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IMPROVING THE EFFECTIVENESS OF THE VIETNAMESE EXTRADITION SYSTEM - INSPIRATION FROM A COMPARATIVE STUDY WITH THE CASE OF THE EUROPEAN UNION

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Contents

INTRODUCTION

1. Overview of "Extradition"

The lack of a universally accepted definition has so far resulted in the existence of a variety of different concepts of extradition. The notion of extradition varies widely according to the divergent views of scholars, practitioners and provisions of domestic law concerning extradition as well as relevant treaties.[1] Generally, extradition may be understood as a formal surrender of an alleged criminal by a country to another country having jurisdiction over the crime charged for criminal prosecution or punishment.[2] In the context of international agreements, extradition is simply a formal surrender of a person by the requested state to the requesting state for prosecution or enforcement of a sentence. Accordingly, it represents the cooperation between two or more countries in combating crime by exercising judicial or administrative proceedings to both arrest and transfer fugitives. The legal basis for extradition collaboration among states are international instruments (bilateral or multilateral treaties), the principle of reciprocity, or national legislation.[3] As far as legal effectiveness is concerned, extradition, alongside mutual legal assistance in criminal matters, plays a crucial role in the fight against international crime generally and transnational crime in particular. With respect to historical development, ancient states have cooperated in extradition far back in noted human history. The oldest document of diplomatic history found which contains provisions regarding extradition of criminals is the peace agreement between King

[1] Pursuant to Harvard Research Draft, p.66: "Extradition is the formal surrender of a person by a State to another for prosecution or punishment"; O'Higgins, Vol. 1: "Extradition is the process whereby one State delivers to another at its request a person charged with a criminal offence against the law of the requesting State in order that he may be tried and/or punished"; M. Bassiouni, *International Extradition: United States Law and Practice,* 4th ed. (New York: Oceana, 2002), p.1, extradition is: "processes whereby one sovereign [state] surrenders to another sovereign [state] a person sought after, an accused criminal or a fugitive offender."; The United States Supreme Court in *Terlinden v. Ames,* 184 U.S. 270, 22 S. Ct. 484 (1901), p.289, extradition defined as "the surrender by one nation to another of an individual accused or convicted of an offence outside of its own territory and within the territorial jurisdiction of the other, which being competent to try and punish him, demands the surrender."

[2] See BLACK'S LAW DICTIONARY (9th ed. 2009), p. 655.

[3] See M. Cherif. Bassiouni, *International Extradition: United States Law and Practice,* Oxford University Press; 6 edition (February 3, 2014), p.2.

Rameses II of Egypt and the Hittite prince Hattusili III in 1258 B.C.[4] During the thirteenth century B.C., the Hittite and Egyptian empires fought an abundance of wars to acquire control of disputed territory. Finally, Rameses and Hattusili agreed to a peace treaty, under which the receiving king would not shelter any such criminals, but rather, deliver them up to the competent authorities in the country from which they fled. Since then, the nature scope and application of extradition law and extradition treaties has changed and widened. Before the eighteenth century, the history of international law witnessed very few treaties concerning international collaboration in the manner of ordinary crime. During this time, countries undertook extradition in the absence of treaties obligations with a view to delivering political enemies rather than normal criminals.[5] Subsequently, in the eighteenth century, although a considerable number of international agreements had been concluded, the cooperation between states was limited due to transport difficulties and the "general harshness" of the problem of fugitives.[6] Since the nineteenth century, the legal framework for extradition had dramatically changed with the center shifting to Europe. Taking into account the first use of "extradition" term, I.A. Shearer stated:

> It had been seen already that the concept of extradition at the beginning of the nineteenth century was not new, but the use of "extradition" word was. The word was imported into English from French, where it was first used officially in a *decrét* dated 19 February 1971. The word did not appear in a treaty to which France was a party until 1828. Extradition, as a term of art, cannot be said to have achieved official recognition in England until the passing of the Extradition Act in 1870, although there are occasional examples of its use in literature from 1839.[7]

Recently, the development of extradition legislation in the European Union is highlighted by two crucial legal instruments; the European Convention on Extradition 1957[8] and the Framework Decision on European Arrest Warrant and Surrender

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[4] See William Magnuson, "The Domestic Politics of International Extradition", Va. J. Int'l L. 52, 846 (2012); see also James H. Breasted, *A History Of Egypt From The Earliest Times To The Persian Conquest* (2d ed. 1916) p. 438; O.R. Gurney, *The Hittetes* (1952) p.63; George Liska, *Imperial America: The International Politics Of Primacy* (1967) pp. 13–14; James Pritchard, *Ancient Near Eastern Texts Relating To The Old Testament* (1992) pp.199–203. However, according to I.A.Shearer, peace treaty between Rameses II of Egypt and the Hittite prince Hattusili III was concluded in 1280 B.C. (see Ivan Anthony Shearer, *Extradition In International Law* (1971) p.5).

[5] I.A.Shearer, *supra* note 3, at 5-7.

[6] *Ibid*, p.10.

[7] *Ibid*, p.12.

[8] European Convention on Extradition opened for signature 13 December 1957, 359 UNTS 273 (entered into force 18 April 1960).

Procedures between Member States 2002.[9] Especially with the adoption of the Framework Decision, the traditional extradition process has been replaced by a "surrender procedure" that formally applies to member states of the European Union (EU). The new European extradition system, to some extent, is considered a revolution in the field of extradition. Specifically, this scheme performs a valuable function in the fight against serious cross-border crime, by aiding mutual recognition of judicial decisions through simpler, speedier extradition between member states. In the context of the EAW Framework Decision, the principle of mutual recognition is the "cornerstone" of EU judicial cooperation on criminal matters, particularly extradition. The execution of EAW based on a high level of confidence among member states has formed an effective "fast-track extradition system" between the member states.

Nowadays, globalization has created favorable conditions for crossing-border activities, yet has coincidentally increased greater chances for international crime.[10] Thanks to accelerated development and modernization of transport in the world, it is clear that today criminals can easily flee to a state other than their state of origin after committing crimes. Extradition has become an increasingly important instrument for every country in the world to cooperate in the effort to bring suspected offenders who flee abroad to justice.

Over the past few years, the extradition system of Vietnam has been improving since the adoption of the Law on mutual legal assistance in 2007. The Law formally established a legal basis for extradition procedure in Vietnam. In term of international law, there have been increasing bilateral extradition treaties and multilateral agreements containing extradition to which Vietnam is a signatory state. Besides, Vietnamese competent authorities have strengthened collaboration with foreign counterparts and the INTERPOL with an eye to arresting and surrendering fugitives. Apart from some achievements obtained, the Vietnamese extradition system also has its shortcomings and obstacles which have caused difficulties for Vietnamese competent authorities, especially in the process of implementing the domestic law and international law on extradition. In order to improve the effectiveness of the Vietnamese extradition system, the thesis will examine issues concerning extradition in Vietnam and connect them to the similar matters and experiences in the EU. Through assessing the research findings

[9] Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, OJ L 190, 18.7.2002, pp. 1-20.
[10] M. Cherif. Bassiouni, *supra* note 2, at 7.

obtained, the study provides suggested recommendations for the Vietnamese extradition system.

2. Impediments of Vietnamese extradition law and requirements for improvement

In practice, Vietnam began cooperating with foreign countries on extradition since a dozen of bilateral treaties on mutual legal assistance in criminal matters consisting of extradition content had been signed between Vietnam and former communist countries in Eastern Europe. After concluding the first treaty concerning extradition,[11] Vietnamese authorities issued the inter-ministry Circular No.139/TT-LB dated 12/3/1984 between Ministry of Justice, People's Supreme Procuracy, People's Supreme Court, Ministry of Interior (now the Ministry of Public Security) and Ministry of Foreign Affairs. This statute aimed to implement all bilateral treaties on mutual legal assistance between Vietnam and the Soviet Union and other socialist countries.[12] Notwithstanding, this document was only a guidance statute at ministerial level and lacked specific stipulations on the procedure of executing requests for extradition and mutual assistance in criminal matters. Subsequently, the Vietnam Criminal Procedure Code 2003 supplemented extradition provision in Chapter XXXVII (*extradition and transfer of dossiers, documents, exhibits of cases*). The Chapter consists of only two articles, particularly, Article 343 (*Extradition in order to examine penal liability or execute judgments*) and Article 344 (*Refusal to extradite*). This was the first time extradition had been defined and prescribed within a Vietnamese legal document with a high legal validity. Nevertheless, these articles are simply general principles for extradition, and it is impossible for Vietnamese competent authorities to apply these provisions in reality.[13] The fact is that, in this time, the extradition requests to and from Vietnam were carried out without the existence of a formal procedure as recognized by

[11] Treaty non legal mutual assistance in civil, family and criminal matters between the Socialist Republic of Vietnam and the Socialist Republic of Soviet Union (signed in Moscow on 10th December 1981 and ratified on 22nd).

[12] Under provisions of Circular 139, the People's Supreme Procuracy is responsible for extradition and criminal matters. Ministry of Interior (now is Ministry of Public Security) would execute requests from People's Supreme Procuracy related to extradition. Law on mutual legal assistance 2007 specified Ministry of Public Security is the focal point of extradition cooperation with foreign countries.

[13] See Nguyen Ngoc Anh, Nguyen Viet Hong & Pham Van Cong, *Dan do – Nhung van de ly luan va thuc tien* (Hanoi, Nha xuat ban CAND, 2006) [*Extradition – Theoretical and Practical Issues*, (Hanoi, People's Police Publisher, 2006)], p.129.

law.[14] As a result, it may have caused arbitrary or unlawful surrender to the requested person. To solve this problem and to meet the requirements of cooperation on mutual legal assistance in criminal matters and the fight against international crimes, the Vietnam National Assembly passed Law on mutual legal assistance in 2007. This law covers four major issues: mutual legal assistance in civil matters, mutual legal assistance in criminal matters, transfer of sentenced person and extradition. Accordingly, the Chapter IV (extradition) of this Law contains 17 articles (from Article 32 to Article 48). The year 2007 is considered as a milestone in extradition law in Vietnam because this was the first time a law document had formally stipulated extradition procedure. However, the implementation of Law on mutual legal assistance in practice was faced with an assortment of difficulties and problems. A number of principal issues with respect to traditional extradition procedure were not set forth in this Law, namely the absence of the process for Vietnamese competent authorities requesting other States to extradite, provisional arrest, political offence exception and simplified extradition. The lack of these issues resulted in contradictions between national law and bilateral extradition treaties to which Vietnam is a contracting party.[15] Despite the demand for international collaboration on extradition rising every year, according to an informal synthesis of the Vietnam Ministry of Public Security,[16] there have been only five extradition requests executed successfully in a period of seven years (from 2007 to 2014) since the adoption of Law on mutual legal assistance. The other cases are in the process of evaluating and examining related documents. Accordingly, Vietnam granted extradition upon the request of the Russian Federation to two its nationals (Poliakov Valeriy and Kosenok Alexey) and received three Vietnamese fugitives who were extradited by Russian competent authority (Nguyen Ha Lan and Pham Thuy Ngan) and Ukrainian counterpart (Le Quang Nhat). A handful other extradition cases are currently under consideration by Vietnamese competent authorities or counterparts of foreign countries.

On an international level, there are also some obstacles that should be taken into account. Most of the treaties on extradition or containing extradition provisions that were signed with the former communist states in the Eastern Europe are either obsolete

[14] Pursuant to the Report of the Interpol National Central Bureau for Vietnam, by the year 2005, Vietnam had extradited 55 fugitives to and from Vietnam since 1995 to 2005, see *Ibid*., at pp. 123-127.
[15] See more at Chapter 1 and Chapter 3.
[16] In accordance with Article 65 of the Law on mutual legal assistance 2007, Ministry of Public Security is the Vietnamese central authority for extradition.

or expired. Several new treaties on extradition have been concluded since 2003, but the limited number of them has not met the requirements of practice, whereas extradition requests have dramatically increased over the past few years. Multilateral treaties may well be a good option for international cooperation on extradition, but Vietnam has reserved most of the provisions concerning extradition when ratifying or accessing those treaties. All of the problems mentioned above have had adverse impacts on the development and effectiveness of Vietnamese extradition system.

3. Aims, Scope and Significance of the Research

3.1. Research Questions

With the obstacles and shortcomings that have been addressed in the above section, Vietnamese extradition law should be amended and supplemented with the aim of combatting crime, especially cross-border crime effectively. Vietnamese authorities have to resolve all challenges to practice as well as all impediments of extradition legislation. By focusing on requirements in order to improve Vietnamese extradition law in theoretical and practical perspective, the thesis will examine extradition law in Vietnam and the European Union through nine main issues concerning extradition (9 chapters). The study attempts to approach an appropriate standard of extradition law for Vietnam and to some extent, the EU legal framework is a consistent model. Accordingly, this study reaches beyond a comparative work by considering achievements and shortcomings experienced in the development of EU extradition law as an inspiration for suggesting appropriate recommendations to enhance the effectiveness of the Vietnamese extradition system. Bearing in mind this target, the study will respond to the following research questions:

1) What are the appraisal outcomes of Vietnamese extradition law in comparison to European Union extradition law?

2) What are the contemporary problems of Vietnamese extradition law?

3) What are recommendations to improve the effectiveness of extradition system in Vietnam?

