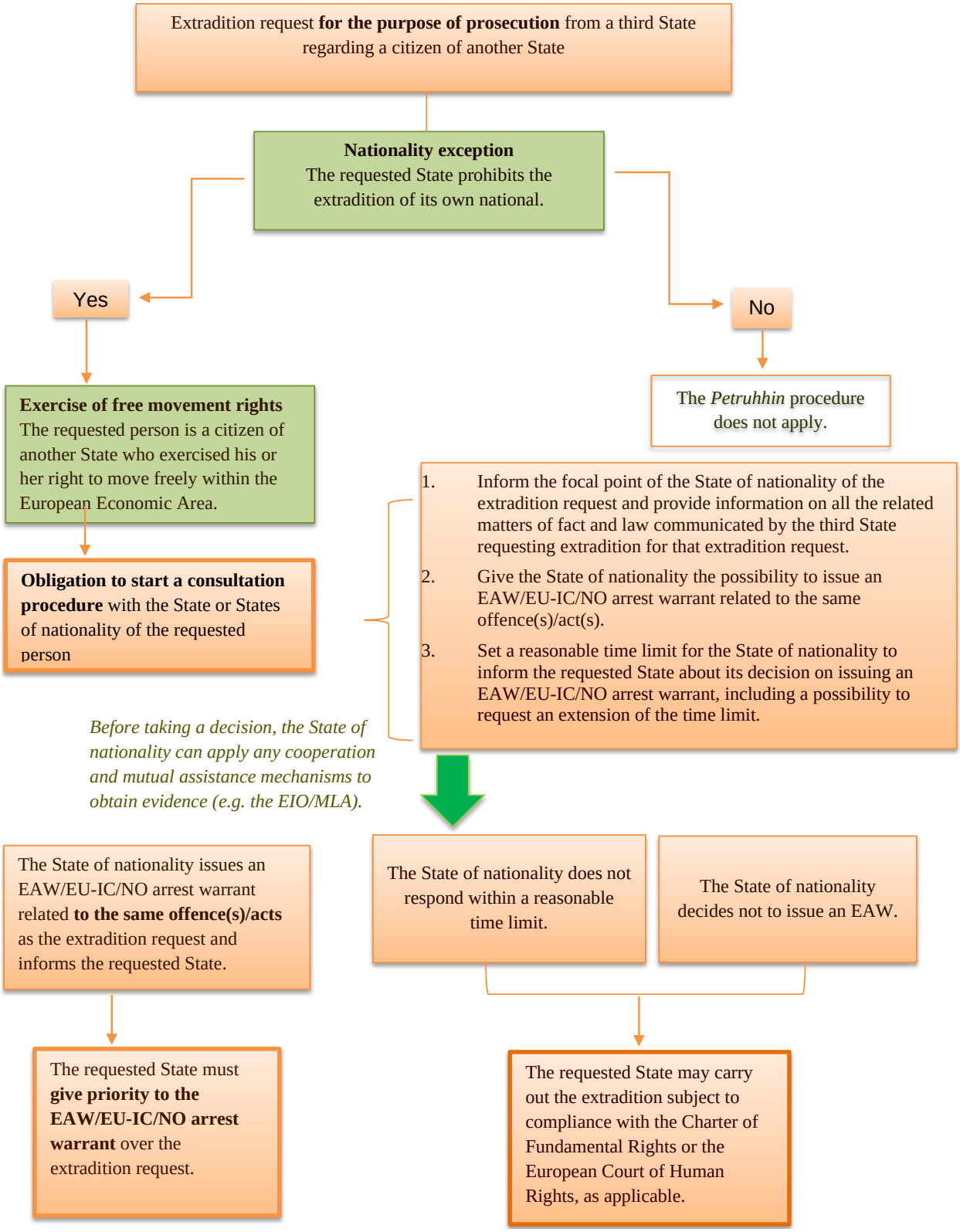
21. Thus, if an executing authority is in the possession of two competing requests and one of them constitutes a European arrest warrant issued on the basis of the above-mentioned cooperation mechanism, the executing authority should give priority to that European arrest warrant over the extradition request. Similarly, if the extradition request concerns a citizen of a European Union member State, the executing authority, prior to taking any decision, must first verify whether the above-mentioned cooperation mechanism would need to apply. In the affirmative, the executing authority should suspend its decision on which request to grant until it has finalized the procedure related to the cooperation mechanism.

