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Situation as of 1 August 2000

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List of Abbreviations

Arr.Cass.	Arresten van het Hof van cassatie (Judgments of the Supreme Court of Appeal)
Arr.R.v.St.	Arresten van de Raad van state (Judgments of the Supreme Administrative Court)
Art.	Article
B.S.	Belgisch Staatsblad (Belgian Official Journal)
Bull.Off.	Bulletin officiel
ECHR	European Convention on Human Rights
ECSC	European Coal and Steel Community
J.T.	Journal des Tribunaux
OJ	Official Journal of the European Communities
Pas.	Pasicrisie
Rev.dr.pén.	Revue de droit pénal et de criminologie
R.v.St.	Supreme Administrative Court
R.W.	Rechtskundig weekblad

I. Introduction

In the nineteenth century, Belgium played a prominent role in the area of international criminal law,[1] of which extradition is a part.[2] This is illustrated by the fact that the Belgian Extradition Act of 1 October 1833,[3] later largely repealed and replaced by the Law of 15 March 1874,[4] was the first law on extradition anywhere in the world.

The Law of 15 March 1874, like Section 6 of the Law of 1 October 1833, is still in force in Belgium, but has lost its exclusive status as a statutory instrument for extradition. Within the scope of the internationalisation, Europeanisation and globalisation that characterised the twentieth century and that are, among other things, evident from the creation of Benelux, the Schengen Area and the European Union, numerous bilateral and multilateral treaties governing extradition - incidentally based on Section 6 of the Law of 1833 - have been made.

In this report, compiled within the scope of the "Schengen Co-operation and Legal Integration in the European Union" project, the regulation of extradition in Belgium, as encompassed in international treaties and in national legislation, is described in accordance with the questionnaire specified for the purpose.

1 *C. van den Wyngaert*, Strafrecht en strafprocesrecht in hoofdlijnen 1998, 987.

2 The fact that extradition forms part of international criminal law is clearly apparent from its definition: "the legal act between two states whereby the state on whose territory a fugitive offender is encountered transfers this person to the state which is seeking him with a view to prosecution or sentencing" (Ibid).

3 Law of 1 October 1833 on Extradition, Bull. Off. LXVII, no. 1195.

4 Law of 15 March 1874 on Extradition, B.S. 17 March 1874. This law in turn has been thoroughly amended by the Law of 31 July 1985 amending Sections 1 and 2 of the Law of 15 March 1874 on Extradition and Inserting a Section 2b into this Law (B.S. 7 September 1985).

II. Traditional Legal Framework for Extradition Proceedings in Belgium

1. National Regulations Governing Extradition Proceedings

Extradition in Belgium is regulated through international legislation and conventions.[5] Arrest with a view to extradition and the procedure regarding extradition therefore have their legal basis in these sources.

Belgian national regulations on extradition are stipulated by the *Law of 15 March 1874*,[6] which was radically amended by the *Law of 31 July 1985*.[7] This law generally outlines the conditions for extradition and stipulates the procedure that must be followed.[8] The Extradition Act does not expressly refer to the *Code of Criminal Procedure*, but it should still be interpreted within the broader context of this Code. The Extradition Act, for example, refers to the character of the examining magistrate and to the magistrates' courts, particularly the Indictment Division. Principally, the Code of Criminal Procedure governs these courts. Another example goes back to Article 7 of the Extradition Act, which refers to "the prescription of criminal proceedings ... according to Belgian law." This prescription is governed by Articles 21 et seq. of the preliminary rules ("titre préliminaire") of the Code of Criminal Procedure. By way of example, it also refers to the possibility of appeal to the Supreme Court within the context of the grant-of-execution procedure: the Code of Criminal Procedure also governs this appeal procedure. Section 34 of the Law on Pre-Trial Detention is also of significance to extradition: this section can be regarded as being directly related to the Extraction Act and complementary to the Code of Criminal Procedure. Sections 3, 5 and 5b of the Law of 1874 deal with arrest with a view to extradition. Section 15 of the *Law of 5 August 1992 on the Police Profession*[9] must also be mentioned here: this law states under Subsection 2 that it is the task of the general police services to track down, apprehend, arrest and put those persons whose arrest is provided for by the law at the disposal of the proper authorities. This authority to arrest is left intact by the reor-

5 Belgium extradites exclusively on the grounds of international treaties. The relevant conventions are included in: *T. Vander Beken/G. Vermeulen*, Compendium internationaal strafrecht 1998, 2056 p.

6 See note 4 for the reference.

7 See note 4 for the reference.

8 As already indicated, the original Extradition Act dates from 1 October 1833. This law was repealed by Section 12 of the Law of 1874 mentioned, with the exception of Section 6, which is concerned with political offences.

9 B.S. 22 December 1992.

ganisation of the police authorities service currently underway in Belgium.[10] Finally, the *Law of 20 July 1990 on Pre-Trial Detention*[11] should also be mentioned. This law stipulates that the examining magistrate can issue a warrant of arrest in absentia if the suspect is a fugitive or in hiding or if there are grounds for requesting his extradition.

Section 3 of the Extradition Act of 1874 contains a procedure in three phases which must be followed in the case of passive extradition, i.e. extradition viewed from the standpoint of Belgium as the requested state. First of all, the person concerned is detained. The recommendation of the Indictment Division[12] of the Court of Appeal in whose jurisdiction the alien was arrested is then obtained. Finally, the Government decides on the request for extradition. The rules relating to arrest with a view to extradition differ depending on whether the procedure is for normal or accelerated extradition.

In concrete terms, this means: Section 15 Subsection 2 of the Law on the Police Profession states that, in fulfilling the assignments of the judicial police, it is the task of the general police services to track down, apprehend, arrest and put those persons whose arrest is provided for by the law at the disposal of the proper authorities. The arrest itself is carried out like any other judicial arrest, but the subsequent enforcement system, which, as far as regular judicial arrest is concerned, is governed by the Pre-Trial Detention Act, is totally different. In principle, the request for extradition is transferred to Belgium through diplomatic channels.[13] Following receipt of this request, the normal procedure or - in urgent

10 See Section 167 of the Law of 7 December 1998 on the Organisation of an Integrated Police Service Structured at Two Levels, B.S. 5 January 1999.

11 B.S. 14 August 1990.

12 The Indictment Division is the higher examining court situated at the level of the Courts of Appeal. It principally considers the appeals against the rulings of the court sitting in chambers. The court sitting in chambers belongs to the court of first instance and fulfils the role of examining court of first instance. The primary function of the latter examining court is to judge whether a judicial investigation has provided sufficient evidence of guilt and whether proceedings before the court of judgment are therefore justified. The court sitting in chambers also rules on the monthly enforcements of deprivation of liberty within the framework of the pre-trial detention.

13 Some conventions deviate from this, in the sense that it is stipulated that the Minister of Justice of the requesting country can directly notify his counterpart in the requested country of the request (see for example Treaty of 27 June 1962 on Extradition and Mutual Assistance in Criminal Matters between the Kingdom of Belgium, the Grand Duchy of Luxembourg and the Kingdom of the Netherlands, ratified by the Law of 1 June 1964, B.S. 24 October 1967; Agreement of 26 May 1989 between the Member States of the European Communities on Simplification and Modernisation of the Method of Sending Requests for Extradition, drawn up at San Sebastian on 26 May 1989, ratified by the Law of 22 April

cases - the accelerated procedure is instituted. In practice, the accelerated procedure is applied in most cases.