3.2. Scope

The comparative studies of this thesis aim to review the achievements and obstacles of extradition law in Vietnam. The study focuses on extradition legislation and

experiences of Vietnam in comparison to the EU as well as its member States. In conclusion, the article bases itself on research findings to formulate concrete recommendations on how to enhance the effectiveness of extradition system in Vietnam. The questions that may be raised herewith are why EU law on extradition becomes the objective of comparative research and to what extent Vietnam can learn from EU's experiences. The study selects the European Union because this region holds a long tradition of extradition legislation. The first extradition act in the world was issued by Belgium in 1833 (The Belgian Extradition Act of October 1, 1833).[17] More importantly, this region is well-known for establishing an efficient mechanism to ensure human rights in criminal proceedings. Experiences and standards of EU extradition law are a good example for a country like Vietnam to study and apply similar appropriate provisions in Vietnam's situation. After 9/11 in the US, European Convention on Extradition 1957 was replaced by the Framework Decision of 13 June 2002 on European Arrest Warrant and surrender procedures between Member States (EAW Framework Decision). Accordingly, "surrender procedures" are applied in the EU zone instead of traditional extradition proceedings. The EAW Framework Decision was established on the basis of the mutual trust (or the mutual recognition) between the EU Member States. Mutual trust, or a "high level of confidence", has been a key component of the system of cooperation in criminal matters in the EU. The Council of the European Union has referred to mutual trust as the "bedrock" of the EAW Framework Decision. It provides the basis for mutual recognition, which in turn is considered to be the "cornerstone" of EU judicial cooperation in criminal matters. The EAW Framework Decision was the first instrument to be adopted on the grounds of the principle of mutual recognition of judicial decisions.[18] Although there are some controversial issues, the EAW Framework Decision has successfully established an effective "fast-track extradition system" between the EU Member States. Many scholars and practitioners agree that the new mechanism supports mutual recognition of judicial decisions through simpler, speedier extradition between states.

Due to the reasons above, the scope of this study are the provisions of the EAW Framework Decision concerning issues that are reviewed and evaluated in

[17] See Christine Van den Wijngaert, *The Political Offence Exception to Extradition: The Dedicate Problem of Balancing the Rights of the Individual and the International Public Order*, Deventer: the Netherlands, Kluwer, 1980, p.12.

[18] See http://ec.europa.eu/justice/criminal/recognition-decision/european-arrest-warrant/index_en.htm (access 09 December 2014).

corresponding chapters of the thesis. Besides, the instruments like European Convention on Extradition and other relevant treaties (bilateral and multilateral agreements) were addressed where possible as an illustration for the development of the EU extradition system. In terms of Vietnamese extradition law, the study focuses on provisions of the Law on mutual legal assistance 2007. The study also examines treaties on extradition to which Vietnam is a contracting party and takes them into consideration as a basis for the comparison with both relevant domestic law of Vietnam and the EU extradition law.

3.3. Significance

2015 saw the European Union (EU) and the Socialist Republic of Vietnam (Vietnam) celebrating their 25th anniversary of the establishment of diplomatic relations.[19] The EU is widely understood as an important partner holding the position as one of the largest foreign investors in Vietnam. On August 4th 2015, following two and a half years of intense negotiations, the EU and Vietnam finally reached a mutual agreement in principle for a free trade agreement (FTA). The main details of the agreement focussed on the removal of essentially all tariffs placed on goods traded between the two economies.[20] Positive co-operation between the two powers has, however, not only been limited to economic agreement but furthermore has reached out to developing a working relationship on projects concerning law reform. In this sense, the EU Delegation to Vietnam, working closely with Vietnamese authorities and under the EU-funded Strategic Dialogue program, are driving towards increasing mutual understanding between the two states alongside promoting good governance. Democratization and establishing respect for international human rights in Vietnam were also set as targets from the agreements.[21] Over the last two decades, Vietnam has signed treaties on mutual legal assistance containing extradition provisions with EU countries, namely Bulgaria, Czech Republic, Romania, and Poland. With others member states, most cooperation has been undertaken case-by-case by reciprocity rule. Thus, the research on Vietnamese extradition law in comparison to the EU extradition law is a significant body of work. It not only reviews *pros and cons* of both systems

[19] See http://25yearseuvietnam.vn/relations-beteween-the-eu-and-vietnam-during-the-last-25-years.

[20] See http://europa.eu/rapid/press-release_IP-15-5467_en.htm (accessed 4 August 2015).

[21] Vietnam Institute of State and Law with the support from the EU in Vietnam through project "Support to the EU – Vietnam Strategic Dialogue" has published the book: "Amending and Supplementing on Human rights, Fundamental rights and Duties of Citizen and other Regulations in 1992 Constitution" (available at http://eeas.europa.eu/delegations/vietnam/documents/eu_vietnam/hr_in_constitution_en.pdf).

with a desire to find solutions to current problems of Vietnam extradition but also seeks to enhance the cooperation in signing extradition treaties with the EU member states as well as upgrade and broaden the further relationship between Vietnam and the EU. The concept that the EU extradition system is the best model for Vietnam is arguably suspicious. Nevertheless, on the grounds of examining relevant aspects of EU law which are close to Vietnamese practice, "success or failure stories" of the EU would offer meaningful lessons for Vietnam to improve the effectiveness of the Vietnamese extradition system. Working with research findings from the study, Vietnam could learn how to deal with difficulties in the process of accessing or ratifying multilateral treaties as well as reserving incompatible articles of those treaties. According to the experience of the EU, mutual trust is the key solution for settling conflicts of law between member states and the principle of mutual recognition has become the cornerstone of the EAW Framework Decision applied between the EU Member States.

Currently, there have been very few studies on EU extradition law in Vietnam; particularly comparative studies on extradition law between the EU and Vietnam. Therefore, the research findings and the recommendations suggested in the thesis to some extent may provide a reference resource for Vietnamese scholars, legal experts or students who are looking for research concerning the EU extradition system. Moreover, as far as the regional framework for extradition is concerned, the Association of the South East Asian Nations (ASEAN)[22], of which Vietnam is a member State, is currently in the process of negotiating to establish a regional model treaty on extradition. There are certainly some notable similarities between the EU and the ASEAN. The EU and the ASEAN "share a commitment to regional integration as a means of fostering regional stability, building prosperity, and addressing global challenges. The EU fully supports ASEAN's renewed efforts to build a closer relationship amongst its member states. The EU wants a strong, united and self-confident ASEAN, proceeding with its own integration."[23] Consequently, similarly to the EAW Framework Decision, the thesis could offer the suggestion that ASEAN countries may apply the principle of mutual recognition in the process of drafting the regional treaty on extradition. Admittedly, the ASEAN to some extent differs from the EU in organization and level of integration.

[22] ASEAN is an international organization including 10 member states (Brunei, Cambodia, Indonesia, Lao PDR, Malaysia, Myanmar, the Philippines, Singapore, Thailand and Vietnam), see http://www.asean.org/asean/asean-member-states.

[23] See http://eeas.europa.eu/asean/index_en.htm (accessed 9 December 2014).

Nevertheless, the ASEAN countries could apply the spirit of mutual trust in whole or in part with a view step by step make the ASEAN become “an EU model in the Asia”, especially in the international cooperation regarding extradition.

4. Methodology

The thesis adhered to a variety of research methods in which comparative methodology plays a crucial role. The study compared two extradition laws systems, Vietnam and the EU, over principal issues through nine thesis chapters. Specifically, it examined the current application and implementation of extradition laws in each system, the obstacles faced by both sides and the solutions proffered by each system towards problems found. From the historical and social perspective, building on results of comparison between the two systems of extradition law, the study not only clarified the similarities and differences but also evaluated strengths and loopholes or limitations of each system; especially on Vietnam’s side. By assessing findings obtained by comparative work, the study suggested recommendations for improving Vietnamese extradition law and its implementation in practice.

Both primary and secondary sources were applied to elaborate the related content of the thesis. The author has attempted to consult as many types of primary sources as possible. Primary sources herein include multilateral international agreements, regional agreements or bilateral treaties regarding extradition. In terms of the EU law, the study focused on the European Convention on Extradition 1957 and Additional Protocols, Framework Decision of 13 June 2002 on the European Arrest Warrant and the surrender procedures between the Member States and other treaties regarding extradition. The EAW Framework Decision becomes the center of the evaluation because this document is currently entering into force among the EU Member States. Besides, the thesis also explored bilateral treaties on extradition between the EU states and reviewed other multilateral agreements containing extradition provisions which have impacts on the EU extradition system. Similarly, as far as the Vietnamese extradition system is concerned, the study identified multilateral and bilateral agreements in connection with the extradition of which Vietnam is a signatory country.

Apart from international law, the thesis analysed domestic legislation such as criminal codes, criminal procedure codes, and extradition laws are cited where is needed

throughout the entire study. The Vietnam Law on mutual legal assistance, the "backbone" of Vietnamese law on extradition, was reviewed and evaluated in every chapter of the thesis.

Secondary sources contained government reports, leading texts, case law, statutes, judicial and other relevant journals that were explored to support primary sources or illustrate where applicable.

Furthermore, the study discussed a number of instances related to extradition for the purpose of illustrating for evaluation in corresponding chapters. Several extradition cases in which Vietnam acts as the requesting or requested country were interpreted in some chapters. The findings of research created the basis for evaluating the applicability of the current Vietnamese extradition law in practice. Finally, the study suggested recommendations for the Vietnamese extradition system which bases on the research findings obtained in nine chapter of the thesis.

5. Structure

Aside from the introduction and the general conclusion, the thesis consists of nine chapters. Chapter 1 examines the relationship between international and national law on extradition. The study first distinguishes monism from dualism in international law. It then explores international law in comparison to domestic legislation regarding extradition. Subsequently, it reviews the relationship between multilateral and bilateral treaties on extradition or containing extradition provision in the case of the EU and Vietnam. On the basis of assessments, recommendations for Vietnamese extradition law are proposed in the last section.

Discussing the relationship between asylum law and extradition law is the primary study of Chapter 2. The article concentrates on identifying the impact of changes in extradition law in the EU on asylum law. It then analyzes asylum law in relation to extradition in Vietnam and finally offers the suggestion that Vietnam should approach the situation through access of the 1951 United Nations Convention Relating to the Status of Refugees and supplement provision regarding asylum in Vietnamese extradition law.

Chapter 3 firstly discusses the definition and role of disguised extradition. It then proceeds to focus on the evaluation of some cases concerning disguised extradition in the EU, for instance, Soblen, Bozano, Doherty as well as the practice of this issue in

Vietnam. Some recommendations are proposed in the conclusion that suggests how to deal with disguised extradition in Vietnam.

Some issues with respect to the research topic, namely extraditable offences, refusal of extradition and provisional arrest are respectively mentioned in Chapter 4, 5 and 6. Chapter 4 compares provisions on extraditable offences between Vietnamese law and the EU law. The study investigates methods used to specify punishable offences in treaties on extradition. It then assesses Vietnamese law regarding extraditable offences in comparison to EU law, particularly the EAW Framework Decision and suggests some recommendations for Vietnam's situation.

Chapter 5 examines grounds for extradition refusal in the EU and Vietnam. It reviews strengths as well as shortcomings and obstacles of both extradition systems. The study concludes with solutions suggested for amending and supplementing provisions of the Vietnam Law on mutual legal assistance 2007 in order to conform to bilateral extradition treaties to which Vietnam is a contracting party.

In Chapter 6, provisional arrest in extradition is analysed in the scope of the EU extradition system in comparison to Vietnam. The article explains the main reason leading to the absence of provisional arrest in Vietnamese extradition law and suggests to what extent this issue should be supplemented in the Vietnam Law on mutual legal assistance 2007.

Wrongful arrest and compensation responsibility is the issue related to a miscarriage of competent authorities involving apprehension of the requested person and their accountability. Chapter 7 explores wrongful arrest in extradition and devotes attention to this problem in the EU in comparison to Vietnam's situation. Finally, it proposes recommendations to establish a legal framework at a national as well as international level for this issue in the EU and Vietnam.

Chapter 8 and Chapter 9 both use the comparative and analytic method to assess matters concerning extradition proceedings such as concurrent request, re-extradition, temporary extradition, postponement of extradition, surrender of property, transit, language and expense in extradition in the EU and Vietnam. On the basis of evaluations regarding obstacles and shortcomings of these issues, they suggest recommendations for improving the effectiveness of provisions regarding extradition process in Vietnamese extradition law.

The Conclusion presents a summarization of the findings achieved from the above chapters. It provides the answers to the three questions posed in the introduction, firstly regarding the impediments of Vietnamese extradition law and secondly in connection with the outcome of a comparison between Vietnamese law and EU law on extradition. The synthesis ends with constructive recommendations for improving the effectiveness of the Vietnamese extradition system.

Chapter 1
RELATIONSHIP BETWEEN NATIONAL LAW AND INTERNATIONAL LAW ON EXTRADITION

(*including relationship between extradition treaties and multilateral agreements that contain extradition provisions***)**

Introduction

Amongst the various countries of the world, it is apparent that different doctrines of the relationship between international law and national law exist. The role and legal validity of the national law and international law depend on what type of law system a country follows. Concerning this context, there are two main groups of theories: monism and dualism.[1] Some countries consider international law and national law to be acknowledged as two separate systems of law.[2] These countries thus have to enact an internal law to implement treaties. The others hold the view that a treaty (international law) would automatically become a part of the national law when a country has ratified or accessed this treaty.[3] In this sense, authorities of that country could directly apply provisions of an agreement in the same vein as with domestic law. Although there is no consistent understanding of the role of international law in relation to national law, many countries and researchers would agree that a nation has an obligation to obey the treaty of which it is a contracting party. This responsibility stems from the principle of *Pacta sunt servanda as* prescribed in Article 3 of *Vienna Convention on Law of Treaties* (United Nation, 1969).[4] Pursuant to this article, every treaty in force is binding upon the parties to it and must be performed by them in good faith. Besides, a party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.[5] In practice, to implement international law, here as treaties, nations may decide to directly apply provisions of those treaties or transform them into internal law. In

[1] See S.K.Verma, *An introduction to Public International Law*, Prentice-Hall of India Pvt.Ltd (October 30, 2004), p.48.

[2] The theory of dualism, for example, contends that international law and domestic law are separate legal orders. Accordingly, international law cannot "operate directly" in the domestic sphere, needing to be "transformed" into domestic law by the legal acts of States (see R. Balkin, "International law and domestic law", in S. Blay, R. Piotrowicz and M. Tsamenyi (eds), *Public International Law: An Australian Perspective* (Melbourne, Oxford University Press, 1997), p.119).

[3]The theory of monism views "all law as part of the same universal normative order". As such, international law does not need to be "transformed" to apply in the domestic legal order (Ibid, p.120).