[14] Court of Justice of the European Union, *Aleksei Petruhhin*, Case No. C-182/15, Judgment, 6 September 2016.

[15] Article 21, paragraph 1, of the Treaty on the Functioning of the European Union provides that "every citizen of the Union shall have the right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in the Treaties and by the measures adopted to give them effect".

[16] Also briefly mentioned in document CTOC/COP/WG.3/2018/2, para. 21.

Illustration of steps to be taken concerning extradition requests for prosecution purposes: main steps of the *Petruhhin* mechanism



Source: European Commission Notice: Guidelines on Extradition to Third States (*Official Journal of the European Union*, C 223/01, 8 June 2022, annex 1).
Note: "EU-IC/NO arrest warrant" refers to an arrest warrant issued under the Agreement between the European Union and the Republic of Iceland (IC) and the Kingdom of Norway (NO) on the surrender procedure between the member States of the European Union and Iceland and Norway. Other abbreviations: EAW, European arrest warrant; EIO, European Investigation Order; MLA, mutual legal assistance.

22. The Court of Justice of the European Union confirmed and refined the *Petruhhin* judgment in subsequent decisions. In its ruling in the *Pisciotti* case,[17] the Court of Justice applied the reasoning from the *Petruhhin* judgment to a situation in which there was an extradition agreement in force between the European Union and the third State requesting extradition. The Court of Justice held that a member State is not required to extend a prohibition to extradite its own nationals to every European Union citizen travelling in its territory. However, before extraditing a European Union citizen, a requested member State must put the citizen's member State of nationality in a position to seek the surrender of that citizen pursuant to a European arrest warrant.

23. In the case *Schotthöfer and Steiner v. Adelsmayr*,[18] the Court of Justice repeated the reasoning from the *Petruhhin* judgment that the Charter of Fundamental Rights of the European Union applies where a European Union citizen has made use of her or his right to move freely from the member State of which she or he is a national to another member State. Moreover, the Court of Justice held that an extradition request must be rejected by the requested member State where that citizen runs a serious risk of being subjected to the death penalty in the event of extradition.

24. In its *Ruska Federacija* judgment,[19] the Court of Justice clarified that the *Petruhhin* mechanism applies mutatis mutandis to extradition requests concerning nationals of States of the European Free Trade Association with which the European Union has concluded a surrender agreement, namely, the Agreement between the European Union and the Republic of Iceland and the Kingdom of Norway on the surrender procedure between the member States of the European Union and Iceland and Norway.

25. The application of the above-mentioned case law has proved difficult in practice, and in June 2020 the Council of the European Union invited Eurojust and the European Judicial Network to analyse the reasons. As a response, Eurojust and the Network published a joint report in November 2020.[20] The main challenges identified in the report included the following: (a) uncertainty about which authority to approach in the member State of nationality, which member State should deal with and bear the costs of translation, and/or which judicial cooperation instrument is best applied to ensure prosecution in the member State of nationality; (b) different practices related to the extent of information provided, the deadlines given for replies and decisions, and the types of assessments carried out in the framework of the *Petruhhin* mechanism; (c) tensions between obligations under European Union law on the one hand, and bilateral and multilateral extradition treaties on the other; and (d) several parallel channels used to inform and transmit information, often leading to duplication of effort, uncertainty and confusion.

26. Subsequently, in December 2020, the Council of the European Union adopted conclusions on the European arrest warrant and extradition procedures: current challenges and the way forward.[21] The conclusions reiterated that "following the judgments of the Court of Justice of the European Union in the *Petruhhin* case and several subsequent rulings, […] Member States are faced with two obligations: on the one hand, the duty to fulfil existing obligations under international law and to combat the risk that the offence concerned will go unpunished and, on the other hand, Member States that do not extradite their nationals are obliged, in accordance with the principles of freedom of movement and non-discrimination on grounds of nationality, to protect citizens from other Member States as effectively as possible from measures that may deprive them of the rights of free movement and residence within the

[17] Court of Justice of the European Union, *Romano Pisciotti*, Case No. C-191/16, Judgment, 10 April 2018.