The normal procedure is regulated in Section 3 of the Extradition Act of 1874. It differs according to the nature of the legal basis of detention underlying the request for extradition.[14] If the request for extradition is based on a conviction or arrest or on a committal by a competent judge or court, the person concerned may be detained in Belgium without further formalities.[15] If the request for extradition is based on a warrant of arrest or equivalent instrument, however, it must first be declared enforceable by an enforcement order[16] by the court of first instance sitting in chambers of the place where the alien resides or can be found in Belgium.[17] In view firstly of the specific nature of the extradition procedure and secondly of the general principle that it is necessary to have an interest in order to make use of a legal remedy, both the parties concerned, the requesting state and the public prosecutor's office, have the option of applying the legal remedies, insofar as they exist.[18] Since the Law of 14 January 1999 came into force on 8 March 1999, the legal bases for detention, insofar as an international agreement expressly provides therefore, may be transmitted by fax.[19]

1997, B.S. 22 November 1997; see also: errata and addenda, B.S. 27 October 1998). The Second Additional Protocol to the European Convention on Extradition, drawn up at Strasbourg on 17 March 1978, in Article 5 makes transfer through diplomatic channels of secondary importance in comparison with direct transfer. Belgium, however, has declared that it does not accept application of this article (Ministerial Circular of 16 June 1998 on Extradition, B.S. 2 March 1999, 6182).

14 *C. van den Wyngaert*, o.c., 1000.

15 Section 3(1) of the Law of 15 March 1874.

16 On the subject of the enforcement order procedure, the Supreme Court of Appeal ruled on 5 December 1998 that the arrest is of a provisional nature if the person concerned submits an appeal to the Indictment Division within twenty-four hours following signature of the warrant of arrest. The Court subsequently ruled that if more than six months have elapsed between the time when this appeal has been submitted and the time of hearing by the Indictment Division, Article 5(4) of ECHR has been infringed.

17 Section 3(2) of the Law of 15 March 1874.

18 For the role of the court sitting in chambers in Belgian criminal procedure, see note 12. An appeal against the ruling of the court sitting in chambers may be lodged with the Indictment Division and against the ruling of the latter. There is also provision for an appeal to the Supreme Court of Appeal (Cass. 21 May 1985, Rev.dr.pén. 1986, 295 (Farmakopoulus arrest); Cass. 6 November 1985, Pas. 1986, I, 266 and Rev.dr.pén. 1986, 307; Cass. 25 April 1990, Rev.dr.pén. 1990, 967; *C. van den Wyngaert*, o.c., 1000-1001).

19 Section 3(3) of the Law of 15 March 1874, inserted by Section 5 of the Law of 14 January 1999 amending Articles 35 and 57b of the Penal Code, Section 31 of the Law of 12 March 1998 to Improve Criminal Procedure at the stage of the investigation and the judicial examination of Sections 3 and 5 of the Extradition Act of 15 March 1874 (B.S. 26 February 1999). The insertion of Subsection 3 into Section 3 of the Extradition Act falls within the

In urgent cases, the accelerated procedure provided for in Section 5 of the Law of 1874 is adopted.[20] Under this procedure, the person concerned is provisionally arrested on presentation of a warrant of arrest, issued by the examining magistrate competent for the place where he or she resides or can be found, and based on an official message from the government of the requesting state to the Belgian authorities.[21] This provisional arrest takes place while awaiting the dispatch of an extradition request and the documents supporting this request. It has a maximum duration of forty days: if the person concerned does not receive any notification of the warrant of arrest issued by the foreign government within this period, he or she should be set free again pursuant to Section 5(2) of the Law of 1874. Under Section 5(5) of this Law, the person arrested under an accelerated procedure can request the court sitting in chambers to grant provisional release.[22]

From the moment when the wanted person has been detained, he or she is at the disposal of the government.[23] As already indicated, the government must obtain the recommendation of the Indictment Division of the Court of Appeal in whose jurisdiction the alien was arrested:[24] This chamber must examine whether the

framework of the Agreement of 26 May 1989 between the Member States of the European Communities concerning Simplification and Modernisation of the Method of Sending Requests for Extradition, which was drawn up at San Sebastian on 26 May 1989, approved by the Law of 22 April 1997 (B.S. 22 November 1997) and which was ratified by Belgium on 12 June 1997 (B.S. 22 November 1997).

20 Section 5b of the Law of 15 March 1874 is concerned with arrest within the scope of an accelerated procedure, on the hypothesis that the alien whose extradition is requested is on board a Belgian ship that has left the territorial waters.

21 Section 5(1) of the Law of 15 March 1874. The arrest de facto takes place on the basis of requests for information distributed through Interpol that are regarded as an official notice from the government of the requesting state. Identification in the Schengen Information System also applies as a request for provisional arrest (Section 64 of the Convention of 19 June 1990 Implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic, regarding the gradual abolition of checks at common borders, ratified by the Law of 18 March 1993, B.S. 15 October 1993; *V. Hreblay*, Les accords de Schengen. Origine, fonctionnement, avenir 1998, 164-165; *C. van den Wyngaert*, o.c., 1001).

22 The request must, however, be submitted within forty days after his or her deprivation of liberty. An appeal against the ruling of the court sitting in chambers can be lodged with the Indictment Division. An appeal against the ruling of the latter is possible to the Supreme Court of Appeal.

23 *C. van den Wyngaert*, o.c., 1001.

24 Section 3(4) of the Law of 15 March 1874. This recommendation, however, does not have to be obtained in the case of an extradition by way of transit across Belgian territory (Section 4 of the Law of 15 March 1874).

conditions of extradition have been met.[25] The procedure principally takes place in public, and the Public Prosecutions Department and the alien, who may be represented by counsel, are heard.[26] The acts of procedure are transferred together with well-founded recommendations to the Minister of Justice within a period of fifteen days.[27]

Without being bound by the recommendation of the Indictment Division, the government ultimately decides on the request for extradition. The government determines whether the extradition of a person is permissible and decides whether the arrest must be revoked.[28] An appeal against the decision on extradition can be lodged with the Supreme Administrative Court.[29] If all local legal remedies have been exhausted, it is still possible to lodge a complaint with the European Court of Human Rights in Strasbourg; this complaint, however, does not have a suspensive effect.

The 1874 Extradition Act governs only passive extradition. It should be noted that, under Section 1 of the Extradition Act, extradition may also take place from a country with which a treaty has been signed on the basis of reciprocity. What this means is that extradition will only be permitted if the requesting state would also permit extradition in identical circumstances (and therefore as the requested state). In other words, the Extradition Act indirectly deals with the substantive detail of active extradition.

2. International Legal Framework for Extradition Proceedings

As indicated in the introduction, Belgian regulations on extradition no longer consist solely of the Law of 15 March 1874 and Section 6 of the Law of 1 October

25 Here the Indictment Division acts as a quasi-administrative advisory body and therefore does not make a judicial decision: an appeal to the Supreme Court of Appeal is consequently not possible (Cass. 8 March 1983, Arr.Cass. 1982-83, 843; *C. van den Wyngaert*, o.c., 1002).

26 Section 3(5) and (6) of the Law of 15 March 1874.

27 Section 3(7) of the Law of 15 March 1874.

28 Unlike in Germany (see Section 15(2) of IRG), Belgium has no statutory regulation concerning the consequences that the (possible) inadmissibility of the extradition has for the arrest of the person.