[4] Vienna Convention on the Law of Treaties (the Vienna Convention) (Vienna, 23 May 1969, 1155 UNTS 331).

[5] Art.27 of Vienna Convention on Law of Treaties.

some cases, competent authorities of a country are likely to issue legal documents for implementing agreements which entered into force within that country.

In international criminal justice, extradition is a significant tool that is provided in various international instruments with a view to cooperating in the fight against crime between countries in the world. The legal basis for extradition are agreements concerning extradition (multilateral and bilateral treaties) and domestic law on extradition. Each country has its own laws regarding extradition procedure and at the same time it is also a member state of an extradition treaty. Around this topic, different countries or territories have specific norms when dealing with the relation between international law and national law on extradition as well as the conflict of law concerning this issue. The first section of this chapter will examine concepts of monism, dualism and the present theory related to these matters. In the next section, the framework of extradition will become the objective of the discussion. Section three and four will take into consideration the relationship between international law and national law on extradition in Vietnam and the EU respectively. The last section continues the comparative work on Vietnam and the EU laws with respect to the relation between treaties on extradition and multilateral treaties containing extradition provisions. Some recommendations drawn from the result of discussions will be addressed in the conclusion.

1. Monism, Dualism and new Approach

Monism and Dualism are widely understood as the two crucial theories of the relation between the international law and national law of a country. Monists view international and national law as parts of the same legal order, and there is no need for any domestic implementation. Where a State ratifies or accesses a treaty, it is directly applicable to the national legal system without a transformation procedure. According to the monist theory, international law is superior to domestic law. In the case of any conflict between them, international law would prevail. H. Kelsen, a famous monist expert, stated that international law and national legal orders are both components of a single overarching legal order where each national legal order thus function as only partial order of the predominant legal order in place.[6]

[6] See H. Kelsen, *Reine Rechtslehre* 16 *et seq*. (1934), at 138, 150.

Dualists regard international law and municipal law as independent systems separate from each other and having different spheres of application.[7] Under the dualist theory, domestic laws regulate the internal activities of a state and its constituents, and international law thus governs the relations between states. International law must therefore be transferred into the internal law before creating individual rights.[8]

The doctrines of incorporation and transformation reflect the application of monist and dualist theories concerning the status of international treaties in national law. The incorporation theory, which reflects the monist theory, proclaims that a rule of international law becomes part of the national law without being adopted by the legislature or the courts of the state.[9] When a treaty is ratified, it will be incorporated into the domestic legal system. In this case, the international law is considered to be self-executing. Specifically, if a state ratifies a treaty, it will be incorporated into municipal law immediately on coming into force.

Conversely, the doctrine of transformation, which illustrates the dualist theory, interprets that the rules of international law do not become part of the national law until they have been expressly and deliberately enacted into domestic law by the use of the appropriate constitutional machinery. For instance, it may be exercised by the passage of a law through the state's legislature.[10] Without transformation, the rights and obligations of international treaties may not be enforced in the domestic sphere; they operate only within international dispute mechanisms.[11]

Recently, in Europe, a new approach has been developed to review the relationship between international law and national law, specifically towards the interaction of European law, international law and domestic law of European Member States. Theories of monism and dualism seem unable to explain the complex relationship between national law and international law adequately in the rapidly changing world of today.

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[7] See Fitzmaurice, G., 1957. "The general principles of international law considered from the standpoint of the rule of law", in D.J. Harris, 1998. *Cases and Materials on International Law*, Fifth edition, Sweet & Maxwell, London, pp. 68–70.

[8] See Balkin, R., 1997. 'Chapter 5: International law and domestic law', in S. Blay, R. Piotrowicz and B.M. Tsamenyi, *Public International Law: an Australian perspective*, Oxford University Press, Melbourne, 119–45.

[9] Shaw, M., 1997. *International Law*, Fourth edition, Cambridge University Press, Cambridge.

[10] Ibid.

[11] Balkin, *supra* note 8.

Nijman and Nollkaemper interpret this view as follows:

"The political and social context that inspired the original theories of dualism and monism is a very different one from that of today. The emergence of new non-legal developments, different from those that inspired traditional monism and dualism, call for alternative theoretical approaches that allow us to systematize, explain, and understand changes in the relationship between international and national law and, at the same time, to give direction to the future development of international and national law. […] Increasing the cross-border flow of services, goods and capital, mobility, and communication have undermined any stable notion of what is national and what is international."[12]

For further discussion, Von Bogdandy argued that:

"Monism and dualism should cease to exist as doctrinal and theoretical notions for discussing the relationship between international law and internal law. Perhaps they can continue to be useful in depicting a more open or more hesitant political disposition toward international law. But from a scholarly perspective, they are intellectual zombies of another time and should be laid to rest, or deconstructed."[13] In Von Bogdandy's view, the use of the concept of "pluralism" drives higher focus to the interaction that plays between national and international legal orders.

Another scholar, A. Wessel, holds the view that within academic discourse the monism/dualism discussion appears to have in fact been replaced by a constitutionalism/pluralism debate. Thus, an alternative to deconstructing and understanding the relationship between international and European law may be found with the adoption of 'pluralism' as offered by Wessel's analyses.[14]

[12] J. Nijman and A. Nollkaemper, in the introduction to their edited volume *New Perspectives on the Divide between National & International Law*, Oxford: Oxford University Press, 2007, p. 10.

[13] A.Von Bogdandy, "Pluralism, Direct Effect, and the Ultimate Say: On the Relationship Between International and Domestic Constitutional Law", *International Journal of Constitutional Law* (I.CON), 2008, pp. 397-413, at 400.

[14] Ramses A. Wessel, "Reconsidering the Relationship between International and EU Law: Towards a Content-Based Approach?" in Enzo Cannizzaro, Paolo Palchetti and Ramses A. Wessel (Eds), *International Law as Law of the European Union*, Leiden/Boston: Martinus Nijhoff Publishers, 2011, 10.

2. National law and International law on extradition – Legal basis for extradition

2.1. Under international law, there is no general duty to extradite.[15] National law, international law and the principle of reciprocity form the basis for every cooperative activity amongst States, intergovernmental organizations or international organizations, in the sphere of combating crime, mutual legal assistance and especially extradition. The legal obligation to extradite exists only where States have signed, ratified or accessed bilateral or multilateral extradition treaties, or if they have become parties to international instruments which institute a duty to extradite on particular offenses.[16] In this case, national law plays a role as the framework for conditions and procedures for extradition or the incorporation of treaties.

Many States have enacted specific extradition law or provisions in relation to extradition in legislation on criminal procedure or penal codes; which enable States to extradite a fugitive to the requesting State. The domestic law establishes related issues for the purpose of dealing with incoming and outgoing requests for extradition and furthermore, the type of requests that can be processed and how those requests are transmitted.

2.2. Treaties have been utilized as a basis for international cooperation of extradition throughout the world for many years. Bilateral agreements establishing a reciprocal duty to extradite have traditionally been the preferred legal instrument used by States in their extradition collaboration. In some countries, national law requires the existence of an extradition treaty as a precondition for permitting the surrender of a fugitive to another State. The requirement for agreements has long been the case, in particular, for countries in the common law tradition, still applying in the United States of America, but also in some civil law countries such as Brazil, the Netherlands or Slovenia.[17] Nevertheless, a nation is not able to negotiate or sign a bilateral agreement with all of the other countries in the world. Furthermore, some international issues, extradition being an example, would be resolved more efficiently by global or regional instruments. Hence, in addition to bilateral treaties, an increasing number of multilateral

[15] See M.C. Bassiouni, International Extradition and World Public Order, A.W. Sijthoff, Leyden (1974), at pp. 3–4; G. Gilbert, Transnational Fugitive Offenders in International Law, Martinus Nijhoff Publishers, The Hague, Boston, London, 1998, p. 47

[16] See Sibylle Kapferer, "Interface between Extradition and Asylum", UNHCR's Department of International Protection, PPLA/2003/05, p 3.

[17] Ibid, at 4.

extradition agreements and conventions have established the mutual duty for States parties to extradite under the conditions set out by the respective instrument. Historically, the existence of multilateral treaties on extradition are as follows:

• Montevideo Convention on Extradition (Inter-American) (1933)[18]

• Convention on Extradition of the League of Arab States (1952)[19]

• Convention on Extradition of the *Organisation Africaine et Malgache* (OCAM) (1961)[20]

• Inter-American Convention on Extradition (1981)[21]

• Convention on Legal Aid and Legal Relations in Civil, Family and Criminal Cases of the Commonwealth of Independent States (1993).[22]

• Economic Community of West African States (ECOWAS) Convention on Extradition (1994)[23]

• South African Development Community (SADC) Protocol on Extradition (2002)[24]

• States members of the Commonwealth are bound by the London Scheme for Extradition within the Commonwealth, formerly known as Commonwealth Scheme on the Rendition of Fugitive Offenders.[25] Though not formally a treaty, this instrument, adopted in 1966 and last amended in November 2002, is binding for Commonwealth countries and contains guidelines to implement in their extradition laws and agreements.[26]

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[18] Montevideo Convention on Extradition, Dec. 26, 1933, 49 Stat. 3111, reprinted in 28 AJIL 65 (1934).

[19] Arab League Extradition Agreement (1952), League of Arab States, Collection of Treaties and Agreements, No. 95 (1978).

[20] Convention on Judicial Cooperation of the Organization Communale Africaine et Malgache (OCAM), Sept. 12, 1961, available at Journal Officiel de la R´epublique Malgache, Dec. 23, 1961, at 2242.

[21] Inter-American Convention on Extradition, Feb. 25, 1981, OAS T.S. No. 60, reprinted in 20 ILM 723 (1981), available at http://www.oas.org/juridico/english/treaties/b-47.html (last visited on Dec. 30, 2014).

[22] Convention adopted at Minsk, Belarus, on 22 January 1993 and amended on 28 March 1997. Came into effect on 19 May 1994. (Signed by Armenia, Belarus, Kazakhstan, Kyrgyzstan, Moldova, Russia, Tajikistan, Turkmenistan, Uzbekistan and Ukraine).

[23] ECOWAS Convention on Extradition, A/PI/8/94, Aug. 6, 1994, available at http://documentation.ecowas.int/download/en/legal_documents/protocols/Convention%20on%20Extradition.pdf (last visited on Nov. 23, 2013).

[24] Southern African Development Community (SADC), Protocol on Extradition, Oct. 3, 2002, available at http://www.iss.co.za/af/regorg/unity_to_union/pdfs/sadc/protextra.pdf (last visited on Feb. 5, 2012).

[25] Commonwealth Scheme for the Rendition of Fugitive Offenders, May 3, 1966, as amended in 1990 and then renamed as London Scheme for Extradition within the Commonwealth in Nov. 2002, LMM (90)32, available at http://www.oas.org/juridico/english/mesicic3_jam_london.pdf (last visited on Nov. 1, 2013).

[26] London Scheme for Extradition within the Commonwealth, Nov. 2002, LMM (90)32, available at http://www.oas.org/juridico/english/mesicic3_jam_london.pdf (last visited on Nov. 1, 2013) (related to Commonwealth Scheme for the Rendition of Fugitive Offenders, May 3, 1966).

With a view to creating a model framework for international extradition, the UN General Assembly adopted a Model Treaty on Extradition[27] in 1990, together with a Model Treaty on Mutual Assistance in Criminal Matters, it intended to be "used as a basis for international cooperation and national action against organized crime and terrorist crime".[28] It must be acknowledged, however, that the treaty was not binding and no universal general extradition convention has yet been established. Partly due to different traditions under common and civil law and partly due to existing variations within their respective legal systems, the approaches of distinct States remain to differ widely in particular areas despite a collective interest in effective extradition relations.

2.3. The principle of reciprocity has long been an established principle in the relations of States with respect to matters of international law and diplomacy. It is a promise that the requesting State will provide the requested State the same nature of assistance in the future; should the requested State ever be asked to do so. This principle is usually incorporated into treaties, memorandums of understanding and domestic law. There is no rule of international law which prevents States from extraditing in the absence of an agreement.[29] In many States, the national legislation provides for the possibility of surrendering without a pre-existing agreement. Sometimes, this is subject to the explicit condition of reciprocity principle.

Reciprocity is particularly popular in States with a civil law tradition; where it is viewed as a binding covenant. In common law countries, it is not regarded as an obligatory principle.[30] Some countries use their domestic legislation as a basis for extradition and apply the principle of reciprocity as a precondition to considering extradition to another State.[31] The Organized Crime Convention[32] specifically mentions

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[27] Model Treaty on Extradition, Dec. 14, 1991, UNGA Res. 45/116, annex, 45 U.N. GAOR Supp. (No. 49A), at 212, U.N. Doc. A/45/49 (1990), reprinted in 30 ILM 1407, available at http://www.un.org/documents/ga/res/45/a45r116.htm (last visited on Nov. 10, 2013).

[28] Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana 27 August–7 September 1990: report prepared by the Secretariat, at para. 245, cited in United Nations, International Review of Criminal Policy Nos. 45 and 46, 1995, at p. iv.

[29] See P. Malanczuk, Akehurst's Modern Introduction to International Law, 7th rev. edn., Routledge, London, New York, 1997, p. 117.

[30] See UNODC, *Manual on Mutual Legal Assistance and Exradition*, United Nation, Vienna, 2012, p. 23.

[31] Japan provides international cooperation (mutual legal assistance and extradition) based on its domestic laws that consider assurances of reciprocity as preconditions to providing such assistance (see art. 3 (2) of the Law of Extradition, is available at http://www.refworld.org/docid/3ed8e14d4.html, and art. 4(ii) of the Act on International Assistance in Investigation and Other Related Matters, is available from the Ministry of Justice of Japan at www.moi.go.jp/ENGLISH).

[32] United Nation, Convention against Transnational Organized Crime, UN Doc. A/RES/55/25 at 4 (2001).

the principle of reciprocity in its article 18, paragraph 1, and obliges all States parties to adhere to it.[33] When no treaty is established, the principle can function as a useful tool when considered as a stand-alone promise of reciprocity of aid between States if the need arises in the future. It is understood that, as with any pledge, both sides should endeavor to retain the promise of the agreement as well as possible.