[18] Court of Justice of the European Union, *Peter Schotthöfer & Florian Steiner vs. Eugen Adelsmayr*, Case No. C-473/15, Order of the Court of Justice, 6 September 2017.

[19] Court of Justice of the European Union, *Ruska Federacija*, Case No. C-897/19, Judgment, 2 April 2020.

[20] Eurojust and European Judicial Network, *Joint Report of Eurojust and the European Judicial Network on the Extradition of EU Citizens to Third Countries* (November 2020).

[21] *Official Journal of the European Union*, C 419/09, 4 December 2020, p. 28.

European Union. In that regard, the Court of Justice of the European Union has clarified that the requested Member State must ascertain whether there is an alternative measure which would be less prejudicial to the exercise of the rights of free movement and which would be equally effective in achieving the objective of preventing impunity. This includes informing the Member State of which the person concerned is a national and, should that Member State so request, surrendering the requested person to that Member State in application of the European arrest warrant Framework Decision, provided that said Member State has jurisdiction to prosecute that person for offences committed outside national territory".[22]

27. On 17 December 2020, the Court of Justice of the European Union rendered a decision in the extradition case C-398/19,[23] in which it maintained the "Petruhhin doctrine". The Court of Justice, sitting in Grand Chamber, did not heed the opinions criticizing the case law which was based on that doctrine, as well as the different opinion of Advocate General Hogan in the case at issue,[24] who detailed the legal and practical challenges involving the consultation procedure and the preference for criminal prosecution by the member State of nationality, although the crimes concerned had been committed on the territory of the third country requesting the extradition of the perpetrator.[25]

28. The Court of Justice of the European Union stressed, however, that "where, as in the main proceedings, the requested Member State has been sent, by a third State, a request for the extradition of a Union citizen who is a national of another Member State, for the purposes of a criminal prosecution, the question of European Union law that arises is solely whether the requested Member State is able to adopt a course of action, with respect to that Union citizen, which would be less prejudicial to the exercise of that citizen's right to free movement and residence by considering that he or she should be surrendered to the Member State of which he or she is a national rather than extradited to the third State requesting extradition".[26]

29. The case at issue showed again that the *Petruhhin* judgment of the Court of Justice constitutes a paradigm shift in international extradition law. Further discussion may ensue, however, as to whether or not the judgment unduly restricts cooperation between European Union countries and third countries.

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[22] Ibid., para. 43.

[23] Judgment of the Court of Justice of 17 December 2020.

[24] Delivered on 24 September 2020.

[25] The Advocate General questioned whether *Petruhhin* was correctly decided. He pointed out that there is a decisive difference between the position of the nationals of the requested State and that of non-nationals who hold the nationality of another European Union member State. As regards its own nationals, the requested member State applies the principle of *aut dedere aut judicare* without restrictions, that is, it can exercise extraterritorial jurisdiction over criminal acts of its citizens on the basis of the "active personality principle". The situation is normally different in the case of alleged offences committed abroad by non-nationals. While the extent of a State's extraterritorial jurisdiction in such latter cases may be open to debate, what is not in dispute is that international law and practice places certain limitations on the capacity of a State to legislate with extraterritorial effect in respect of offences committed by non-nationals outside of its own territory which are different than those applicable in the case of its own nationals. The reason for this is that, under the principles of international law, there must be at least a genuine link between the exercise of the extraterritorial jurisdiction in respect of non-nationals and the State exercising it. All of this is sufficient to demonstrate that there is in fact a material difference between the position of the citizen of a State which does not extradite its own nationals on the one hand and non-citizens on the other, so far as the extraterritorial application of the criminal law of that State is concerned. In fact, there is a risk of impunity in the case of the latter which does not arise in the case of the former. As a consequence, the Advocate General saw a non-violation of the principle of non-discrimination set forth in article 18 of the Treaty on the Functioning of the European Union, depending on the nationality of the requested person.

[26] Judgment of the Court of Justice, Case No. C-398/19, para. 66. See, by analogy, *Pisciotti*, C-191/16, Judgment, 10 April 2018, para. 50.