29 See, *inter alia*, Supreme Administrative Court 11 April 1975 (Arr. no. 16968 (III)), Arr. R.v.St. 1975, 344. Since the Law of 19 July 1991 concerning the administrative interim injunction before the Supreme Administrative Court (B.S. 12 October 1991), only the Supreme Administrative Court can order a stay of execution, if an instrument or regulations of an administrative authority are subject to nullification.

1833. Belgian extradition law is also formed by bilateral and multilateral conventions concluded on the basis of Section 6 of the Law of 1874. These principally comprise:

- around fifty bilateral extradition treaties;
- the Treaty on Extradition and Mutual Assistance in Criminal Matters between the Kingdom of Belgium, the Grand Duchy of Luxembourg and the Kingdom of the Netherlands of 27 June 1962, ratified by the Law of 1 June 1964, B.S. 24 October 1967 (Benelux Treaty on Extradition);[30]
- the European Convention on Extradition, drawn up in Paris on 13 December 1957, the Protocol thereto, drawn up in Strasbourg on 15 October 1975, and the second Protocol to this Convention, drawn up in Strasbourg on 17 March 1978, all ratified by the Law of 22 April 1997, B.S. 22 November 1997;[31]
- the Convention Implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic, regarding the gradual abolition of checks at common borders, Final Instrument, Protocol and Joint Declaration, signed at Schengen on 19 June 1990. This agreement was ratified by the Law of 18 March 1993, B.S. 15 October 1993;
- Title III of the European Convention of 20 April 1959 on Mutual Assistance in Criminal Matters, ratified by the Law of 19 July 1975, B.S. 23 October 1975 (err. B.S. 6 November 1975).

The conventions mentioned above have all been incorporated into Belgian national law. As the theory of monism is observed in Belgium,[32] these treaties accordingly prevail over both earlier and later rules of law, and the legal subordinates can cite them directly before the internal judge.[33] It follows from this that, insofar as the request for extradition falls within the area of application of one or other convention mentioned, this convention prevails over the Extradition Act of 1874, as well as Section 6 of the Law of 1833.

30 Came into effect on 11 December 1967. For further information see: *F. Thomas*, Internationale rechtshulp in strafzaken, in: Algemene praktische rechtsverzameling 1998, 15-19.

31 Came into effect on 27 November 1997. This treaty, however, was previously already applicable under Article 60 of the Convention Implementing Schengen.

32 This has been so since the 'Smeerkaas arrest': Cass. 27 May 1971 (N.V. Fromagerie Franco-Suisse Le Ski), Arr.Cass. 1971, 959 and J.T. 1971, 460, conclusions *Ganshof van der Meersch*).

33 *A. Alen*, Handboek van het Belgisch staatsrecht 1995, 59.

a) Benelux Treaty on Extradition of 27 June 1962

During and after World War Two, the realisation grew that the risk of war could be reduced by European co-operation in the economic sphere. As a result of this realisation, the ECSC and on a smaller scale, the Benelux Economic Union came into being. This regional organisation, with headquarters in Brussels, sprang from the creation (London, 5 September 1944) of a customs union between Belgium, the Netherlands and Luxembourg. In 1947, this union was ratified by the parliaments of these three states. While this co-operation was hampered by post-war problems in the beginning, the treaty setting up the Benelux Economic Union (the Hague Treaty of 3 February 1958, ratified by Law of 20 June 1960, B.S. 27 October 1960) was signed in 1958, creating free movement of persons, goods, services and capital. The free movement of goods corresponds to transferring personal controls to the external borders of the Benelux area. This agreement came into effect on 1 July 1960 (B.S. 1 July and 11 August 1960).

The creation of the Benelux Union led to security problems in much the same way as the introduction of the Schengen area and the subsequent abolition of controls at internal frontiers in the early 1980s. Consequently, a number of specific treaties were entered into force (1952 and 1961) which, among other things, provided for a rapid system of mutual assistance in regard to the prevention and repression of punishable acts in the sphere of co-operation with regard to customs and duties and in the sphere of the regulation of import, export and transit. These treaties were eventually rescinded when three supplementary protocols to what is known as BASS came into effect. This is the agreement of 29 April 1969 on co-operation in administrative and criminal matters in the area of the regulations relating to realisation of the objectives of the Benelux Economic Union (B.S. 17 February 1971).

The Benelux Treaty on Extradition of 27 June 1962 also fits into the context of the provision of security in an open area. It was also partly prompted by changes at the level of the Council of Europe, where work was in progress on the creation of a European Convention relating to mutual assistance on criminal matters. The close political and geographical ties between the Benelux partners justify a separate extradition treaty.

The Benelux Treaty on Extradition plays a prominent role in Belgian extradition law. In comparison with the Extradition Act of 1874, as amended in 1985, this Treaty contains the following relaxations:

- The penal threshold that must be crossed for extradition to take place is lower. Section 2 Subsection 2 stipulates that acts which have been made punishable by a term of imprisonment of at least six months or with a more severe penalty or disciplinary measure under the laws of the requesting party and of the requested party could lead to extradition. The section adds to this that, when a sentence or a disciplinary measure has been imposed within the territory of the requesting state, this sentence or disciplinary measure must last at least three months. Subsection 2 of Section 2 contains the provision relating to a request for extradition in relation to several acts, some of which do not meet the required penal threshold.
- Political offences are also excluded from the Benelux Treaty on Extradition. The Treaty explicitly states that attacks on the life or freedom of a head of state or of a member of the ruling family and desertion are not to be regarded as political offences.
- Article 10 of the Treaty deals with the traditional grounds for refusal of extradition because of the risk of the death penalty. This Article reads: "If the offence for which extradition is requested is punishable by death under the law of the requesting Party, and if the death penalty is not applicable to such offence under the law or according to the practice of the requested Party, the latter Party may grant extradition on condition that the requesting Party undertakes to recommend to the Head of State that the death penalty be commuted to another penalty."
- The following should be pointed out at the procedural level: Article 11 of the Treaty provides for the transfer of the extradition request from the Minister of Justice of the requesting state to his counterpart in the requested state (cf. the Belgian Extradition Act which provides for transfer through diplomatic channels).
- The principle of speciality is not encompassed in the Belgian Extradition Act, but does apply according to case law. The principle of speciality is included in Article 13 of the Benelux Treaty on Extradition. Article 13 first enunciates the general rule of the principle of speciality and then states that the principle does not apply in three cases, namely: 1) when the party who has extradited someone gives its consent thereto (a request must be submitted for this purpose, if the offence for which the request is made in itself entails an obligation to extradite under the Treaty), 2) if the extradited person has not left the territory of the party to which he or she had been extradited within fifteen days following his or her final release, even though he or she had the oppor-

tunity to do so, or if he or she has returned to the territory after having left it, 3) if the extradited person, either for extradition before a judicial authority of the requested party or following his or her extradition before a judicial authority of a requesting party, has explicitly given consent to be prosecuted and sentenced in relation to any offence, whatever it might be.