Although reciprocity is one of the essential principles of international law, it is basically a "diplomatic promise" and thus not binding to concerned countries in every circumstance. Treaties are still favored legal basis for international cooperation between States in mutual legal assistance in criminal matters and extradition.

3. Relationship between national law and international law on extradition in Vietnam

3.1. International law and national law in Vietnam. Monism or Dualism?

The question of the relationship between international and national law is resolved in a variety of ways. Every State has its own rule of internal law and specific statutory provisions for dealing with these matters. Over the past years, the application and legal validity of the international law in comparison with the national law have raised concerns and varying views amongst Vietnamese practitioners and scholars, as well as lawmakers. Doan Nang, the head of the legal group within the Ministry of Science, Technology and Environment, stated that the socialist legal system dictates that national sovereignty and self-determination must be respected when entering and implementing international treaties.[34] His view, supported by various other Vietnamese bureaucrats, indirectly claims that Vietnam is a dualist country.

Regarding the issue at hand, Vietnam firstly issued the *Ordinance on the Conclusion and Implementation of Treaties* in 1989.[35] The Ordinance included 21 articles that established the legal basis and procedures for competent authorities of Vietnam to negotiate, access, ratify and implement treaties in practice. Generally, the provisions of the 1989 Ordinance were not sufficiently established and did not clearly identify the status of international law in the Vietnamese law system. On 20 August

[33] The article states, in part, that States "shall reciprocally extend to one another similar assistance".

[34] See Doan Nang, 2002. "Right settlement of relationship between international and national laws", *Legislative Studies Magazine*, 5/6:39 (translated into English) and Doan Nang, 1998. "Perfecting the legislation on signing and implementing international agreements", *Vietnam Law & Legal Forum*, May:18.

[35] Ordinance No. 25/LCT/HDNN8 on the Conclusion and Implementation of Treaties of the Socialist Republic of Vietnam, adopted by the Council of State 25/10/1989.

1998, a new *Ordinance on the Conclusion and Implementation of Treaties*[36] was passed by the Vietnamese Standing Committee of National Assembly and replaced the Ordinance 1989 with more specific provisions clarifying those rules that were previously unclear. The ordinance specified the mechanism in which Vietnam can apply for the negotiation, signature and ratification of treaties. Furthermore, it scrutinized the effect of agreements on domestic law; providing detail for the exercise of constitutional powers. The Ordinance consisted of six chapters which were further subdivided into 35 articles. Unfortunately, in this new Ordinance, some important issues were not specified and one of the most notable shortcomings of such was the interaction between international law (treaties) and national legislation and thus how to resolve distinctions and conflicts between them concerning the same legislative matter in practice. The Ordinance 1998 also does not clearly set forth whether a treaty that has been ratified is self-executing or requires the enactment of legislation to incorporate the treaty obligations into Vietnamese domestic law.[37]

In the year 2001, Vietnam formally became a Member State of the Vienna Convention on Law of Treaties.[38] On the ground of principles and provisions of the Vienna Convention as well as objective requirements of law and practice in Vietnam, the *Law on Conclusion, Accession and Implementation of Treaties* was adopted by the Vietnamese National Assembly in 2005.[39] Under this law, the first time the relation between international law and national law was referred to is found in Article 6 (treaties and provisions of domestic law).[40] Pursuant to paragraph 2 and 3 of this article,

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[36] Ordinance on the Conclusion and Implementation of Treaties, adopted by the Standing Committee of National Assembly on 20/8/1998, entried into force 24/8/1998.

[37] See more in Tannetje Bryant and Brad Jessup, "Fragmented pragmatism: the conclusion and adoption of international treaties in Vietnam" in Nicholson, P. and Gillespie, J. (eds), *Asian Socialism & Legal Change: The Dynamics of Vietnamese and Chinese Reform*, Asia-Pacific Press, Canberra, 2005, pp.189-199.

[38] Vienna Convention on the Law of Treaties, 1155 U.N.T.S. 331, 8 I.L.M. 679, entered into force Jan. 27, 1980.
See Vietnam's accession in https://treaties.un.org/Pages/ViewDetailsIII.aspx?&src=TREATY&mtdsg_no= XXIII~1&chapter=23&Temp=mtdsg3&lang=en (accessed 10/3/2014).

[39] National Assembly, Law on Conclusion, Accession and Implementation of Treaties was adopted on 14/6/2005, entered into force 01/01/2006.

[40] Article 6. Treaty and provisions of domestic law
(1). In cases where a legal document and a treaty to which the Socialist Republic of Vietnam is a party, contains different provisions on the same matter, the provisions of the treaty shall prevail. (2). The promulgation of legal documents must ensure that they shall not obstruct the implementation of treaties which contain provisions on the same matter and to which the Socialist Republic of Vietnam is a party. (3). On the basis of the requirements, contents and nature of a treaty, the National Assembly, the State President or the Government, when deciding to consent to be bound by the treaty, shall also decide on the direct application of the whole or part of the treaty to agencies, organizations and/or individuals in case

international law holds higher legal validity as a result of a priority principle applied to international law in cases where there are different provisions on the same matter between a treaty and a domestic legal document. In addition, Vietnamese authorities could, on the basis of requirements and nature of a treaty, decide to apply in whole or in part of the agreement to agencies, organizations and/or individuals in case the provisions of the treaty are explicit and specific enough for execution. If not, the authorities are likely to amend and supplement internal law for implementing the treaty. It means that, although not mentioning directly, enforced international law automatically becomes a part of national law. In this sense, it could be understood that Vietnam has a monistic system. After treaties are in force with Vietnam, competent authorities may apply directly whole or part provisions of these treaties or in other words, the self – executing rule[41] will be used. Under provisions of the Vietnamese Law on Conclusion, Accession and Implementation of Treaties, a bilateral or multilateral treaty will take effect with Vietnam when it is ratified (if Vietnam is a signatory party) or is decided to be accessed by the National Assembly or the President of Vietnam. Article 32(3)(c) of this law addresses that the ratification of a treaty shall have the contents including the decision on the direct application of the whole or part of that treaty. It also consists of the decision or proposal to amend, supplement, cancel or promulgate legal documents of the National Assembly and the National Assembly Standing Committee for the implementation of the ratified treaty. This above content is also mentioned in Article 50 (*Competence to decide on accession to multilateral treaties and contents of such decisions*). When Vietnam concludes a bilateral treaty with another country, the time and conditions of "entry into force" on the treaty with two contracting States is regulated in the articles of that treaty. For example, Article 20(1) of the Treaty on extradition between Vietnam and Korea[42] provides: "*This Treaty is subject to ratification. This Treaty shall enter into force upon the exchange of the instruments of ratification*". The provision means that from the time the two parties

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the provisions of the treaty are explicit and specific enough for implementation; or decide or propose to amend, supplement, cancel or promulgate legal documents for the implementation of the treaty.

[41] Carlos Manuel Vázquez defined: At a general level, a self-executing treaty may be defined as a treaty that may be enforced in the courts without prior legislation by Congress, and a non-self-executing treaty, conversely, as a treaty that may not be enforced in the courts without prior legislative "implementation", see Carlos Manuel Vázquez, "The Four Doctrines of Self-Excuting Treaties", 89 *Am. J. Int'l L.* (1995), p. 695 (available at http://scholarship.law.georgetown.edu/facpub/1016); see more Thomas Buergenthal, "Self-Executing and Non-Self-Executing Treaties in National and International Law", 235 RECUEIL DES COVRS 303, 317 (1992 IV).

[42] Treaty on extradition between the Socialist Republic of Vietnam and the Republic of Korea, signed 15/9/2003.

have handed over the ratification instruments, the treaty immediately becomes self – executing to Vietnam and Korea.

Interestingly, in contrast to the clear evidence of monism, Article 6(3) of Law on Conclusion, Accession and Implementation of Treaties also addresses that the National Assembly, the State President or the Government, may decide or propose to "promulgate legal documents for the implementation of the treaty". In this extent, the law allows international law to incorporate into national law through transformation procedure. With this provision, the law accepts that the dualism rule may be applied in certain cases. Consequently, it may name the "partly monist" mechanism in the case of Vietnam.

3.2. Vietnam domestic law and international law on extradition

As far as the framework of extradition is concerned, there are domestic laws and bilateral treaties on extradition in Vietnam.[43] The relation between the national and international law on extradition, the same as relevant issues, is governed by the provisions of Law on Conclusion, Accession and Implementation of Treaties.

In domestic law, extradition is defined and stipulated in the *Criminal Procedure Code in 2003*[44] and *Law on mutual legal assistance in 2007*.[45] The Criminal Procedure Code in 2003 specifies extradition in Chapter XXXVII (*extradition and transfer of dossiers, documents, exhibits of cases*) with two articles: Article 343 (*Extradition in order to examine penal liability or execute judgments*) and Article 344 (*Refusal to extradite*). It is the first time extradition has been defined and prescribed within a legal document in Vietnam that holds high legal validity. Nevertheless, these articles are simply general principles of extradition and lack a specific procedure for execution of extradition request. Consequently, it is difficult for Vietnamese authorities to apply these provisions in reality.[46] To solve this problem and responding to the request of the practice of co-operation together with the requirement of mutual legal assistance in

[43] At present, Vietnam is not a member State of multilateral or regional treaties on extradition, but multilateral treaties containing extradition provisions. This issue will be discussed in the following section of this Chapter.

[44] National Assembly, Criminal Procedure Code, adopted 26/11/2003, entried into force 01/7/2004.

[45] National Assembly, Law on Mutual Legal Assistance, adopted 21/11/2007, entried into force 01/7/2008.

[46] See Nguyen Ngoc Anh, Nguyen Viet Hong, Pham Van Cong, *Dan do – Nhung van de ly luan va thuc tien*, (Hanoi, Nha xuat ban CAND, 2006), tr.129 [Nguyen Ngoc Anh, Nguyen Viet Hong, Pham Van Cong, *Extradition, Theoritical and Practical Issues*, Hanoi, People's Police Publisher, 2006, p.129.]

criminal matters and fighting crimes, the Vietnamese National Assembly adopted the Law on mutual legal assistance in 2007. This law covers four major issues: mutual legal assistance in civil matters, mutual legal assistance in criminal matters, transfer of sentenced person and extradition. Provisions for extradition are enshrined in Chapter IV containing 17 articles (from Article 32 to Article 48). Accordingly, the chapter provides the order and procedures for conducting extradition requests, including specific issues: extradition for penal liability examination or execution of criminal judgments; cases of being extradited; non-prosecution and non-extradition to a third country; refusal of extradition for foreign countries; dossiers requesting for extradition; written request for extradition and accompanying documents; receiving extradition requests; considering extradition requests of many countries for a person; decision to extradite; escorting extradited persons; postponement of the execution of the decision to extradite and temporary extradition; re-extradition; transfer of objects and exhibits related to the case; transit and costs of extradition. Under Law on mutual legal assistance, an extradition request is examined and considered on the basis of requiring dossiers for extradition. The Ministry of Public Security of Vietnam is the focal point for receiving dossiers, executing decisions on extradition and sending the supported documents for extradition requests to the competent authorities of foreign countries.[47] Since then, Vietnamese authorities have issued several under-law documents such as Decree and Circular to guide and implement provisions of the law. [48]

On an international level, bilateral treaties to which Vietnam is a contracting party and consisting of provisions on extradition can be divided into two categories: bilateral treaties on mutual assistance in criminal, civil and family matters which contains extradition provisions and bilateral treaties on extradition. By the year 2003, Vietnam had signed 12 treaties on mutual legal assistance in civil, family and criminal

[47] Art.65 Vietnam Law on mutual legal assistance 2007.

[48] For instance, Nghi đinh so 92/2008/NĐ-CP ngay 22/8/2008 cua Chinh phu huong dan ap dung mot so quy đinh của Luat tương tro tu phap [Decree No.92/2008/ND-CP dated 22 August 2008 issued by Government on guiding the application of some provisions of Law on mutual legal assistance]; Thong tu lien tich so 15/TTLT-BTP-BNG-TANDTC ngay 15/9/2011 cua Bo Tu phap, Bo Ngoai giao và Toa an nhan dan toi cao huong dan ap dung mot so quy đinh ve tuong tro tu phap trong linh vuc dan su cua Luat tuong tro tu phap [Inter-Circular No.15/TTLT-BTP-BNG-TANDTC dated 15 September 2011 issued by Ministry of Justice, Ministry of Foreign Affairs and the People's Supreme Court on guiding the application of some provisions on mutual legal assistance in civil matters of Law on mutual legal assistance]; Thong tu so144/2012/TT-BTC ngày 04/9/2012 cua Bo Tai chinh quy đinh viec lap du toan, quan ly, su dung va quyet toan kinh phi bao đam cho cong tac tuong tro tu phap, co hieu luc thi hanh tu 20/10/2012 [Circular No.144/2012/TT-BTC dated 04 September 2012 issued by Ministry of Finance on drafting estimation, management, using and final settlement of expenses for mutual legal assistance.]

matters which contained provisions regarding extradition.[49] In these treaties, the issue of extradition was enshrined in a separate chapter or a section of mutual legal assistance in criminal matters with the principal contents of extradition included, for instance; obligation to extradite, refusal of extradition, requests for extradition, provisional arrest, surrender, transit and extradition expenses. Generally, the aforementioned 12 treaties were mostly those between the former Soviet Union and socialist countries in the Eastern European countries during the 1980s and the early 1990s. It explains why the majority of bilateral treaties Vietnam were signed in this period following the uniform pattern of the Socialist Bloc. Accordingly, "the treaties in which the extradition provisions are contained deal with other matters as well; extradition forms but one chapter of a treaty which makes comprehensive provision for legal assistance in civil, family and criminal cases".[50] Currently, despite political changes, almost all contracting countries agreed to succeed the signed bilateral treaty with Vietnam. Some of them suggested to amend the signed agreement or to negotiate a new bilateral treaty.[51]

Apart from the 12 treaties noted above, by the year 2013, Vietnam has negotiated and concluded nine (9) separate treaties on extradition with South Korea, Algeria, India, Indonesia, (entered into force); with Australia, Hungary, Cambodia (official signed) and China, South Africa (are preparing for official signing).[52]

The proceedings of extradition in Vietnam would be executed under provisions of the domestic legislation, specifically the Law on mutual legal assistance 2007. Accordingly, the law underlines the framework for extradition collaboration in international treaties to which Vietnam is a signatory. Besides, this law also considers the reciprocity principle[53] as a legal measure to cooperate with other countries in criminal matters, particularly extradition. In practice, it is not a simple task to apply reciprocity in extradition process due to this principle concerning diplomatic policies and traditional relations between countries. Besides, other factors should also be taken

[49] Vietnam and South Korea concluded Treaty on Extradition in the year 2003. This is the first Treaty on extradition Vietnam signing with a foreign country. 12 countries are Soviet Union, Ukraine, Belarus, Czechoslovakia, Poland, Mongolia, North Korea, Lao PDR, Russia Federation, Hungary, Bulgaria and Cuba (see more in Appendix I).