C. Practical considerations

30. The aforementioned Eurojust revised guidelines contain an analysis of the various factors that must be given due consideration in the different scenarios contained therein before the executing authority takes a decision as to which of the requests it will execute. These factors, however, could also be considered mutatis mutandis in cases where typical extradition requests, and no European arrest warrants, are involved.

31. Thus, for example, a scenario involving two or more extradition requests for the same person for prosecution of the same offence or offences refers to a conflict of jurisdiction, and a decision as to which of the competing extradition requests to grant is essentially a matter of deciding which jurisdiction should prosecute.

32. Moreover, in a scenario in which two or more States request the extradition of the same person for the prosecution of different offences, the key questions concern the sequence of prosecutions: which jurisdiction should prosecute first, and which jurisdiction will suffer the greatest loss if the prosecution must await the outcome of a prosecution in another jurisdiction? In this context, the following indicative elements could be considered: the impact on the criminal proceedings in the respective member States (e.g. the dates when the offences were committed and the national rules on prescription; the advanced stage of the proceedings in one of the requesting States; the prosecution of co-accused persons and/or different members of an organized criminal group; the interests of victims; or the possibility of confiscation proceedings); and the possibility of re-extradition of the person sought. Further, in the context of such a scenario, it is important that the competent authorities involved also consider the possibility of a transfer of criminal proceedings.[27] Other factors to be considered include the relative seriousness of the offence or offences from different perspectives, including the relative seriousness of the individual offences, the number of offences committed, the impact of the criminal acts on the victims, the number of victims and, if applicable, any particular condition of the victims (e.g. the vulnerability of certain victims).

33. In a scenario involving two or more extradition requests for the same person, of which one or more are for prosecution and one or more are for the enforcement of a sentence, the main factors to be considered include whether there is a risk of prescription due to statutes of limitation applicable to the enforcement of a sentence or to prosecution, the possibility of re-extradition of the person sought, the possibility for the arrangement of a transfer of prisoners, where applicable, and a significant difference in the relative seriousness of the offences concerned.

34. In a scenario involving two or more extradition requests for the same person for the enforcement of different sentences in relation to different offences, the key question concerns the sequence for serving different sentences in different requesting States. Consequently, it will be, to a large extent, the responsibility of the prison authorities in the requesting States concerned to cooperate closely on the planning and practical arrangements for the serving of the sentences, also taking into account the personal circumstances of the person sentenced. The main elements to be considered in this regard are the following: the risk of prescription of sentences due to statutes of limitation; the possibility of social rehabilitation of the sentenced person (if the person sought is a national of one of the competing Member States or has his or her habitual residence there, or has close ties with it, this could be a relevant factor to take into consideration in prioritizing a relevant request); the possibility of re-extradition of the person sought; the possibility for the arrangement of a transfer of prisoners, where applicable; the dates of the offences, to ensure that the requested person will serve the oldest sentence first; and the relative seriousness of the offences, to ensure that the requested person will serve the sentence for the more serious offence before the sentence for the less serious one.

[27] See CTOC/COP/WG.3/2017/2.

35. In all scenarios, the competent authority of the requested State should also assess whether there is an applicable bilateral or multilateral agreement containing any additional relevant factors that it would need to consider when deciding which request to grant.

36. Before the competent authority takes an informed decision as to which of the concurrent extradition requests to grant, it would be advisable to coordinate with the authorities that have issued the different extradition requests. Such coordination could be pursued through consultations in which the authorities involved provide all the relevant additional information needed to take an informed decision on which of the competing requests will be prioritized for execution. The authorities could also discuss, depending on the circumstances of the case, the application of additional legal provisions or other legal instruments that might become relevant at some stage. Depending on the concrete facts of the case, this scenario could involve, for instance, a subsequent extradition, a transfer of criminal proceedings or a transfer of prisoners. In some cases, a temporary extradition could be relevant, for instance, if one of the requesting authorities requires the requested person's temporary presence in its territory to attend trial (see also art. 16, para. 11, of the United Nations Convention against Transnational Organized Crime, on the temporary surrender of a national of the requested State party).