- The Benelux Treaty on Extradition also provides for an urgent procedure (Article 19, which refers to Article 15 governing provisional arrest in urgent cases). This procedure calls for direct contact between the judicial authorities of the state concerned or through Interpol. In the case of urgent need, Article 19 provides for what is referred to as an accelerated procedure, which means that the judicial authorities of the requesting party can request the immediate handover of the person to be extradited. This person can be handed over under Article 19(2) only if he or she (who may be assisted by a lawyer) explicitly gives consent before an official of the Public Prosecutions Department of the requested party and if this official has also given consent for this to be done. The handover takes place without other formalities within eighteen days following the provisional arrest. If the handover does not take place within five days following the arrest, the judicial authorities of the requested party will inform the judicial authorities of the requesting party and, if there is reason to do so, invite them to continue to act in accordance with Article 11, which relates to the normal procedure in an extradition request. For the person being extradited, the handover in the context of the accelerated procedure is equivalent to his or her renouncing the principle of speciality.

b) European Convention of 13 December 1957

The European Convention on Extradition (effective 27 November 1997[34]) and the two Protocols to this Treaty (effective 16 February 1998) have clearly reduced the significance of the bilateral extradition treaties signed by Belgium. Article 28 of the European Convention on Extradition nullifies the provisions of any former bilateral agreements, conventions or agreements governing extradition between two contracting parties. This means that the provisions of bilateral treaties between Belgium and Bulgaria, Denmark, Estonia, Finland, Great Britain, Greece, Hungary, Israel, Croatia, Latvia, Liechtenstein, Lithuania, Norway, Austria, Poland, Slovakia, Slovenia, the Czech Republic, Turkey, Sweden, Switzerland and Romania have lapsed, as do the provisions of the Treaty of 29 October 1901 be-

34 This Treaty was previously already applicable under Article 60 of the Convention Implementing Schengen.

tween Belgium and the United Kingdom, insofar as this Treaty also governed relations between Belgium and Cyprus and Malta.[35,36] As a result of the European Convention on Extradition coming into effect, Belgium now maintains relations on this matter with three countries with which it had not previously made a bilateral treaty: Ireland, Iceland and Moldova.[37]

Article 28 of the European Convention on Extradition thus clearly plays a central role in Belgian extradition law, albeit together with the Convention of 27 June 1962, the Benelux Treaty on Extradition. With respect to this Treaty, Belgium has made a proviso in regard to Article 28 so that it remains applicable to relations between Belgium and the Grand Duchy of Luxembourg and the Netherlands. Reference should be made in all this, however, to Article 59(1) of the Convention Implementing the Schengen Agreement of 19 June 1990, which stipulates that the provisions of this convention relevant to extradition serve to supplement and simplify the European Convention on Extradition and the Benelux Treaty on Extradition.[38] This means that the Benelux Treaty on Extradition continues to exist for relations between Belgium and the Netherlands and Luxembourg, with the exception of provisions from the Convention Implementing the Schengen Agreement that are more favourable: extradition relations between the Benelux countries therefore remain for the most part unchanged. It also means that the bilateral treaties which bind Belgium to France, Germany, Italy, Spain, Portugal and Greece were rescinded as the Convention Implementing the Schengen Agreement came into effect with respect to those states and that these treaties were replaced by the European Convention on Extradition.[39]

Belgium made a *proviso* in connection with *Article 28*: "Because of the special arrangements between the Benelux countries, the Belgian Government does not

35 Ministerial Circular of 16 June 1998 on Extradition, B.S. 2 March 1999, 6174.

36 The provisions concerning mutual assistance in criminal matters in the treaty signed on 4 June 1971 between Belgium and the Socialist Federal Republic of Yugoslavia on extradition and mutual assistance still form the judicial basis for relations between Belgium and Croatia and Slovenia. The Convention on Extradition and Mutual Assistance in Criminal Matters signed by Belgium and Romania on 14 October 1976 is still valid today, insofar as the aforementioned countries have not yet ratified the European Convention on Mutual Assistance in Criminal Matters of 20 April 1959 (Ibid.).

37 Ibid.

38 Article 59(2) of the Convention states that the provisions of Paragraph 1 do not alter the applicability of more far-reaching provisions of bilateral treaties which are in force between the contracting parties.

39 Interdepartmental Circular of 10 December 1998 on the consequences of the Schengen Agreement in the field of police and judicial co-operation, B.S. 29 January 1999, 2740.

accept Article 28(1) and (2) concerning relations with the Kingdom of the Netherlands and the Grand Duchy of Luxembourg. The Belgian Government reserves the option of deviating from these provisions with respect to its relations with the other Member States of the European Community."

Belgium also issued *declarations* on the European Convention on Extradition. In relation to *Article 1*, Belgium declared: "The Belgian Government judges that the proviso made by Portugal relating to Article 1 Subparagraph c is not compatible with the object of the Convention. It understands this proviso in the sense that extradition is only refused if the person sentenced to life imprisonment, in accordance with the law of the requesting state, cannot be freed after a particular time has elapsed, as a result of a judicial or administrative procedure." Belgium also issued a declaration in relation to *Article 14*: "Belgium judges that the principle of speciality is not applicable when the person concerned has explicitly given consent to being prosecuted or sentenced on any basis by the judicial authority of the requested state, if this possibility is provided for in the law of this state. On the other hand, if extradition to Belgium is requested, Belgium assumes that, if the person to be extradited has formally renounced the formalities and guarantees of extradition, the principle of speciality is no longer applicable." In relation to *Article 15*, Belgium declared as follows: "Belgium judges that the exception provided for in Article 15 extends to the case where the person who has been transferred to Belgium has formally renounced the law of the requested state or the speciality of the extradition." The declaration in relation to *Article 21* reads: "The Belgian Government permits transit through its territory only under the same conditions as extradition." Finally, Belgium issued a declaration in relation to *Article 23*: "If the extradition request and the papers to be submitted are in the language of the requesting state, and this language is not Dutch, French or German, they must be accompanied by a translation into French."

c) Conclusions

International law plays a large role in Belgium extradition law and therefore in the procedures on this matter. This is evident on the one hand from the positioning of extradition in law: it forms part not only of constitutional and administrative law and criminal law but also of international law, since it relates to a legal act between two sovereign states.[40] On the other hand, the significant role attributed to international law in relation to extradition is abundantly clear from the numerous

40 *C. van den Wyngaert*, o.c., 988.

bilateral and multilateral treaties - extradition is only possible in regard to countries with which Belgium has concluded an extradition treaty on the basis of reciprocity - which govern Belgian extradition law and prevail over the Extradition Act of 1874. We have already indicated these treaties and their place in the Belgian legal system above. Here, we repeat merely that the European Convention on Extradition - together with the Benelux Treaty on Extradition and the Convention Implementing the Schengen Agreement - occupies a very important position. The European Convention on Extradition was ratified in April 1997 and, like the two Additional Protocols, was incorporated into the Belgian internal legal system in the Law of 22 April 1997.[41] The Convention came into effect with regard to Belgium on 27 November 1997[42] and the two Protocols on 16 February 1998.

3. Obstacles to Extradition

a) *Traditional Obstacles to Extradition in Belgium*

The Belgian Extradition Act of 1874 contains some conditions for extradition that at the same time constitute possible obstacles to extradition.

(1) Principle of Reciprocity

Traditionally, a person can be extradited on the basis of reciprocity only to a country with which a treaty has been made in this regard.[43] The meaning of the condition of reciprocity is that extradition is only permitted if the requested state also permits extradition in identical circumstances.[44]

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41 Law of 22 April 1997 containing assent to a) the European Convention on Extradition, drawn up in Paris on 13 December 1957; b) Protocol to the European Convention on Extradition, drawn up in Strasbourg on 15 October 1975; c) Second Protocol to the European Convention on Extradition, drawn up in Strasbourg on 17 March 1978; d) Agreement between the Member States of the European Communities on the Simplification and Modernisation of the Method of Dispatch of Requests for Extradition, drawn up in San Sebastian on 26 May 1989, B.S. 22 November 1997. The protocols are not applicable to relations between Belgium and the Netherlands (Ministerial Circular of 16 June 1998 on Extradition, B.S. 2 March 1999, 6174 and 6182).