[50] I.A. Shearer, *Extradition in International Law*, Manchester University Press, Manchester (1977), p. 66.

[51] For instance, Ukraine, Belarus, Poland, Bulgaria, Hungary, Czechs, Slovakia succeed prior signed bilateral treaties with Vietnam. Russia requested to sign a Protocol supplementing for the bilateral treaty concerning death penalty exception in extradition.

[52] See more in Appendix II.

[53] Art.4(2) Law on mutual legal assistance 2007.

into account such as the nature of crimes or nationality of offenders. Therefore, in practice, treaties are the most important legal framework for Vietnam to collaborate with foreign countries on extradition cases. There is the fact that more than half of signed treaties of Vietnam had concluded before the Law on mutual legal assistance was adopted in 2007 and later entered into force in 2008. In this regard, these bilateral treaties on extradition seem to have developed even earlier and faster than the domestic law concerned. Due to the differences of law systems and legal tradition between Vietnam and the contracting States, the number of matters, namely capital punishment exception, military offense, political crime, simplified extradition and provisional arrest were specified in bilateral extradition treaties but not mentioned in domestic law on extradition - Law on mutual legal assistance 2007. Pursuant to the Vietnam Law on Conclusion, Accession and Implementation of Treaties, the problems would be solved by the priority principle to apply provisions of treaties.[54] However, these obstacles created conflicts between national law and international law on extradition in Vietnam. Furthermore, the lack of domestic provisions regarding the implementation of treaties has caused difficulties for related offices and persons. So far as the problems above are concerned, the Law on mutual legal assistance 2007 should be amended and supplemented by more specific provisions to facilitate implementation and applicability of treaties on extradition to which Vietnam is a contracting party.

4. Relationship between national law and international law on extradition in the European Union

"The European Union is a unique economic and political partnership between 28 European countries developed into a huge single market with the Euro as its common currency."[55] The Council of Europe, with 47 members, covers the entire European continent which makes up the 28 European nations of EU.[56] As a result, in the sphere of European laws, there are two main systems of law which run parallel but maintain a close relation and furthermore interact with one another. Those are Council of Europe

[54] For instance, Vietnam still maintains capital punishment to serious crimes but agree this is a ground for extradition refusal in the Extradition Treaty with Australia (signed 10/4/2012). Law on mutual legal assistance adopted in 2007 without provisions relating to death penalty in Extradition chapter.

[55] See more on http://europa.eu/about-eu/basic-information/index_en.htm (accessed 30/11/2014).

[56] See more on http://www.coe.int/aboutCoe/index.asp?page=nepasconfondre&l=en (accessed 30/11/2014).

laws and EU laws.[57] There is no doubt that the internal laws of European countries and bilateral or multilateral treaties signed among them always coexist. Each EU Member State is bound by the EU law but at the same time may also be subject to a bilateral treaty or multilateral treaties in or out of the EU zone. However, as mentioned above, due to the EU being an intergovernmental organization EU law thus plays a vital role in comparison to domestic law of Member States.

The relationship between European law and the Member States law represents the theory of monism in international law. It is reflected by the supremacy and immediate applicability of EU law in practice. The principle of direct effect enables individuals to immediately invoke a European provision before a national or European court. This principle, however, only relates to certain European acts and several conditions. The direct effect of European law has been enshrined by the Court of Justice in the judgment of Van Gend en Loos of 5 February 1963.[58] In this judgment, the Court stated: "Treaty is more than an agreement which merely creates mutual obligations between the contracting States. This view is confirmed by the preamble to the Treaty, which refers not only to governments but to peoples. It is also confirmed more specifically by the establishment of institutions endowed with sovereign rights, the exercise of which affects Member States and also their citizens."[59] It may be understood that European law not only established obligations for the Member States but also rights for individuals in those countries. Therefore, individuals may avail themselves of these rights and directly invoke European acts before national and European courts.[60] However, it is not necessary for the Member State to adopt the European act concerned into its internal legal system.

In 1964, the European Court of Justice acknowledged the doctrine which accepts national law as being subordinate to EU law following the outcome of the Costa vs. ENEL case. This decision holds an authorizing passage in that primary:

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[57] In accordance to with Memorandum of Understanding between the Council of Europe and the European Union signed on 11 May 2007 in Strasburg, two parties committed to establish close co-operation based on their shared properties, namely rule of law and legal collaboration (is available at http://www.coe.int/t/der/docs/MoU_EN.pdf).

[58] See Morten Rasmussen, "Revolutionizing European law: A history of the Van Gend en Loos judgment", *Int J Constitutional Law* (2014) 12 (1): 136-163 and J.H.H. Weiler, "Van Gend en Loos: The individual as subject and object and the dilemma of European legitimacy", *Int J Constitutional Law* (2014) 12 (1): 94-103.

[59] Case 26/62, Judgment of 5 February 1963, Algemene Transport- en Expeditie Onderneming Van Gend en Loos v. Nederlandse Administratie der Belastingen, [1963] ECR 1.

[60] See http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv%3Al14547 (accessed 8/3/2015).

"By contrast with ordinary international treaties, the EEC Treaty has created its own legal system which, on the entry into force of the Treaty, became an integral part of the legal systems of the Member States and which their courts are bound to apply. By creating a community of unlimited duration, having its own institutions, its own personality, its own legal capacity and capacity of representation on the international plane and, more particularly, real powers stemming from a limitation of sovereignty or a transfer of powers from the States to the Community, the Member States have limited their sovereign rights, albeit within limited fields, and have thus created a body of law which binds both their nationals and themselves."[61]

European Union law establishes the relationship between Community and Member States. Immediate applicability is a characteristic of European Union law by which legal rules of the European Union, original or derived, is immediately applicable in the law of the Member States. Therefore, in such a situation, the European Union law is a part of the legal order applicable to each Member State. Furthermore, a transfer of competences from national state to the European Union may result in the following consequences:

(1) European Union law is naturally integrated into the legal order of the states without the need any special formula of introduction;

(2) European Union rules shall be ranked in national legal order as European Union law;

(3) the national judges are obliged to apply European Union law.

All of the above descriptions established the monistic doctrine of the relation between EU law and domestic law. On the contrary, some scholars support dualism theory based on the enforcement mechanism of EU law to national law. Pavlos Eletheriadis[62] holds the view that because the EU law relies on all three areas of law; namely EU law, national law and international law, it is not determined by a single or dominant set of principles but by many parallel sets. He argues that EU law is closer,

[61] Case 6/64, Judgment of 15 July 1964, Flaminio Costa v. ENEL, [1964] ECR 585, referred in Jancic, Davor, Recasting Monism and Dualism in European Parliamentary Law: The Lisbon Treaty in Britain and France (June 1, 2013). In: Basic Concepts of Public International Law: Monism and Dualism, by Marko Novakovic (ed.), Belgrade: University of Belgrade, Institute of Comparative Law and Institute of International Politics and Economics, 2013, p. 804. Available at SSRN: http://ssrn.com/abstract=2304896

[62] See Pavlos Eletheriadis, "The Structure of European Union Law" in Catherine Barnard and Okeoghene Odudu (edt), *Cambridge Yearbook of European Legal Studies*, Volume 12; Volumes 2009-2010, p.142

therefore, to the so called the "dualist" model, according to which EU law is subject to both international and domestic law. EU law, just like international law, is not a social order of law or a legal system. Devoid of a police force, a complete system of courts or alternative enforcement tools to implement respect for its laws, the Commission Council and Court of Justice cannot be deemed a comprehensive institutional order. The EU law therefore relies completely on the actions of the Member States for its practical implementation[63], thus explaining the EU's lack of a principle of assurance. Considering this, EU law can be recognized as a dual order which acts in the same vein as an international law which remains independent from the national law of Member States.[64]

Due to the complexity of the EU law and the similarities of history, culture and geography between certain groups of European countries, there are regional and sub-regional extradition treaties which co-exist with some of them still in force between the EU Member States. They are as follows:

• European Convention on Extradition (1957)[65] and its additional protocols[66], adopted under the auspices of the Council of Europe.

• Benelux Treaty concerning Extradition and Mutual Assistance in Criminal Matters (1962), concluded between Belgium, the Netherlands and Luxembourg.[67]

• Nordic States Scheme on Extradition (1962), concluded between Denmark, Finland, Iceland, Norway and Sweden.[68]

• Agreement between the 12 Member States of the European Communities on the simplification and modernization of methods of transmitting extradition requests (1989).

• Title III, Chapter 4 of the Convention implementing the 1985 Schengen Agreement (Schengen Convention, 1990).

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[63] Ibid,. p. 144.
[64] Ibid,.
[65] European Convention on Extradition opened for signature 13December 1957, 359 UNTS 273 (entered into force 18 April 1960) (hereinafter ECE).
[66] Additional Protocols (ETS Nos. 86 and 98, CETS No. 209 and CETS No. 212), done at Strasbourg on 15 October 1975, on 17 March 1978, on 10 November 2010 and done at Vienna 20 September 2012.
[67] Benelux Treaty concerning Extradition and Mutual assistance in Criminal Matters, 27 June 1962, 616 U.N.T.S. 120 (1968) (hereinafter Benelux Treaty).
[68] Agreement Concerning Co-operation (Fin.-Den.-Ice.-Nor.-Swe.) [Nordic Extradition Treaty], Mar. 23, 1962, 434 U.N.T.S. 145 (1962) (hereinafter Nordic Treaty).

• The Convention on Simplified Extradition Procedures between the Member States of the European Union (1995)[69] and the Convention Relating to Extradition between the Member States of the European Union (1996).[70] Both the 1995 and the 1996 EU Conventions have not yet entered into force, as France and Italy are yet to ratify them. Both conventions do, however, apply between the Member States which have made declarations to that effect. These are, for the 1995 Convention: Austria; Denmark; Finland; Germany; Luxembourg; the Netherlands; Spain; Sweden; and the United Kingdom. For the 1996 Convention: Austria; Belgium; Denmark; Finland; Germany; Luxembourg; the Netherlands; Spain; Sweden; and the United Kingdom.[71]

These instruments have created complex regulations governing extradition within the European Union as well as between the Member States. As of 1 January 2004, the extradition regime under the above-listed instruments (except the Benelux Treaty and Nordic Treaty) was replaced within the European Union by a new system of mutually recognized and enforceable arrest warrants, as provided for in the Council Framework Decision of 13 June 2002 on the European Arrest Warrant and the Surrender Procedures between Member States.[72] (FD EAW).

The following subsections will take into consideration some essential legal instruments which impact explicitly on the formation and development of extradition law within the European Union.

4.1. European Convention on Extradition (ECE)

Regarding extradition matter in the European countries, *the Council of Europe European Convention on extradition* was opened for signature in Paris, France on 13 December 1957 and entered into force on 18 April 1960.[73] It was the first multilateral treaty on extradition between European countries. There are, at present, 50 Member States of this Convention with three non-Member States of the Council of Europe being

[69] Convention of 10 March 1995 drawn up on the basis of Article K.3 of the Treaty on European Union, on simplified extradition procedure between the Member States of the European Union (not yet in force), OJ C 78, 30.3.1995.

[70] Convention of 27 September 1996 drawn up on the basis of Article K.3 of the Treaty on European Union, relating to extradition between the Member States of the European Union (not yet in force), OJ C 313, 23.10.1996

[71] See Sibylle Kapferer, *supra* note 16, at 6.

[72] OJ L 190, 18.7.2002, pp. 1–18.

[73] European Convention on Extradition, ETS 24; 1 ECA 173; 359 UNTS 273.

Israel, Korea and South Africa.[74] The Convention was supplemented by four additional protocols, namely: the Additional Protocol in 1975, the Second Additional Protocol in 1978, the Third Additional Protocol in 2010 and the Fourth Additional Protocol in 2012.[75] The Convention does not provide a direct relation between the Convention and national laws of member states, but some points concerned are taken into account in Article 28 (Relation between this Convention and bilateral agreements) as follows:

1. This Convention shall, in respect of those countries to which it applies, supersede the provisions of any bilateral treaties, conventions or agreements governing extradition between any two Contracting Parties.

2. The Contracting Parties may conclude between themselves bilateral or multilateral agreements only in order to supplement the provisions of this Convention or to facilitate the application of the principles contained therein.

3. Where, as between two or more Contracting Parties, extradition takes place on the basis of a uniform law, the Parties shall be free to regulate their mutual relations in respect of extradition exclusively in accordance with such a system notwithstanding the provisions of this Convention. The same principle shall apply as between two or more Contracting Parties each of which has in force a law providing for the execution in its territory of warrants of arrest issued in the territory of the other Party or Parties. Contracting Parties which exclude or may in the future exclude the application of this Convention as between themselves in accordance with this paragraph shall notify the Secretary General of the Council of Europe accordingly. The Secretary General shall inform the other Contracting Parties of any notification received in accordance with this paragraph.