III. Dual nationality of individuals who are under a request for extradition

37. The doctrine of non-extradition of nationals is found in the legislation or constitutions of many States, particularly those with a civil law tradition. Depending on the country, the refusal of extradition may be mandatory or discretionary. It may also be the case that relevant constitutional provisions include a clause providing that extradition of a national should be allowed only on the basis of an international treaty.

38. A number of multilateral agreements that provide for exceptions from extradition on the basis of nationality,[28] or refer to the conditions provided for by the domestic laws of the parties or by applicable extradition treaties regarding the grounds for refusal of an extradition request, including the nationality of the person sought,[29] also include the *aut dedere aut judicare* principle in order to prevent impunity concerning the requested States parties' own nationals.

39. On the other hand, dual nationality has emerged as a particularly large-scale phenomenon in recent years. Practices facilitating the acquisition of dual nationality also include the development and regulation of new means to acquire nationality reflecting modern economic needs, such as the urgent need to attract investors (*jus doni*, also known as nationality by investment).

40. In the context of extradition or surrender procedures, dual nationality of the person sought may have an impact at two levels: first, what happens if the person sought is a national not only of the requested State, but a dual national permanently residing in the requesting State, perhaps also possessing the nationality of the requesting State? Here, the test of nationality applied by the International Court of Justice in the *Nottebohm* case,[30] namely, the principle of effective nationality (the *Nottebohm* principle), may be of relevance: the national must prove a meaningful connection to the State in question.

41. Second, there seems to be a growing tendency in international law to accept claims of criminal jurisdiction based on nationality (the active personality principle), even in cases of dual nationality where the relevant nationality is not the effective

[28] For example, the European Convention on Extradition (art. 6, paras. 1 and 2).

[29] See the United Nations Convention against Transnational Organized Crime (art. 16, paras. 7 and 10); and the United Nations Convention against Corruption (art. 44, paras. 8 and 11).

[30] *Nottebohm case (second phase), Judgment, I.C.J. Report*s, p. 4.

one.[31] In this scenario, competing requests of the various countries of nationality may raise the same type of questions and considerations examined under section II of the present background paper.

42. If two States of nationality request extradition, priority is usually given to the State of effective nationality, since the personal links (family bonds, friends and social environment) speak in favour of the State where the accused has maintained his or her permanent residence. As the incidence of dual nationality increases, the creation of a certain priority of nationalities in cases of dual nationality, with the effective one as the primary focus and the other one as a sort of dormant nationality, would enable States to achieve better cooperation.[32] An effective system for the transfer of criminal proceedings may also offer an adequate solution to conflicts of jurisdiction.

43. A good practice of cooperation in identifying the best jurisdiction in which to prosecute an international contract killer with dual nationality, who was wanted in two European Union member States and one non-member State, and consequently in deciding on his surrender or extradition to that jurisdiction, was reported by Eurojust in 2019. Eurojust arranged a close dialogue between the countries involved, including the member State in which the person had been arrested and which had to decide which surrender or extradition request to prioritize. Eurojust also advised on a possible transfer of criminal proceedings to avoid potential conflicts of jurisdiction, and offered round-the-clock translation and transmission of European arrest warrants and European Investigation Orders. In 2021, the contract killer was sentenced to life imprisonment in the member State in which he was surrendered.[33]

44. Moreover, within the context of the European Union, it should be noted that, in its aforementioned judgment in the extradition case C-398/19 (see above, paras. 27–29), the Court of Justice of the European Union held that having dual nationality of a member State and a third State cannot deprive the person concerned of the freedoms he or she derives from European Union law as a national of a member State.[34]

IV. Detention conditions in the requesting State and their impact on extradition

A. Detention conditions in the requesting State as a risk of inhuman or degrading treatment or punishment: case law of the European Court of Human Rights

45. The requested State's non-refoulement obligations under international human rights law establish a mandatory ban on extradition if the surrender of the person sought would result in exposing him or her to a risk of torture or other serious human rights violations. Article 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 1984 expressly provides that no State party shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that she or he would be in danger of being subjected to torture. The prohibition of refoulement to a risk of torture is also part of customary international law and has attained the rank of a peremptory norm of international law, or jus cogens.

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[31] See Stefan Oeter, "Effect of nationality and dual nationality on judicial cooperation, including treaty regimes such as extradition", in *Rights and Duties of Dual Nationals: Evolution and Prospects*, David A. Martin and Kay Hailbronner, eds. (The Hague; New York, Kluwer Law International, 2003).