42 Previously already applicable under Article 60 of the Convention Implementing Schengen.

43 Section 1 of the Law of 15 March 1874.

44 *C. van den Wyngaert*, o.c., 992-993.

(2) Requirement of Double Punishability or Executability

In addition, a punishable act - offence or crime - must have been committed on the territory of the requesting state or outside the territory of the requesting state in those cases in which Belgian law permits prosecution of those offences, committed outside Belgian territory, and insofar as reciprocity exists.

Extradition will be refused if the prosecution or execution of the sentence is barred by lapse of time under Belgian law.[45] These two obstacles, which refer to authority *ratione loci* of the requesting state and barring by lapse of time under Belgian law, can be brought together in a requirement made in relation to extradition, namely the requirement of double punishability or executability: it signifies that the acts both in the requested state and in the requesting state must be capable of giving rise to prosecution or execution of a sentence, depending on the case.[46]

(3) No Extradition of Nationals

From early times, Belgium has not extradited its own subjects:[47] in compensation, it complies with the obligation contained in Article 6(2) of the European Convention on Extradition, namely the duty to prosecute where appropriate Belgian subjects who commit offences outside Belgium. Extradition of nationals, however, is not possible (see III.2.c).

(4) No Extradition for Political Offences

Under Section 6 of the original Extradition Act of 1 October 1833[48] - the only section, as already indicated, of the original Extradition Act not repealed by the Extradition Act of 1874 - extradition will not be permitted if it is requested because of a political offence or because of an act related to such a political offence. The Act of 1833, however, does not clarify the meaning of the term political offence.[49] This naturally entails the necessary problems of interpretation.

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45 Section 7 of the Law of 15 March 1874.

46 *C. van den Wyngaert*, o.c., 996.

47 Section 1 of the Law of 15 March 1874. Section 7 of the Agreement of 27 September 1996 drawn up on the basis of Article K.3 of the Treaty on the European Union on Extradition between the Member States of the European Union abolishes the exception with regard to national subjects with respect to the Member States of the European Union: this convention, however, has not yet come into effect.

48 Bull. Off. LXVII, no. 1195.

49 Section 6, however, does state that an attack on a foreign head of state (Subsection 2) and - on condition of reciprocity - collaboration with the enemy (Subsections 3 to 6 inclusive)

(5) [No] Extradition for Military or Fiscal Offences

The 1874 Extradition Act, before it was amended in 1985, ruled out extradition for military and fiscal offences. Since the Amending Act of 1985, these offences have no longer been explicitly left outside the scope of the Extradition Act. The applicable Convention on Extradition can nonetheless prohibit extradition for these offences.

(6) No Extradition for Trials before an Exceptional Court

Belgium made a number of provisos on the European Convention on Extradition. Firstly a proviso was made in relation to Article 1:

> "Belgium reserves the right not to permit extradition if the person concerned would be subjected to an exceptional court or if the extradition is requested with a view to execution of a sentence which has been passed by such a court."

(7) No Extradition of Sick or Aged Persons

Extradition is not permitted if the transfer may have exceptionally serious consequences for the person concerned, in particular because of his or her age or state of health.

(8) Importance of Extradition Obstacles

The Law of 15 March 1874, which includes the obstacles to extradition, functions as the framework act,[50] within the limits of which the Government can make extradition treaties with third-party states.[51] Like any other law, it can be amended

are not regarded as political offences. Kidnapping is also not regarded by Belgium as a political crime (Article 1 of the European Convention of 27 January 1977 on the Suppression of Terrorism, B.S. 5 February 1986). This Convention states in Article 13 that a number of criteria which must be met for an offence to be regarded as political, in particular: as a result of the act, common danger has arisen for the life or safety of persons or danger of persons suffering physical injury; as a result of the act, persons have been harmed who have nothing to do with the underlying motives; and brutality or treacherous means have been used in committing the act.

50 This also means that if the extradition obligations ensuing from these conventions do not go further than the general framework of the 1874 Act specifies, no parliamentary ratification of the Convention on Extradition is necessary (*C. van den Wyngaert,* o.c., 989; *C. van den Wyngaert/G. Stessens/T. Scheirs*, Lignes de forces pour une réforme de la loi sur les extraditions, in: Belgian Senate and Ministry of Justice (ed.), Colloque réforme droit pénal 1998, (157), 171.

51 *C. van den Wyngaert/G. Stessens/T. Scheirs*, l.c., 171.

by the Belgian Parliament and by ordinary law, if the need to do so arises. A research team from the University of Antwerp (U.I.A.), led by Professor *Chris Van den Wyngaert*, was charged a few years ago by the then Minister of Justice *Stefaan De Clerck* with the task of outlining a preliminary draft of a new Extradition Act.

The Constitution, however, contains direct provisions covering these obstacles to extradition. These obstacles, insofar as Belgian internal law is concerned, are contained in the Extradition Act of 1874 and in Section 6 of the Extradition Act of 1833. Section 12 of the Constitution is nevertheless of direct significance to this topic. This section provides that the freedom of the individual is guaranteed, that no person may be prosecuted other than in cases stipulated by the law and in the form it prescribes and that, unless discovered while committing the act, no person can be arrested other than pursuant to a well-founded warrant from the judge, which must be signed at the time of the arrest or within twenty-four hours.

The provisions of the Law of 15 March 1874 are dictated not so much by a deep-seated sense of justice as by the concern to enforce the sovereignty of the Belgian State, which in 1874 was still very young.[52] The refusal to extradite Belgian subjects is illustrative of this.

b) *New Obstacles to Extradition in Belgium*

It has already been mentioned above that numerous international conventions, together with the 1874 Extradition Act, which serves as a framework Act in this matter, govern extradition from Belgium. Some conventions have recently been incorporated into Belgian national legislation, including the Benelux Treaty on Extradition, the European Convention on Extradition and the Convention Implementing the Schengen Agreement. In view of the arrangement of this comparative overview, however, attention should be given to the amendments that the Extradition Act of 15 March 1874 recently underwent, due to international developments, among other things. This Act was thoroughly amended by the Law of 31 July 1985 Amending Sections 1 and 2 of the Extradition Act of 15 March 1874 and inserting a Section 2b into the same Act.[53]

Since the amendment in 1985, the 1874 Act stipulates that grounds for extradition can only be provided by those acts that are punishable by a custodial sentence of

52 Belgium has been independent since 1830.

53 B.S. 7 September 1985.

which the maximum duration is more than one year under Belgian and foreign law, or - in the case where the extradition is requested for the execution of a sentence already passed - those acts for which a term of imprisonment of at least one year has been imposed.[54,55] Since the amendment to the Act in 1985, in other words, Belgium has opted for the elimination system to determine whether acts are subject to extradition: the 1874 Act was previously based on the enumeration method.[56] As a result, the dual criminality requirement has been explicitly included in Section 1(2) of the 1874 Act since the 1985 amendment. It was nevertheless already generally accepted beforehand that only acts that are liable to punishment both under Belgian law and according to the law of the requesting state[57] are eligible for extradition.