Paragraph 1 of this Article confirms the supremacy of ECE to bilateral agreements on extradition between Member States. Contracting Parties are bound by bilateral treaties but when conflicts appear, ECE will prevail. Pursuant to Paragraph 3 of this Article, it may be understood that a Contracting State of the Convention could carry out extradition based on another system (possibly that of another extradition treaty) with other member states through using a uniform law or issue an internal law which regulates the execution in its territory of warrants of arrest issued by the other Party.[76]

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[74] See http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=024&CM=8&DF=&CL=ENG (visited 20/12/2014).

[75] See http://conventions.coe.int/treaty/en/treaties/html/024.htm (visited 20/12/2014).

[76] This provision related to the Nordic Treaty between Denmark, Finland, Iceland, Norway and Sweden which will be examined in the latter part.

The Party which excludes or may in future exclude the application of the Convention has to notify the Secretary General of the Council of Europe and after that, the other contracting Parties shall inform about this notification. Paragraph 3 is a flexible provision for Member States that have signed other agreements on extradition to execute extradition with a uniform law or to provide mutual assistance in extradition matter.

4.2. Benelux Extradition Treaty

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 was amended by the Protocol of 11 May 1974 (hereinafter referred to as the Benelux Treaty) in relations between the Member States of the Benelux Economic Union. The treaty's function was to the widen the possible offenses leading to the extradition of criminals, to simplify procedures and formalities of such and to further implement mutual legal assistance in criminal matters that reach further than the capabilities of existing treaties. The treaty went on to specify the possibility of, in urgent cases, an officer pursuing a suspect of an extraditable offense found in one Benelux country to another Benelux country and the further possibility, under certain conditions, of that officer then proceeding to arrest the suspect.[77] In accordance with Art.28 of ECE, Benelux countries keep the right to apply the Benelux Treaty between their territories. In case of extradition requests from other European countries, ECE is still the essential legal instrument. Benelux countries are also subject to FD EAW and this is the legal basis for extradition cooperation with other EU countries at present.

4.3. Nordic Extradition System

In 1962, Denmark, Finland, Iceland, Norway, and Sweden all adopted the Nordic States Scheme on Extradition. Similar to the Benelux Extradition Treaty, this agreement reflects the close relations between Member States. The Nordic Member States came to an agreement regarding propositions of collaboration and co-operation which included the motion of "the highest degree of political equality" amongst all Scandinavian citizens within the respective countries. This notion was continued during the late 1950s and early 1960s and adopted essentially a model domestic legislation

[77] See Chantal Joubert, Hans Bevers, *Schengen Investigated: A Comparative Interpretation of the Schengen Provisions on International Police Cooperation in the Light of the European Convention on Human Rights*, Martinus Nijhoff Publishers, 2006, p. 32.

focussing on extradition between the states and further established an independent system of intra-Nordic extradition with notable distinct characteristics.[78] As an introductory overview of this system of intra-Nordic extradition, it appears apposite to heed that the legislation formed did not implement treaty obligations; the system was not based on any prior treaty between the countries involved.[79] The Nordic extradition system was founded on the grounds of high mutual trust in each other and the each other's national legal system.[80] In 2005, a multilateral convention was concluded between the Nordic countries and this new convention was referred to as the "Nordic Arrest Warrant".[81] It may be argued that, although essentially mirroring the EAW in its functional procedure, the new Nordic convention contained fundamental distinctions that established it as a more effective and efficient system of extradition than that of the European Arrest Warrant Scheme.[82]

Nordic states are also members of the ECE and FD EAW. Both of the agreements (Art.28(3) ECE and Art.31(2) FD EAW) do not prohibit the EU Member States in their application of other extradition arrangements. This is accepted under the understanding that the additional arrangements imposed allow extension and development of the objectives of ECE and FD EAW and furthermore aid the simplification and further facilitation of the procedures for extradition or surrender of the suspect sought. The three Nordic EU Member States (Denmark, Finland and Sweden) each delivered a statement of their continued application of their specific intra-Nordic system of extradition amongst themselves. [83]

4.4. Framework Decision on European Arrest Warrant (FD EAW)

A "new extradition mechanism" was established in the EU with the adoption of the *Framework Decision of 13 June 2002 on the European arrest warrant and the*

[78] See Gjermund Mathisen, "Nordic Cooperation and the European Arrest Warrant: Intra-Nordic Extradition, the Nordic Arrest Warrant and Beyond", *Nordic Journal of International Law* 79 (2010), p. 5.
[79] *Id.*
[80] *Id*, at 5-7.
[81] Convention Establishing a Nordic Arrest Warrant, Jan. 24, 2006, Council Doc. No.5573/06, available at http://www.asser.nl/upload/eurowarrantwebroot/ documents/ cms_eaw_id1056_1_CouncilDoc. 5573.06.pdf (last visited on Nov. 1 ,2013) (summarizing Convention).
[82] Gjermund Mathisen, *supra* note 78, at 16-24.
[83] *Id*, at 16-17.

surrender procedures between Member States[84] (FD EAW). The FD EAW entails specific and flexible procedure for surrendering fugitives and the "traditional extradition system" was replaced by the "surrender procedures". Paragraph 1, Article 1 of the FD EAW states that the European arrest warrant is a judicial decision issued by a Member State with a view to the arrest and surrender by another Member State of a requested person for the purpose of conducting a criminal prosecution or executing a custodial sentence or detention order. The FD EAW also prescribes necessary factors and steps like extradition procedure, for instance, threshold and enumeration of extraditable offenses; ground for mandatory or optional non-execution of the European arrest warrant; central authority; content and form of an arrest warrant; surrender procedure; transit and expenses. Notably, the new "principle of mutual recognition" was the first time it had been successfully introduced in the FD EAW and following that, this principle also applied to confiscation orders, monetary sanction and even judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the EU.[85] Regarding the application of FD EAW and its relation to the prior legal instruments, Article 31 of the FD EAW regulates that this Framework Decision, from 1 January 2004 shall replace the corresponding provisions of the conventions in the field of extradition between member states including: the European Convention on Extradition 1957; the Convention of 27 September 1996 relating to extradition between the Member States of the European Union; the Convention of 10 March 1995 on simplified extradition procedure between the Member States of the European Union.[86] Furthermore, the FD EAW provides that Member States may continue to apply bilateral or multilateral agreements or agreements in force that may be extended or enlarged to simplify and facilitate surrender procedure of persons who are the subject of EAW. Accordingly, the Benelux extradition treaty and the intra-Nordic extradition system are still implemented within Benelux and Nordic countries. Concerning the relation between FD EAW and national law, Member States were required to take the necessary measures (for instance, enact legislation or amend extradition law) to comply with the provisions of the FD EAW by 31 December 2003.[87] Generally, with the adoption of the FD EAW, EU countries are obliged to transpose its

[84] Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, OJ L 190, 18.7.2002, pp. 1-20.
[85] *Supra* note 20, p.4.
[86] EAW Framework Decision, Art. 31 (1).
[87] EAW Framework Decision, Art. 34 (1).

provision into national legislation to arrest and surrender requested persons, enhancing the effectiveness of combatting crime in the European Union. Besides, the FD EAW has no direct effect in territories of Member States of the EU and in this case, only their domestic Implementation Acts have.[88] Furthermore, Member States were not obliged to implement the FD EAW by adopting its precise language and were free to use appropriate existing measures (such as a national extradition law) if it satisfied the requirements of the FD EAW. However, given the obligation to ensure that the application of the FD EAW was achieved in a clear and precise manner and had binding force, most Member States adopted new national measures to fulfill their obligation (Republic of Ireland enacted European Arrest Warrant Act 2003 is an example).[89]

5. Relationship between extradition law, extradition agreements and other multilateral agreements containing extradition provisions in Vietnam and the European Union

Extradition obligations are prevalent in many countries of the world and derive from a combination of bilateral and multilateral extradition agreements alongside those international instruments implemented to combat forms of transnational crime such as terrorism. [90] In principle, international treaties between States have the same force under international law. It may give rise to conflicting obligations under different agreements. A contradiction of obligations may arise when the requested State is subject to bilateral or multilateral agreements that require the state performs extradition yet is furthermore obliged by another, typically regional, treaty that directs a refusal of extradition under particular circumstances.[91] To deal with this problem, some extradition conventions contain clauses which clarify their relationship with other conventions and/or bilateral treaties. Thus, for example, Article 28 of the European Convention on Extradition (1957) provides that its provisions supersede those of any bilateral treaties, conventions or agreements governing extradition between any two contracting parties. They may conclude bilateral or multilateral agreements among themselves only to the extent that they supplement the Convention or facilitate its implementation. To determine the

[88] Art. 34(2)(b) Treaty on the European Union:
Framework Decisions shall be binding upon the Member States as to the result to be achieved but shall leave to the national authorities the choice of form and methods. They shall not entail direct effect.
[89] See Clive Nicholls et al,. *Nicholls, Montgomery, and Knowles on The Law of Extradition and Mutual Assistance*, Oxford University Press, 14 Mar 2013, p. 275.
[90] Sibylle Kapferer, supra note 16, at 11.
[91] *Id*, at 12.

general rules for the application of successive treaties between the same parties and on the same subject matter which do not contain explicit provisions as to which of them should take precedence over the other, Article 30 of the Vienna Convention on the Law of Treaties (1969)[92] states that "the later treaty will normally prevail over the earlier one, and the more specialized over the more general". In practice, most EU States have concluded bilateral treaties on extradition with countries in Europe, the EU and the non-EU regions. At the same time, these States are members of multilateral agreements and other international instruments with respect to extradition. The relationship between those treaties is a considerable matter that requires clarification.

Over the past few years, Vietnam has strengthened the conclusion, accession and ratification of bilateral and multilateral agreements regarding international cooperation in criminal matters and extradition. The interaction between extradition law, extradition treaties and other international instruments containing extradition provisions is a controversial issue in Vietnam. The following sections will examine the complexity of the above-mentioned legal relationships in the EU as well as Vietnam.

5.1. Vietnam

By the year 2014, Vietnam has signed, ratified or acceded a number of multilateral treaties which contain provisions related to extradition, such as three UN Conventions on drug control (Single Convention on Narcotic Drugs, 1961; Convention on psychotropic substances, 1971; Convention on illicit traffic in narcotic drugs and psychotropic substances, 1988), two optional protocols to the Convention on rights of the Child (The Optional Protocol on the sale of children, child prostitution and child pornography; The Optional Protocol on the involvement of children in armed conflict); Convention against transnational organized crime (Vietnam signed the Convention on 13 December 2000 at Palermo-Italy and, is currently proposed of procedures for ratification); Convention against Corruption in 2003 (Vietnam signed and ratified the Convention in 2009), 12 multilateral treaties on the prevention and punishment of crimes of international terrorism[93] (Vietnam is considering to access the remaining

[92] Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 332, reprinted in 8 ILM 679.

[93] Convention on Offenses and Certain Other Acts Committed on Board Aircraft, signed at Tokyo on 14 September 1963; Convention for the Suppression of Unlawful Seizure of Aircraft, signed at the Hague on 16 December 1970; Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, signed at Montreal on 23 September 1971; Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents on 14 December 1973; Protocol on the Suppression of Unlawful Acts of Violence at Airports Serving International Civil

conventions) and ASEAN Convention on Counter Terrorism (Vietnam signed on 13 January 2007 and ratified on 14 January 2011).[94]

Most of those international agreements contain extradition provisions, however, with most of them, Vietnam holds reservation and declarations that shall not be bound by provisions in relation to extradition. Instead, Vietnam would rather negotiate and conclude bilateral treaties on extradition with other Member States of the Convention. The main reason is the existence of too many different issues and conflicts between Vietnamese laws and provisions on extradition of those Conventions at the time of ratification or accession. Besides, in term of domestic law, Vietnamese law on extradition had not been issued at the time of ratifying treaties so that extradition was a new and complicated issue for competent authorities in Vietnam to apply and implement the provisions concerned in practice. Recently, Vietnam has initiated considering withdrawing reservations to extradition provisions of some multilateral agreements.

The reservations and declarations concerning extradition in treaties of which Vietnam is a contracting party are enumerated as follows:

- *Single Convention on Narcotic Drugs, 1961*

Reservation:

[The Government of Viet Nam declares its reservation to] article 36, paragraph 2, point b on Extradition and article 48, paragraph 2 on Dispute settlement. [95]

Article 36, paragraph 2, point b:

> b) i) Each of the offences enumerated in paragraphs 1 and 2 a) ii) of this article shall be deemed to be included as an extraditable offence in any extradition treaty existing between Parties. Parties undertake to include such offences as extraditable offences in every extradition treaty to be concluded between them.

Aviation, supplementary to the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, signed at Montreal on 24 February 1988; Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, done at Rome on 10 March 1988; Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf, done at Rome on 10 March 1988; International Convention for the Suppression of the Financing of Terrorism, adopted by the General Assembly of the United Nations on 9 December 1999; International Convention against the Taking of Hostages, adopted by the General Assembly of the United Nations on 17 December 1979; International Convention for the Suppression of Terrorist Bombings, adopted by the General Assembly of the United Nations on 15 December 1997.

[94] See more in Appendix 3.

[95] http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=VI__16&chapter=6&lang=en#EndDec (accessed 10 March 2014).

ii) If a Party which makes extradition conditional on the existence of a treaty receives a request for extradition from another Party with which it has no extradition treaty, it may at its option consider this Convention as the legal basis for extradition in respect of the offences enumerated in paragraphs 1 and 2 a) ii) of this article. Extradition shall be subject to the other conditions provided by the law of the requested Party.

iii) Parties which do not make extradition conditional on the existence of a treaty shall recognize the offences enumerated in paragraphs 1 and 2 a) ii) of this article as extraditable offences between themselves, subject to the conditions provided by the law of the requested Party.

iv) Extradition shall be granted in conformity with the law of the Party to which application is made, and, notwithstanding subparagraphs b) i), ii) and iii) of this paragraph, the Party, shall have the right to refuse to grant the extradition in cases where the competent authorities consider that the offence is not sufficiently serious.