[32] Ibid., p. 77.

[33] Eurojust, *Report on Eurojust's Casework in the Field of the European Arrest Warrant* (The Hague, 2021), p. 46.

[34] Judgment of the Court of Justice of 17 December 2020, para. 77. See also *Denis Raugevicius*, Case No. C-247/17, Judgment, 13 November 2018, para. 29; and *Mario Vicente Micheletti and others*, Case No. C-369/90, Judgment, 7 July 1992, para. 15.

46. The European Court of Human Rights has held in consistent jurisprudence that a non-refoulement obligation is inherent in the obligation not to subject any person to torture or to inhuman or degrading treatment or punishment, as set forth in article 3 of the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights), and that this obligation is to be engaged whenever there is a real risk of exposure to such treatment as a result of forcible removal, including extradition.[35] Similar jurisprudence has been developed in the framework of the United Nations Human Rights Committee.[36]

47. Extradition practitioners routinely consider whether the conditions of detention in requesting States present a risk of violating article 3 and the absolute prohibition the European Convention on Human Rights imposes on treatment contrary to its article 3. As far it relates to prison conditions, the prohibition contained in article 3 "enshrines one of the most fundamental values of democratic society".[37]

48. The conditions of detention that requested persons face if extradited are broadly understood to encompass many aspects of the treatment of detainees, ranging from contact with prison staff to contact with the outside world. The relevant assessment of such conditions is primarily focused on concerns related to overcrowding, the provision of health care and hygiene facilities, the adequacy of facilities in and the ventilation of prison cells, and opportunities for exercise and personal development. Recently, during the coronavirus disease (COVID-19) pandemic, there were also concerns arising from isolation and other challenges, such as the risk of infection, due to the pandemic.[38]

49. Ill-treatment must attain a minimum level of severity if it is to fall within the scope of article 3. The assessment of this minimum is relative; it depends on all the circumstances of the case, such as the duration of the treatment, its physical and mental effects and, in some cases, the sex, age and state of health of the victim.[39]

50. Under article 3, the State must ensure that a person is detained in conditions which are compatible with respect for her or his human dignity, that the manner and method of the execution of the measure do not subject her or him to distress or hardship of an intensity exceeding the unavoidable level of suffering inherent in detention and that, given the practical demands of imprisonment, her or his health and well-being are adequately secured.[40]

51. When assessing conditions of detention, account must be taken of the cumulative effects of these conditions, as well as of specific allegations made by the applicant in that regard. The length of the period during which a person is detained in the particular conditions must also be considered.[41]

52. The competent authority of the requested State should, initially, rely on information on the detention conditions prevailing in the requesting State that is

[35] European Court of Human Rights, *Soering v. the United Kingdom*, Application No. 14038/88, Judgment, 7 July 1989; *Cruz Varas and others v. Sweden*, Application No. 15567/89, Judgment, 20 March 1991; *Vilvarajah and others v. the United Kingdom*, Application No. 13163/87 and others, Judgment, 30 October 1991; *Chahal v. the United Kingdom*, Application No. 22414/93, Judgment, 15 November 1996; and *Ahmed v. Austria*, Application No. 25964/94, Judgment, 17 December 1996.

[36] See Human Rights Committee, communication No. 470/1991, *Kindler v. Canada*, Decision of 30 July 1993; *Charles Chitat Ng. v. Canada*, communication No. 469/1991, Decision of 5 November 1993; and *Cox v. Canada*, communication No. 539/1993, Decision of 31 October 1994.

[37] European Court of Human Rights, *Mursic v. Croatia*, Application No. 7334/13, Judgment, 20 October 2016, para. 96.

[38] See, in the extradition context, *Hafeez v. the United Kingdom*, Application No. 14198/20, Decision of 28 March 2023, para. 68. See also, mutatis mutandis, *Fenech v. Malta*, Application No. 19090/20, Judgment, 1 March 2022, paras.125–143.

[39] European Court of Human Rights, *Mursic v. Croatia*, Application No. 7334/13, para. 97.