The Amending Act of 31 July 1985 contains a second innovation - at least for Belgium: it has introduced the condition for extradition that the administration of justice in the requesting state must fulfil certain minimum standards. This condition is elaborated in two sections of the 1874 Extradition Act. First, Section 1(2) 3rd paragraph of this Act has stipulated since 1985 that, if the punishable act for which extradition is requested is punishable by the death penalty in the requesting state, Belgium can only permit the extradition if the requesting state has given an explicit assurance that the death penalty will not be carried out. Secondly, a new Section 2b was introduced into the 1874 Act in 1985, in which it is stipulated that extradition cannot be permitted if there are serious reasons for assuming that the request has been made with the intention of prosecuting or sentencing the person on the basis of his race, religion, nationality or political persuasions, or there is a threat of the position of the person concerned being adversely influenced for one of these reasons. In other words, Section 2b of the 1874 Act stipulates that extra-

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54 Section 1(2) of the Law of 15 March 1874. It is also stipulated in this Section that if extradition is requested for the enforcement of a security measure, deprivation of liberty for unlimited time or for at least four months must be imposed.

55 N.B. If the request for extradition relates to various separate acts which under Belgian and foreign law are punishable by a custodial sentence, but do not satisfy the requirements in relation to the level of punishment, extradition may also be permitted for these acts, even if only a pecuniary penalty has been imposed (Section 1(3) of the Act of 15 March 1874).

56 The elimination method means that the level of punishment determines the acts for which extradition may be permitted: only acts that exceed a minimum threshold of seriousness are eligible for extradition. The enumeration method means that a limiting list is drawn up of the acts for which extradition may be permitted (on these two methods, see: *C. van den Wyngaert*, o.c., 993-994).

57 It suffices that the acts are punishable both in Belgium and in the requesting state: the qualification need not necessarily be equal (*C. van den Wyngaert*, o.c., 995).

dition must be refused if there is a threat of the wanted person being treated in a discriminatory manner in the requesting state.

We also note that, although the European Convention on Human Rights does not contain any explicit obstacles to extradition, this Convention also applies to extradition under certain circumstances. Articles 3 and 6 of the ECHR, for example, may apply as obstacles to extradition in certain situations.

On the other hand, the Extradition Act does not explicitly refer to threatening infringements of the ECHR as obstacles to extradition. Some amendments were nevertheless made to the (Belgian) Extradition Act in 1985, which contains an implicit reference to the ECHR. Among other things, a new Article 2b was introduced into the Act, in which it is stipulated that extradition cannot be permitted if there are serious reasons for assuming that the request has been made with the intention of prosecuting or sentencing the person on the grounds of race, religion, nationality or political persuasion or that there is a threat of the position of the person concerned for one of these reasons being adversely affected. The link with the ECHR is to be clarified. This link is also to be found in Section 1 of the Belgian Extradition Act, where Subsection 2(3) has stipulated since 1985 that, if the punishable act for which extradition is requested is punishable in the requesting state by the death penalty, Belgium can only permit the extradition if the requesting state has explicitly given an assurance that the death penalty will not be carried out. In regard to the importance of these new requirements, the Act of 1985 has made amendments to the Extradition (General Provisions) Act of 1874, which can be changed by ordinary act of parliament.

Legislators in 1985 opted for the elimination method, as this is more flexible than the enumeration method.[58] If this latter method is opted for, an amendment should always be made to an Act if it is judged that the possibility of extradition should be extended to a crime that does not appear on the list of crimes for which extradition is possible. The choice in favour of the elimination method also followed an international trend: this system is almost always opted for in recent conventions.[59] The minimum punishment threshold introduced in the Belgian Extradition Act is matched to the thresholds in the European Contention on Extradition and the Convention Implementing the Schengen Agreement. The introduction of Section 2b into the Extradition Act and the reformulation of Section 1 of this Act in the sense that a clause relating to the death sentence has been introduced, both follow

58 See note 56 for an explanation of these methods.

59 *C. van den Wyngaert*, o.c., 994.

the recent international trend to abandon - to some extent - the taboo which traditionally related to examination of the administration of justice in the requesting state. Previously an *a priori* trust in the dispensation of justice in the requesting state was taken as a basis so that it was felt that the requested state must not engage in an examination of the dispensation of justice in the requesting state, all the more so since it was judged that this would constitute non-permissible interference in the internal affairs of this state.[60]

4. Privileges and Duties of the Parties Involved in Extradition Proceedings

a) *Privileges and Duties of the Requesting and Requested State*

If an extradition request is addressed to Belgium, in other words, in the case of a passive extradition from the point of view of Belgium, Belgian extradition law applies. As already indicated, this consists firstly of the Belgian Extradition Act from 1874 and secondly of a number of treaties, including the Benelux Treaty on Extradition, the Convention Implementing the Schengen Agreement and the European Convention on Extradition. In Belgian law, these treaties, which have all been incorporated into the Belgian legal system, prevail over the 1874 Extradition Act. In other words, if the extradition request comes from a co-signatory of the Convention, the Convention[61] principally stipulates the privileges and obligations of Belgium and of the requesting party. The 1874 Extradition Act applies secondarily: the conditions and the procedure for extradition, enshrined in this Act, have already been discussed above.

If Belgium requests another country to extradite a person, in other words, in the case of an active extradition, the law of the requested state determines the conditions of extradition and the procedure to be followed.[62] The extradition law of the requested state will therefore have to be examined so that Belgium's privileges and duties in regard to this state can be determined. In addition, the following principles must be mentioned with regard to Belgium, regardless of the extradition law of the requested state. In case law, it is accepted on the one hand that the principle of speciality applies in active extradition: the requesting state may only prosecute or execute sentences on the basis of the acts for which extradition was

60 *C. van den Wyngaert*, o.c., 999.

61 The hierarchy of current conventions has already been indicated previously.

62 *C. van den Wyngaert*, o.c., 991.

permitted.[63] The principle of speciality is codified in Article 14 of the European Convention on Extradition of 13 December 1957 and in Article 13 of the Benelux Treaty on Extradition, which have been incorporated into the Belgian internal legal system and apply between the contracting parties (see above). On the other hand, case law applies the principle of *male captus, bene detentus* in relation to active extradition, which means that the courts of law in the requesting state are not authorised to pronounce on any irregularities committed in the extradition procedure by the authorities (government, judiciary) of the requested state.[64]

b) *Rights and Privileges of the Person Sought for Extradition*

The person sought for extradition can, depending on the case, invoke the provisions of the 1874 Extradition Act or the provisions of the conventions incorporated into the Belgian legal system, in which Belgium has incorporated duties and which are summarised above. If the extradition request originates from a state that is a party to the European Convention on Extradition of 13 December 1957, the principle of speciality applies within the limits of Article 14 of the Convention. Belgium has issued a declaration in relation to this article.[65]

The person concerned can invoke the provisions of the Act of 1874 or of the applicable international treaties in an open session of the Indictment Division, which must formulate a recommendation relating to the extradition request; the person concerned is heard and, where appropriate, represented by counsel. No appeal to the Supreme Court of Justice can be lodged against the recommendation of this Indictment Division. Nor can a request for annulment be submitted to the Supreme Administrative Court. The eventual decision of the Government on extradition, however, may be appealed to the Supreme Administrative Court. The person concerned can ultimately lodge a complaint with the European Court of Human Rights in Strasbourg. Both at the Supreme Administrative Court and at the European Court of Human Rights, the provisions of the 1874 Act or of the applicable international conventions can again be invoked.[66]

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63 Cass. 15 June 1982, R.W. 182-83, 1497, note *A. Vandeplas*; Antwerp 21 May 1987, R.W. 1987-88, note *A. Vandeplas*; Corr. Dendermonde 5 September 1990, R.W. 1990-91, note *A. Vandeplas*; *C. van den Wyngaert*, o.c., 991.