- *Convention on psychotropic substances, 1971*

Reservation:

[The Government of Viet Nam declares its reservation to] article 22 paragraph 2 point b on Extradition and Article 31, paragraph 2 on Dispute settlement. Article 22 paragraph 2 point b[96] provides:

b) It is desirable that the offences referred to in paragraph 1 and paragraph 2 a) ii) be included as extradition crimes in any extradition treaty which has been or may hereafter be concluded between any of the Parties, and, as between any of the Parties which do not make extradition conditional on the existence of a treaty or on reciprocity, be recognized as extradition crimes; provided that extradition shall be granted in conformity with the law of the Party to which application is made, and that the Party shall have the right to refuse to effect the arrest or grant the extradition in cases where the competent authorities consider that the offence is not sufficiently serious.

- *Convention on illicit traffic in narcotic drugs and psychotropic substances, 1988*

Reservations:

"Reservations to article 6 on Extradition, article 32 paragraph 2 and paragraph 3 on Dispute settlement."[97]

[96] http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=VI-16&chapter=6&lang=en#EndDec (accessed 10 March 2014).

Article 6:

EXTRADITION

1. This article shall apply to the offences established by the Parties in accordance with article 3, paragraph 1.

2. Each of the offences to which this article applies shall be deemed to be included as an extraditable offence in any extradition treaty existing between Parties. The Parties undertake to include such offences as extraditable offences in every extradition treaty to be concluded between them.

3. If a Party which makes extradition conditional on the existence of a treaty receives a request for extradition from another Party with which it has no extradition treaty, it may consider this Convention as the legal basis for extradition in respect of any offence to which this article applies. The Parties which require detailed legislation in order to use this Convention as a legal basis for extradition shall consider enacting such legislation as may be necessary.

4. The Parties which do not make extradition conditional on the existence of a treaty shall recognize offences to which this article applies as extraditable offences between themselves.

5. Extradition shall be subject to the conditions provided for by the law of the requested Party or by applicable extradition treaties, including the grounds upon which the requested Party may refuse extradition.

6. In considering requests received pursuant to this article, the requested State may refuse to comply with such requests where there are substantial grounds leading its judicial or other competent authorities to believe that compliance would facilitate the prosecution or punishment of any person on account of his race, religion, nationality or political opinions, or would cause prejudice for any of those reasons to any person affected by the request.

7. The Parties shall endeavour to expedite extradition procedures and to simplify evidentiary requirements relating thereto in respect of any offence to which this article applies.

8. Subject to the provisions of its domestic law and its extradition treaties, the requested Party may, upon being satisfied that the circumstances so warrant and are urgent, and at

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[97] See http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=VI-19&chapter=6&lang=en (accessed 10 March 2014).

the request of the requesting Party, take a person whose extradition is sought and who is present in its territory into custody or take other appropriate measures to ensure his presence at extradition proceedings.

9. Without prejudice to the exercise of any criminal jurisdiction established in accordance with its domestic law, a Party in whose territory an alleged offender is found shall:

a) If it does not extradite him in respect of an offence established in accordance with article 3, paragraph l, on the grounds set forth in article 4, paragraph 2, subparagraph a), submit the case to its competent authorities for the purpose of prosecution, unless otherwise agreed with the requesting Party;

b) If it does not extradite him in respect of such an offence and has established its jurisdiction in relation to that offence in accordance with article 4, paragraph 2, subparagraph b), submit the case to its competent authorities for the purpose of prosecution, unless otherwise requested by the requesting Party for the purposes of preserving its legitimate jurisdiction.

10. If extradition, sought for purposes of enforcing a sentence, is refused because the person sought is a national of the requested Party, the requested Party shall, if its law so permits and in conformity with the requirements of such law, upon application of the requesting Party, consider, the enforcement of the sentence which has been imposed under the law of the requesting Party, or the remainder thereof.

11. The Parties shall seek to conclude bilateral and multilateral agreements to carry out or to enhance the effectiveness of extradition.

12. The Parties may consider entering into bilateral or multilateral agreements, whether ad hoc or general, on the transfer to their country of persons sentenced to imprisonment and other forms of deprivation of liberty for offences to which this article applies, in order that they may complete their sentences there.

- *The Optional Protocol on the sale of children, child prostitution and child pornography.*

Vietnam ratified this Protocol in 2001 and declared to reserve Article 5 regarding extradition matter. [98]

Article 5

[98] http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11c&chapter=4&lang=en (accessed 19 December 2014).

1. The offences referred to in article 3, paragraph 1, shall be deemed to be included as extraditable offences in any extradition treaty existing between States Parties and shall be included as extraditable offences in every extradition treaty subsequently concluded between them, in accordance with the conditions set forth in such treaties.

2. If a State Party that makes extradition conditional on the existence of a treaty receives a request for extradition from another State Party with which it has no extradition treaty, it may consider the present Protocol to be a legal basis for extradition in respect of such offences. Extradition shall be subject to the conditions provided by the law of the requested State.

3. States Parties that do not make extradition conditional on the existence of a treaty shall recognize such offences as extraditable offences between themselves subject to the conditions provided by the law of the requested State.

4. Such offences shall be treated, for the purpose of extradition between States Parties, as if they had been committed not only in the place in which they occurred but also in the territories of the States required to establish their jurisdiction in accordance with article 4.

On 26 March 2009, the Government of Vietnam informed the Secretary-General that it had decided to withdraw the following reservation made upon ratification of the Protocol:"... the Socialist Republic of Vietnam makes its reservation to article 5 (1), (2), (3), and (4) of the said Protocol."[99]

- *Convention against Corruption in 2003.*

Declaration:

"In accordance with Article 44 of the Convention thereof, the Socialist Republic of Vietnam declares that it shall not take the Convention as the legal basis for extraditions. The Socialist Republic of Vietnam shall conduct extradition in accordance with the Vietnamese law, on the basis of treaties on extradition and the principle of reciprocity."[100]

In conclusion, as far as the relationship between extradition bilateral treaty and conventions containing extradition provisions are concerned, Vietnam gives priority to the bilateral agreement and also, to some extent, the principle of reciprocity. It is the fact that reciprocity is not efficiently implemented in Vietnam which lends to bilateral

[99] See https://treaties.un.org/pages/viewdetails.aspx?src=ind&mtdsg_no=iv-11-c&chapter=4&lang=en#EndDec (accessed 19 December 2014).
[100] See http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-14&chapter=18&lang=en

treaties seeming to be the first choice for extradition cooperation with other countries. However, in the upcoming years, Vietnam should take advantage of extradition provisions in multilateral treaties because it is unrealistic for Vietnam to conclude extradition agreements with every country in the world.

5.2. The European Union

The EU law includes a system of multilateral agreements as a result of EU being a unique economic and political partnership with 28 European countries.[101] Concerning the field of extradition, as mentioned in the above sections, there are a number of instruments with different names: convention, treaty, agreement and decision between member states of the EU. Pursuant to these treaties, contracting states could decide to apply their domestic law, bilateral treaties on extradition or the multilateral treaties on extradition in the scope of the EU. Besides, each EU Member State is also a party to international instruments in and out of the region. The EU is also a party to several United Nations (UN) treaties relating to anti-criminal matters, for example, the UN Convention against Corruption[102], the UN Convention against Transnational Organized Crime.[103] As a result, relations between national law, bilateral law and EU law regarding extradition are complex. The following section will discuss mutual interaction and the role of the EU law in association with other multilateral agreements on extradition.

5.2.1. Relationship with European Convention on the suppression of terrorism 1977

In the system of European law, the European Convention of 27 January 1977 on the suppression of terrorism[104] is a multilateral treaty regulating anti-terrorism which influences one of primary principle of extradition – political offense exception. All Member States of the EU are signatories to this Convention. Pursuant to traditional extradition, "political offenses" is mandatory ground for refusal of extradition. Due to the dangerous nature of the terrorist crime, in order to prevent and suppress terrorism

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[101] See http://europa.eu/about-eu/countries/index_en.htm (last visited 20/12/2014).

[102] See https://treaties.un.org/pages/viewdetails.aspx?src=ind&mtdsg_no=xviii-14&chapter=18&lang=en (accessed 20/12/2014). On 15 September 2005, the European Commission and the Council Presidency signed the Convention on behalf of the European Community.

[103] See https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-12&chapter=18&lang=en (accessed 20/12/2014). On 12 December 2000, the European Community and all EU Member States formally signed the Convention and its supplementing protocols.

[104] European Convention on the Suppression of Terrorism, CoE, Jan. 27, 1977, E.T.S. No. 90.

effectively, the European Convention on the suppression of terrorism sets forth a list of offenses which shall not be regarded as a political offense although, in fact, these crimes regard politics or have political purposes. The offenses listed, for instance, are serious offenses involving an attack against the life, physical integrity or liberty of internationally protected persons, including diplomatic agents; an offense involving kidnapping, the taking of a hostage or serious unlawful detention; an offense involving the use of bombs, grenades, rockets, automatic firearms or letter or parcel bombs if their use endangers persons. Thank to provisions of the Convention, all mentioned crimes are extraditable crimes and the offenders shall be judged and punished under criminal law regardless; extradition requests for those political crimes shall be rejected in accordance with European Convention on Extradition. The EU law goes even further with the abolishment of the political offense exception to extradition in the Framework Decision on the European Arrest Warrant and the surrender procedure between Member States adopted in 2002.

5.2.2. Agreement on Extradition between the European Union and the United States[105]

The agreement between the European Union (EU) and the United States of America (US) came to pass in reaction to the terrorist attacks of 9/11.[106] The objective of the agreement is to simplify the cooperation on extradition and mutual legal assistance in criminal matters by establishing particular rules in order to fight terrorism and organized crime more effectively. The Agreement on Extradition between the EU and US is formed of 22 articles which serve to only regulate part of the section of extradition through developing and building on pre-existing bilateral treaties. Remarkably, the agreement between the EU and US overrules decrees agreed on through the traditional process of mutual agreement. Article 3 (2) of the Agreement states: "The European Union, pursuant to the Treaty on European Union, shall ensure that each Member State acknowledges, in a written instrument between such Member State and the United States of America, the application, in the manner set forth in this Article, of its bilateral extradition treaty in force with the United States of America." Accordingly, the EU - US extradition agreement has supremacy over the similar

[105] Agreement on extradition between the European Union and the United States of America, OJ L 291 of 7.11.2009.

[106] See Valsamis Mitsilegas, "The New EU–USA Cooperation on Extradition, Mutual Legal Assistance and the Exchange of Police Data" (2003) 8 *European Foreign Affairs Review*, Issue 4, pp. 515–536.

arrangement between the EU Member States and the US. Consequently, the EU Member States and the US amended some bilateral agreements in order to comply with the EU – US agreement. Taking Article 6 of the EU - US agreement as an example, this article, which deals with transmissions of a request for provisional arrest through Interpol channel, was later added to Article 16 (1) of the Germany - US agreement due to its prior absence.[107] The amendment of such then ensures the consistency of the two agreements when faced with the transmission of a request for provisional arrest.

5.2.3. Relationship with European legal instruments on Human Rights

Depending on whether the international treaties concerned have been granted the status of *jus cogens*[108] or peremptory norms of international law, the guarantee of human rights are then applied appropriately. Situations where a requested suspect may be subject to a risk of torture, cruel, inhuman or degrading treatment or punishment will result in the rejection of such extradition as a result of Articles 53 and 64 of the Vienna Convention on the Law of Treaties (1969). In these articles it is stated that any treaty provisions which conflict with *jus cogens* are thus rendered void[109] and the application of such ultimately overrules a duty to extradite pursuant to an extradition treaty binding the requested and the requesting States.

All 28 members of the EU are signatories of and bound by the European Convention on Human Rights. Where a person whose extradition is sought does not agree with the decision of the EU requested state, he/she could take the case to the European Court on Human Rights. In the light of legal instruments like the European Convention on Human Rights[110] and the Charter of Human Rights[111], bars to extradition

[107] See Art. 3 Second Supplementary Treaty Amending the Treaty of June 20, 1978, as Amended by the Supplementary Treaty of October 21, 1986 between the United States of America and Germany, signed at Washington April 18, 2006 (available at http://www.state.gov/documents/organization/184046.pdf).

[108] The prohibition of exposing a person to a risk of torture, cruel, inhuman or degrading treatment or punishment.

[109] Article 53 of the Vienna Convention on the Law of Treaties provides: "A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character." Under Article 64 of the same Convention, "if a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates".

[110] European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), Nov. 4, 1950, 213 U.N.T.S. 262, T.S. No. 71 (1953).

[111] Charter of Fundamental Rights of the European Union (EU Charter), Dec. 18, 2000, OJEC, C364/1.

will be decided by the European Court of Human Rights in circumstances where human rights are violated in extradition cases.[112]

Conclusion

National and international law regarding extradition of each EU country have a long history of development. When the European Union was formed (at present with 28 members), the EU mechanism was adopted to govern extradition between contracting states. Because the EU member states have different political regimes, with law systems varying from civil law to common law, monist to dualist, the relationship between national laws, EU laws and international law are complex. Generally, the EU States recognize the supremacy of international law (especially EU treaties) and implement them in good faith. Extradition cooperation in the EU is governed by a system of relevant agreements and national legislation. Framework Decision on EAW has been applied in the EU area since 2004 and replaced with ECE. Accordingly, surrender procedures took the position of traditional extradition proceedings. The new mechanism, with the cornerstone as the principle of mutual recognition, helps to make surrender process faster, simpler and more efficient. However, in early implementation, the EAW Framework Decision caused some conflicts with the national law of EU countries. For instance, Germany, Poland and Cyprus had to amend the Constitution or the Basic Law to comply with provisions of the EAW Framework Decision. Besides, provisions of this legal instrument in respect to the abolishment of double criminality (to 32 offenses) and political offense exception has raised concerns about a violation of the non-discrimination rule and human rights among EU countries. In short, regardless of some controversial issues, the EAW Framework Decision is considered a successful model of the "new fast-track extradition system" imposing on all Member States of the EU. The most important point of international cooperation is the high level of confidence among Member States. In this respect, the principle of mutual recognition plays its role as backbone through the establishment and implementation of EAW Framework Decision.