[40] European Court of Human Rights, *Kudla v. Poland*, Application No. 30210/96, Judgment, 26 October 2000, paras. 93 and 94; and *Mursic v. Croatia*, para. 99.

[41] *Mursic v. Croatia*, para. 101.

objective, reliable, specific and up to date and that demonstrates that there are deficiencies, which may be systemic or generalized, or which may affect certain groups of people or certain places of detention. This information may be obtained from, inter alia, judgments of international courts, such as the European Court of Human Rights, as well as decisions, reports and other documents produced by bodies of the Council of Europe or under the aegis of the United Nations.

53. In that regard, it follows from the case law of the European Court of Human Rights that article 3 of the European Convention on Human Rights imposes, on the authorities of the State in whose territory an individual is detained, a positive obligation to ensure that any prisoner is detained in conditions which guarantee respect for human dignity, that the way in which the detention is enforced does not cause the individual concerned distress or hardship of an intensity exceeding the unavoidable level of suffering that is inherent in detention and that, having regard to the practical requirements of imprisonment, the health and well-being of the prisoner are adequately protected.[42]

B. Case law of the Court of Justice of the European Union

54. The Court of Justice of the European Union has also developed interesting case law in this regard. Its *Aranyosi and Căldăraru* judgment[43] altered the legal landscape, making it imperative, in certain cases, for member States executing European arrest warrants to assess detention conditions in the member State issuing the warrant before surrendering the person sought.

55. The Court of Justice held, in particular, that the prohibition of inhuman or degrading treatment or punishment guaranteed by article 4 of the Charter of Fundamental Rights of the European Union ("No one shall be subjected to torture or to inhuman or degrading treatment or punishment") is absolute, and that, where the judicial authority of the executing member State is in possession of evidence of a real risk of inhuman or degrading treatment of individuals detained in the issuing member State, it is required to assess the existence of the individual risk when deciding on surrender.

56. According to that judgment, a finding that there is a real risk of inhuman or degrading treatment by virtue of general conditions of detention in the issuing member State cannot lead, in itself, to the refusal to execute a European arrest warrant.[44] Whenever the existence of such a risk is identified, it is then necessary that the executing judicial authority make a further assessment, specific and precise, of whether there are substantial grounds to believe that the individual concerned will be exposed to that risk because of the conditions in which it is envisaged that she or he will be detained in the issuing member State.[45] The mere existence of evidence that there are deficiencies, which may be systemic or generalized, or which may affect certain groups of people or certain places of detention, with respect to detention conditions in the issuing member State does not necessarily imply that, in a specific case, the individual concerned will be subject to inhuman or degrading treatment in the event that he or she is surrendered to the authorities of that member State.[46]

57. The executing judicial authority must, pursuant to article 15, paragraph 2, of the Council of the European Union framework decision on the European arrest warrant and the surrender procedures between member States, request from the judicial authority of the issuing member State, as a matter of urgency, all necessary supplementary information on the conditions in which it is envisaged that the

[42] See European Court of Human Rights, *Torreggiani and others v. Italy*, Application Nos. 43517/09, 46882/09, 55400/09, 57875/09, 61535/09, 35315/10 and 37818/10, Judgment, 8 January 2013, para. 65 (available in French).

[43] Case Nos. C-404/15 and C-659/15 PPU, Judgment, 5 April 2016.

[44] Ibid., para. 91.

[45] Ibid., para. 92.

[46] Ibid., para. 93.

individual concerned will be detained in that member State. Requests may also relate to the existence, in the issuing member State, of any national or international procedures and mechanisms for monitoring detention conditions, for example, those regarding visits to prisons, that make it possible to assess the current state of detention conditions in those prisons.

58. If, in the light of the information provided pursuant to article 15, paragraph 2, of the framework decision, and of any other information that may be available to it, the executing judicial authority finds that there exists, for the individual who is the subject of the European arrest warrant, a real risk of inhuman or degrading treatment, the execution of that warrant must be postponed, but it cannot be abandoned. Where the executing authority decides on such a postponement, the executing member State is to inform Eurojust, in accordance with article 17, paragraph 7, of the framework decision, giving the reasons for the delay.