64 Cass. 5 November 1986, Arr.Cass. 1986-87, 318; Cass. 3 July 1998, Arr.Cass. 1998, 790. Cf. Cass. 24 April 1991, Arr.Cass. 1990-91, 868.

65 See above II.2.

66 For further information, see the reply to II.1, in which reference is made to the - limited - possibilities for contesting the arrest within the scope of extradition.

Today the whole question of Belgian extradition law is positioned in the discourse of human rights and subjective rights.[67] This explains in dogma the fact that the person concerned can invoke the provisions concerned: the term "subjective rights" implies direct involvement of the person whose extradition is sought, and trends in relation to the enforcement of human rights (see the reforms in relation to the European Court of and, at the time, the European Commission on Human Rights), namely a trend in favour of the appearance of private individuals, further strengthen this.

III. Impact of the New European Framework for Extradition on the Extradition Proceedings of Belgium

1. Schengen Implementing Convention of 19 June 1990

a) Ratification and Implementation

The Schengen Agreement of 14 June 1985 relating to the gradual abolition of checks at common borders, published in the Belgian Official Journal of 29 April 1986, came into effect on 2 March 1986. Ratification was not required for this purpose.[68] The Schengen Convention of 19 June 1990 Implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the Gradual Abolition of Checks at their Common Borders, was ratified in Belgium by the Law of 18 March 1993.[69] This Convention came into effect on 26 March 1995. In this way, the Convention Implementing Schengen, relevant to the topic of extradition, was incorporated into the Belgian legal system.[70] Belgium subsequently adopted the instrument of ratification on 31 March 1993.[71] The EU

67 See *C. van den Wyngaert/G. Stessens/T. Scheirs*, Lignes de forces pour une réforme de la loi sur les extraditions, in: Belgische Senaat en Ministerie van Justitie (ed.), Colloque réforme droit pénal 1998, 157-216.

68 *A. Alen*, o.c., 729.

69 B.S. 15 October 1993.

70 Although the legal entry into effect for the original Member States (Benelux, Germany, France) was set at 1 September 1993 and for Portugal and Spain at 1 March 1994, the practical entry into force for these countries was set at 26 March 1995 (*A. Alen*, o.c., 729; *F. Thomas*, Internationale rechtshulp in strafzaken, in: Algemene praktische rechtsverzameling 1998, 26). Entry into force with respect to Italy took place on 26 October 1997 and with respect to Greece and Austria on 1 and 8 December 1997 respectively (*F. Thomas*, o.c., 26).

71 B.S. 15 October 1993, 22693.

extradition conventions of 10 March 1995 and 27 September 1996[72] have not yet come into effect with regard to Belgium. Belgium, however, has already signed them.[73]

b) *Provisos Made by Belgium*

Belgium has not made any provisos in relation to Articles 59 and 92 of the Schengen Implementing Convention. In adopting the instrument of ratification, however, Belgium has repeated the provisos and declarations relating to Article 60 that it made on the European Convention on Extradition.[74]

c) *Impact on the National Law of Belgium*

The incorporation into the Belgian legal system of the Schengen Implementing Convention by Law of 18 March 1993 leads to this Convention forming part of Belgian extradition law and, in view of the hierarchy of legal norms, prevailing over the 1874 Extradition Act, at least between the contracting states.[75]

It is of particular significance that, with the implementation of this Convention in the Belgian legal system, recording in the Schengen Information System also counts as a request for provisional arrest with a view to extradition.[76] As a rule, the Schengen Implementing Convention specifies the transfer of extradition requests between the authorised ministries - the Ministry of Justice in the case of Belgium - and considers transfer through diplomatic channels as optional. This also signifies an innovation in Belgian extradition law. With regard to representation by a lawyer, the Schengen Implementing Convention has not made any substantial changes to Belgian extradition law: Section 3 of the 1874 Extradition Act

72 Convention of 10 March 1995, drawn up on the basis of Article K.3 of the Treaty on the European Union, relating to the simplified procedure for extradition between the Member States of the European Union, OJ 95/C, 78/01; Convention of 27 September 1996, drawn up on the basis of Article K.3 of the Treaty on the European Union relating to extradition between the Member States of the European Union, OJ 96/C, 313/02.

73 *G. Vermeulen*, Internationaal strafrecht. Basisteksten internationaal strafrecht 1999, 5, 199-203 and 237-246.

74 B.S. 15 October 1993, 22693-22694.

75 For further information on the Schengen-cooperation see *C. Chevallier-Govers*, De la coopération à l'intégration policière dans l'Union européenne 1999, 164-165; *V. Hreblay*, Les accords de Schengen. Origine, fonctionnement, avenir 1998, 164-165; *K. Pollet*, L'intégration de l'acquis de Schengen dans le cadre de l'Union européenne: impact et perspectives, in: M. Dony (ed.), L'Union européenne et le monde après Amsterdam 1999, 149.

76 See: *V. Hreblay*, o.c., 164-165.

already provides for the possibility of representation by counsel in the procedure before the Indictment Division. In the first phase of deprivation of liberty (normal or accelerated procedure), representation by counsel is possible.

With regard to the obstacles to extradition,[77] the introduction of the Schengen Implementing Convention into the internal Belgian legal system confirms that which has been codified in the Extradition Act of 1874 since 1985, namely the possibility of extradition for fiscal offences.[78] People can now be extradited for acts for which the requested contracting party has granted amnesty, except if the punishable act falls within the jurisdiction of this party, on the one hand, and, on the other hand, if the absence of a complaint or authority to institute criminal proceedings that are exclusively required according to the law of the requested contracting party do not cause the duty to extradite to cease to apply. It is also significant that the Schengen Implementing Convention provides that, in order to be able to establish whether limitation has been reached, acts which have been committed in the requesting state and which interrupt the limitation period there must be taken into consideration. This means that if Belgium is the requested state and if there is doubt as to whether a time lapse has occurred, the judicial authorities will have to ask for information from the requesting state on the acts which possibly interrupt the period of limitation and which would have been set in the requesting state so that these could be taken into consideration in the assessment of the time lapse.

According to Article 95(2) Schengen Implementing Convention it is the responsibility of the authorities of the requesting state to ensure that an entry is lawful under the laws of all the other Schengen states. This reversal of responsibilities (compared with traditional co-operation in criminal matters) is not criticised in Belgium.

77 See also on this point Interdepartmental Circular of 10 December 1998 on the consequences of the Schengen Convention in the area of border checks and the police and judicial co-operation, B.S. 29 January 1999 (in particular p. 2740-2741).

78 See: *V. Hreblay*, o.c., 165.

2. EU Convention Relating to Extradition between the Member States of the European Union of 27 September 1996

a) Ratification and Implementation

Belgium signed this Convention as long ago as 27 September 1996. It was neither ratified nor implemented in the Belgian legal system.

b) Provisos Made by Belgium

Belgium did not make any provisos with regard to the Convention.[79]

c) Impact on the National Law of Belgium

As the Convention of 27 September 1996 has not yet been incorporated into the Belgian national legal system, this Convention does not have any implications for Belgian extradition law for the time being.