59. The executing judicial authority must postpone its decision on the surrender of the individual concerned until it obtains the supplementary information that allows it to discount the existence of such a risk. If the existence of that risk cannot be discounted within a reasonable time, the executing judicial authority must decide whether the surrender procedure should be brought to an end.

60. In its *ML* and *Dorobantu* judgments,[47] the Court of Justice of the European Union confirmed its ruling in *Aranyosi and Căldăraru* and provided further guidance on how an individual assessment regarding the existence of an individual risk of inhuman or degrading treatment of persons to be detained in the issuing member State after their surrender should be conducted.

61. In particular, the Court of Justice held that the referring court does not have to examine the general conditions which govern the prison system of the issuing member State.[48] The assessment which that authority is required to make cannot, in view of the fact that it must be specific and precise, concern the general conditions of detention in all the prisons in the issuing member State in which the individual concerned might be detained.[49] When assessing the individual risk to the person concerned, the court must assess the conditions of detention only in those prisons in which, according to the information available to it, it is likely that the person concerned will be detained, including on a temporary or transitional basis, and must focus solely on the actual and specific conditions of detention of that person. The individual assessment is not limited to the review of obvious inadequacies; all the physical aspects of the detention conditions in the prison are relevant (for example, personal space, sanitary conditions and freedom of movement within the prison).

62. Moreover, the executing judicial authorities cannot rule out a real risk merely because the person concerned has, in the issuing member State, a legal remedy permitting him or her to challenge the conditions of his or her detention, or because there are, in the issuing member State, legislative or structural measures intended to monitor detention conditions.[50] Further, an individual risk cannot be weighed against considerations relating to the efficacy of judicial cooperation in criminal matters and to the principles of mutual trust and recognition.

C. Consultations as a tool to provide clarification and assurances

63. At its ninth meeting, in May 2018, the Working Group on International Cooperation had an opportunity to discuss the term “effective advocacy”, not as a legal term of art, but rather as a descriptive concept, referring to cases in which the requested State communicates to the requesting State its legal requirements, as well

[47] Judgment of the Court of Justice of 25 July 2018, *ML*, Case No. C-220/18 PPU; and Judgment of the Court of Justice of 15 October 2019, *Dorobantu*, Case No. C-128/18.

[48] *ML*, Case No. C-220/18 PPU, para. 62.

[49] *Dorobantu*, Case No. C-128/18, para. 64.

[50] Ibid., para. 81; and *ML*, Case No. C-220/18 PPU, para. 57.

as any potential problems with the extradition request, and offers the opportunity for the provision of additional information or evidence to substantiate the case or strengthen the assurances needed after a potential surrender of the fugitive, as appropriate.[51]

64. Consultations between the requesting and requested States could play a facilitating role at different stages of the extradition proceedings, from the stage preceding the submission of the extradition request to the final surrender of the person sought to the requesting State. Especially at the "executive stage" of the extradition process, consultations may also offer the opportunity to consider whether the provision of particular assurances by the requesting State could, in certain cases, allow extradition to be granted, while providing an acceptable degree of protection of the person sought.[52] The detention conditions in the requesting State and information showing that they do not infringe on fundamental human rights of the person sought could also be the focus of such assurances.

V. Conclusions and recommendations

65. The Working Group on International Cooperation may wish to recommend that the Conference of the Parties encourage States parties to consistently exchange, through international, regional and subregional forums, best practices and lessons learned in the field of extradition, including on the indicative issues highlighted and analysed in the present background paper, with a view to overcoming practical problems and challenges that hinder timely and effective cooperation.

66. The Working Group may also wish to recommend that the Conference of the Parties continue to foster focused discussion on the training and capacity-building needs of competent authorities with regard to the performance of their tasks to facilitate the process of international cooperation in criminal matters, in particular with regard to extradition, and call upon States parties to provide financial support to technical assistance efforts, including those undertaken by the United Nations Office on Drugs and Crime, to strengthen knowledge and capacity within those authorities.

[51] CTOC/COP/WG.3/2018/2, para. 9.

[52] Ibid., para. 30. The Organized Crime Convention itself provides that, before refusing extradition, the requested State party is to, where appropriate, consult with the requesting State party to provide it with ample opportunity to present its opinions and to provide information relevant to its allegation (art. 16, para. 16).