Prior to the implementation of the Convention of 27 September 1996, the following can be stated in relation to the Extradition Act of 1874: With regard to extradition for conspiracy with or participation in a criminal organisation, it should be noted that in Belgium since the Law of 10 January 1999 (B.S. 26 February 1999) Sections 324b and 324c of the Penal Code make participation in a criminal organisation a penal offence. The problem therefore does not arise of Belgium being accused of not penalising the participation in criminal organisations. A different problem arises, however. Article 3 refers to a penalty threshold of a maximum of twelve months, while Section 1 Subsection 2 of the Extradition Act refers in this matter to "a term of imprisonment, the maximum duration of which is greater than one year." Under Section 25 of the Penal Code, a month is equal to thirty days, so Article 3 of the Treaty stipulates a minimum threshold of 360 days and Section 1 of the Extradition Act a minimum threshold of 365 days. Some co-ordination should be ensured here in all ways.

Extradition for tax offences has no longer been excluded in Belgium since 1985. It therefore appears that Article 12 of the Treaty will not directly result in problems.

The implementation of Article 7 in relation to prescription, on the other hand, does appear problematic, as it is directly contradictory to Section 7 of the Extradi-

79 Belgium naturally took part in the joint declaration of the Member States on the right of asylum.

tion Act: in view of the hierarchy of norms; this latter section is therefore best adapted. The contents of Article 7(2) of the Treaty appear to be compatible with the contents of the Extradition Act, as this stipulates that, in the event of a punishable act, offence or misconduct, committed on the territory of the requesting state or outside the territory of the requesting state, extradition is only possible if Belgian law permits the prosecution of these offences, committed outside Belgian territory, and insofar as reciprocity exists.

The principle of speciality is not codified as such in the Extradition Act, although case law and legal doctrine accept its validity in an absolute sense. Article 10 of the Convention contains a watering-down of the principle of speciality, of which Belgium will have to take account. It appears to us that, in view of the fact that Belgium made a proviso in relation to Article 28 of the European Convention on Extradition, with which the Convention of 1996 is associated, the Benelux Treaty on Extradition will continue to apply in relations between Belgium, the Netherlands and Luxembourg.

3. Convention on Simplified Extradition of 10 March 1995

a) Ratification and Implementation

Belgium signed this Convention on 10 March 1995. It was neither ratified nor implemented in the Belgian legal system.[80]

b) Provisos Made by Belgium

Belgium did not make any provisos with regard to the Convention.

c) Impact on the National Law of Belgium

As the Convention of 15 March 1995 has not yet been incorporated into the Belgian legal system, this Convention for the time being does not have any implications for Belgian extradition law.

80 Simplified extradition with regard to Belgium at present exists solely within the scope of extradition traffic between the countries of Benelux under Article 19 of the Benelux Treaty on Extradition.

As far as Belgium is concerned, accelerated extradition only exists at present within the context of Benelux. The provision on this matter from the Benelux Treaty on Extradition will, in our opinion - in view of the provisos formulated by Belgium in relation to Article 28 of the European Convention on Extradition - continue to apply, even after the implementation of the 1995 Treaty. Belgium will otherwise have to adjust to the contents of the 1995 Treaty, as soon as it has served the necessary international and national documents for implementation.

IV. Conclusion

While Belgium played an exemplary role in the area of international criminal law, including extradition law, in the nineteenth century, it has lost this role in the twentieth century. The Belgian Extradition Act of 15 March 1874, which largely repealed and replaced the Extradition Act of 1 October 1833, the first extradition law in the world, became obsolete over the years and less appropriate to the modern developments in international criminal and extradition law, particularly efforts to speed up procedures and to bring about gradation in the significance of any obstacles to extradition and in this way to make easier for persons to be extradited. On the eve of the twenty-first century, however, Belgium has caught up with international developments in extradition law again. Characteristic is the significant amendment in 1985 of the 1874 Act and the incorporation of the Schengen Implementing Convention into the Belgian internal legal system in 1993 and - eventually - of the European Convention on Extradition in 1997. These two conventions in particular - together with the Benelux Treaty on Extradition of 1962 - have increasingly taken over the role of the 1874 Act, which applies as a framework Act for the conclusion of international extradition conventions.[81] They have contributed to the modernisation of Belgian extradition law to a very great extent. It can therefore be justly stated that the conventions mentioned have played and continue to play a positive role with regard to Belgian extradition law.

Now that Belgian extradition law has been given fresh impetus, it seems logical to us that Belgium should also incorporate the other conventions that have been concluded and signed within the scope of the European Union and that will lead to extradition procedures becoming faster and more flexible on a large scale into its internal legal system in the short term. This particularly relates to the Convention of 10 March 1995 and the Convention of 27 September 1996. It also appears nec-

81 *C. van den Wyngaert/G. Stessens/T. Scheirs*, l.c., 171.

essary to us - also in order to counter contradictions between the 1874 Extradition Act and the conventions mentioned and to obtain more consistent legislation - for the 1874 Act to be adapted to the contents and wording of the international conventions that - in view of the hierarchy of legal norms - *de facto* and *de jure* prevail over it. This need was already recognised under the previous *Dehaene* Government. The then Minister of Justice *Stefaan De Clerck* assigned a research group at the University of Antwerp (U.I.A.) with the task of outlining a reform of the Extradition Act. The proposals that emerged from this exercise and contained in an internal research report dated 31 January 2000,[82] were largely based on the international conventions mentioned.[83] The research results have not yet been cast into a preliminary draft of the Act as was initially intended.[84] The present Minister of Justice has opted for a change in legislation on extradition to be fitted in with the creation of an integrated law on mutual assistance in criminal matters. Researchers at the Universities of Antwerp, Ghent and Liège were recently assigned with the task of developing the framework for such a law. The results of this study are expected towards the end of 2001.

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82 *C. van den Wyngaert/G. Stessens/I. van Daele*, Onderzoeksrapport in opdracht van de minister van Justitie, unpublished.

83 Ibid.

84 The outlines of the study report and therefore of the proposals are based on key conditions for extradition which are related to fundamental or, on the other hand, noteworthy interests of the wanted persons. Examples are the dual criminality requirement, the exception for political offences and the infringement of the right to a fair trial in the requesting state. Particularly the Indictment Division must test these core conditions in court: non-fulfilment of a core condition will entail refusal of extradition. The procedure before the Indictment Division should take place with full argument and the Minister of Justice should be bound by the declaration of admissibility by the Indictment Division. Alongside core conditions, there are conditions of expediency that, from the point of view of the wanted person, are not an interpretation of a subjective right and relate to considerations of expediency, considerations of criminal law policy or even to political considerations. Examples for this are the possibility of refusing extradition because a criminal investigation is taking place in the requested state against the wanted person or because the wanted person must undergo sentencing because of other acts. The judgment of conditions of expediency is left to the public prosecutor's office, while formally it is still the Minister of Justice who decides. Non-fulfilment of the conditions of expediency does not necessarily lead to refusal of extradition (the refusal is optional when conditions of expediency are involved in the proceedings), but can have the consequence that extradition is deferred or combined with other forms of mutual assistance, such as transfer of prosecution or execution of sentences. Through the reform proposals, the extradition procedure should be made simpler and more transparent in conjunction with the enforcement order procedure and any procedure relating to the refugee status of the wanted person now that the decision, arising from the procedure to be conducted, is essentially reduced to a pure judicial decision. (For a more in-depth discussion of the reform proposals, see: *C. van den Wyngaert/G. Stessens/ T. Scheirs*, l.c., 157-216).

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