In the case of Vietnam, extradition institution has been a relatively recent matter (provided in law since 2007) and the process of construction, development and

[112] For example, *Soering v. United Kingdom*, Ser. A No. 161 (1989); Decision of the European Court of Human Rights, pursuant to the European Convention on Human Rights and Fundamental Freedoms, 5 Nov. 1950, 213 U.N.T.S.221.

execution of extradition laws is faced with a number of difficulties. This chapter has analyzed the practice of international law and national law on extradition in Vietnam and the interaction between them. The most obvious finding to emerge from this study is that the Law on mutual legal assistance 2007 has some flaws and shortcomings which need to be resolved and improved. More importantly, some provisions of the Law on mutual legal assistance are in contradiction with treaties on extradition to which Vietnam is a contracting party. If this problem is not tackled, Vietnamese competent authorities will be unable to implement agreements on extradition effectively. The second finding is that some bilateral treaties with respect to extradition between Vietnam and other states are obsolete, especially the treaties signed with the former communist countries in the Socialist Bloc. Besides, more extradition treaties should be ratified and concluded to enhance legal framework for cooperation on surrendering fugitives between Vietnam and foreign countries. In addition, Vietnam should review and withdraw, where possible, all reservations and declarations concerning extradition in multilateral treaties of which Vietnam is a member State.

In short, to solve all the aforementioned shortcomings and obstacles, Vietnam authorities firstly have to amend and supplement extradition provisions in the Law on mutual legal assistance 2007 in order to adhere to those extradition treaties of which Vietnam is a contracting party. Second, out of date and unsuitable bilateral treaties should be revised and amended or replaced by new ones. Third, authorities should consider withdrawing inappropriate reservations with respect to multilateral treaties containing extradition provisions to which Vietnam is a Member State. Last but not least, Vietnam should keep signing, ratifying or accessing other treaties related to extradition with a view to creating a more efficient mechanism for combating crimes in Vietnam.

The principle of mutual recognition is a remarkable initiative of the EU Member States in which Vietnam could consider applying for provisions regarding international law. Accordingly, this rule, to some extent, would help to reconcile conflicts of law in international cooperation between Vietnam and other countries, particularly in extradition treaties. Currently, the Association of South East Asian Nations (ASEAN) is in the process of negotiating a regional framework for extradition. Mutual recognition may be a good response to the requirements of the cooperation mechanism on extradition in ASEAN. In 2007, during a speech titled: “Forty Years of ASEAN. Can

the European Union be a Model for Asia?" at the Konrad Adenauer Foundation in Berlin, the Secretary General of ASEAN stated:

> It is by no accident that ASEAN has been looking at the European Union's rich experience as we map out our own plans for becoming a community by 2015… The very nature of ASEAN as an intergovernmental organization differs from that of the EU. However, we are looking for good ideas and best practices, and the European Union certainly has plenty of these. There are three specific challenges that we in ASEAN are seized with as we lay the foundations of our ASEAN Community, and for which we are looking towards European experience for some ideas.[113]

Apparently, in terms of extradition, whether ASEAN could establish a regional Extradition Treaty between Member States on the basis of the principle of mutual recognition like the EU would be still be questioned. Admittedly, the organization of ASEAN is different from the EU, the application of mutual trust, therefore, depends on the cooperation level of all ten Member States in the upcoming time.

[113] See http://www.asean.org/resources/2012-02-10-08-47-56/speeches-statements-of-the-former-secretaries-general-of-asean/item/forty-years-of-asean-can-the-european-union-be-a-model-for-asia (accessed 16 August 2014).

Chapter 2
RELATIONSHIP BETWEEN EXTRADITION LAW AND ASYLUM LAW

Introduction

Extradition and asylum are different concepts with their own procedures, objectives and targets but they interact and overlap each other in certain circumstances. The former is in purpose to surrender the requested person for prosecution or enforcement of sentence while the latter protects asylum seeker from persecution in the country from where they fled. In some cases, extradition and asylum have a mutual relationship which involves the same person and influence one another. Accordingly, a situation may occur whereby a person who is acknowledged as a refugee or is applying for the refugee position in a State may at the same time be in the position of a person whose extradition is sought by another State. In this situation, that country, in accordance with its law, would consider granting extradition to the requested person or reject surrendering him/her to the requesting State for the reason this person is in the process of applying for refugee or that country has granted refugee status to him/her.[1] Countries have a tendency to issue separate laws on extradition and asylum because extradition is in connection with criminal proceedings meanwhile asylum is normally an administrative procedure.[2] Nevertheless, in practice, where the requested person holds simultaneous status as an asylum seeker, competent authorities have to invoke provisions of both extradition and asylum law to make the final decision. Therefore, in such situation, the study of the relationship between extradition and asylum law would clarify the role and descriptions of extradition as well as its effect on other proceedings concerned.

Over the last fifty years with the starting point as the *European Convention on Extradition 1957*[3] (ECE), European Union (EU) law on extradition has changed significantly over the issuance of a number of legal instruments concerned. Under this change, especially with the adoption of *Framework Decision of 13 June 2002 on the*

[1] See Sibylle Kapferer, "Interface between Extradition and Asylum", UNHCR's Department of International Protection, PPLA/2003/05, pp 94-100.
[2] See Ida Staffans, *Evidence in European Asylum Procedure,* Martinus Nijhoff Publishers, Leiden and Boston, 2012, p.26.
[3] European Convention on Extradition 1957, ETS 24.

European arrest warrant and the surrender procedures between Member States[4] (hereinafter EAW Framework Decision), surrender procedure based on EAW has replaced traditional extradition procedure in the EU area. Thanks to the EAW Framework Decision, the surrender process of a fugitive is both faster and more efficient. However, surrounding provisions of EAW Framework Decision, some Member States and scholars have raised questions regarding human rights assurance to which the right of refugees and asylum seekers is one of the main concerns.[5] Accordingly, due to the relationship between extradition and asylum, the new provision has restricted the right to asylum for EU citizens.[6] In Vietnam, definition and legal status of refugees and asylum seekers have never been formally mentioned in any law. Vietnam is yet to be a member of any treaties concerning refugee. However, to some extent Vietnam extradition law contains some grounds for ensuring lawful rights of the persons sought and to protect them from discrimination or persecution on account of their race, religion or political opinion. This chapter will not try to investigate law and practice of asylum in the EU. The study considers observances of the EU experiences as an illustration for clarifying the relationship between extradition and asylum law on the basis of respecting human rights. What the EU have dealt with are problems in respect of the above-mentioned issues and thus may be a useful reference for Vietnam to establish an appropriate legal framework concerned in domestic law as well as on an international level. In order to fulfill this objective, the first section will examine extradition and asylum in historical and legal perspectives. The following section will focus on the relationship between extradition law and asylum law in the EU and Vietnam respectively. Finally, some recommendations will be drawn on the basis of assessment of issues concerned with the EU zone and Vietnamese practice during the conclusion of this chapter.

[4] Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, OJ L 190, 18.7.2002, p. 1–20.

[5] See Valsamis Misilegas, "The Limits of Mutual Trust in Europe's Area of Freedom, Security and Justice: From Automatic Inter-State Cooperation to the Slow Emergence of the Individual", *Yearbook of European Law,* Vol.31, No 1 (2012), pp. 319-372; Luisa Marin, "Effective and Legitimate? Learning from the Lesson of 10 years of Practice with the European Arrest Warrant", *New Journal of European Criminal Law,* Vol. 5, Issue 3, 2014, pp. 327-348 (available at http://www.utwente.nl/bms/pa/staff/marin/2014-marin-effective-and-legitimate-njecl-05-03-0327.pdf)

[6] See Vermeulen, Gert. 2002. "Criminal Policy Aspects of the EU's (internal) Asylum Policy." *Revue Des Affaires Europeennes = Law & European Affaires* 5, 602–612.

1. Extradition and Asylum

"Asylum" is a Latin word originating from the Greek word "asylon" which means “freedom from seizure”.[7] This word is the combination of “a” meaning “not” and “syle” meaning “right of seizure”.[8] From the very beginning, asylum has been regarded as a place of refuge where one could be free from the reach of a pursuer. Holy places first provided such a refuge and scholars are of the view that "the practice of asylum is as old as humanity itself”.[9] The term “asylum” is defined as the protection offered by a place (state or territory) to a person who flees to seek it.[10] Asylum seekers are people who are seeking a safe place, where they can find protection from persecution and other forms of discrimination. The United Nation’s High Commissioner for Refugees (UNHCR) defines that “asylum seekers are individuals who have sought international protection and whose claims for refugee status have not yet been determined”.[11] When asylum seekers apply for asylum and are granted by a country, they become refugees in the territory of such country.

Today, asylum receives worldwide recognition as a system providing protection and shelter to those displaced and in a position where refuge in a foreign country is attempted to be achieved. Either from their country of nationality or place of habitual residence, asylum seekers leave as a result of no legal certainty and impending danger to their psycho-physical or moral integrity. Asylum is granted to those who have a well-founded fear of persecution or serious harm in their own country and therefore in need of international protection. In terms of legal aspect, asylum is recognized as a fundamental right and an international institution. The most important legal framework in relation to asylum is the *1951 Convention relating to the status of refugees*[12] (hereinafter Refugee Convention) and the *1967 Protocol relating the status of*

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[7] Atle Grahl-Madsen, “Territorial Asylum”, in *The Land Beyond: Collected Essays on Refugee Law and Policy by Atle Grahl-Madsen,* ed. Gudmundur Alfredsson and Peter Macalister-Smith (Leiden: Martinus Nijhoff Publishers, 2001), p.280.

[8] Ibid, referring to in Roman Beod, “The State of the Right of Asylum in International Law”, *Duke Journal of Comparative and International Law* 5 (1994-1995): 2.

[9] See S. Prakas Sinha, *Asylum and International Law* (The Hague: Martinus Nijhoff Publishers: 1971), p.5.

[10] Ibid, referring to in the definition given by the Institute de Droit International at its Bath session in 1950.

[11] UNHCR, 2009 Global Trends, p.23.

[12] Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 137, 152.

refugees[13] (hereinafter 1967 Protocol). In accordance with the provision of Article 1 of the Refugee Convention, the term "refugee" shall apply to "any person who, as a result of events occurring before 1 January 1951 and owning to well-founded fear of being prosecuted for reason of race, religion, nationality, membership of a social group or political opinion, is outside the country of his nationality and is unable or, owning to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owning to such fear, is unwilling to return to it."[14]

Apart from the Refugee Convention 1951 and its 1967 Protocol, there are a number of legal instruments and documents issued regarding human rights in general and asylum and refugee's right in particular. The list includes multilateral agreements such as the Universal Declaration of Human Rights adopted by the UN General Assembly[15]; the United Nations Declaration on Territorial Asylum 1967[16]; the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment[17]; the European Convention on Human Rights[18], the EU Charter of Fundamental Rights[19], the African Convention on Human and Peoples' Rights[20], the African Convention on Refugees[21] and the American Convention on Human Rights[22].

Pursuant to international and domestic law on the protection of refugees and related provisions on extradition, it is not difficult to examine the relationship between extradition and asylum as two different institutions with separate procedures but a sometimes conflicting and contradictory coexistence.[23] While asylum framework tries to

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[13] Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, 6225, 606 U.N.T.S. 267, 268

[14] Art I(A)(2) of Refugee Convention.

[15] Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A(III) (UDHR).

[16] Declaration on Territorial Asylum, G.A. res. 2312 (XXII), 22 U.N. GAOR Supp. (No. 16) at 81, U.N. Doc. A/6716 (1967).

[17] Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment GA res. 39/46, annex, 39 UN GAOR Supp. (No. 51) at 197, UN Doc. A/39/51 (1984); 1465 UNTS 85.

[18] European Convention on Human Rights opened for signature 4 November 1950, 213 UNTS 221, Europ. TS No. 5 and entered into force 3 September 1953.

[19] Charter of Fundamental Rights of the European Union, 14.12.2007, OJ 2007 C 303/ 1.

[20] African Convention on Human and Peoples' Rights, OAU Doc. CAB/LEG/67/3 rev. 5; 1520 UNTS 217; 21 ILM 58 (1982).

[21] Convention Governing the Specific Aspects of Refugee Problems in Africa, 1001 U.N.T.S. 45, entered into force June 20, 1974.

[22] American Convention on Human Rights, O.A.S.Treaty Series No. 36, 1144 U.N.T.S. 123, entered into force July 18, 1978.

[23] UNHCR, Guidance Note on Extradition and International Refugee Protection, 2008, pp. 25-26.

protect asylum seekers or refugees from any prosecution by a state, extradition aims to seek and arrest fugitives on account of their crimes in the territory of the requested state. On the one hand, asylum and extradition are opposed, because while the target of asylum is preventing refugees from ill-treatment against the standard of human rights, extradition is in purpose to surrender the person whose extradition is sought for prosecution and execution of sentence. On the other hand, in certain circumstances, the person claimed for extradition at the same time is an asylum seeker who is applying for refugee status or granted refugee position. Depending on specific situations, the procedure for extradition and asylum may be carried out in parallel, but in certain cases, extradition would be considered after competent authorities made the final decision for refugee application. Although extradition and the determination of refugee status are two distinct processes with different targets and \governed by different legal standards, it does not imply or mean that these tasks are done in isolation. The fact of whether the person sought qualifies for refugee status has significant implications for the State's obligations required under international law regarding the individual sought and therefore affects the decision concerning the request for extradition.[24] In some countries, when a person recognized as a refugee, or even as only an asylum seeker, extradition request with this person shall be rejected.[25] To take advantage of this policy, many people manage to seek asylum as a tactic for blocking the extradition request. Other countries have a tendency to apply for refuge in the State where impetus for the conservation of political interests of the state requesting the return of the individual is lowest. The requested individual is least likely to be granted refuge in a State that maintains strong political ties or interests with the state of nationality regardless of the previous conduct of the offender.[26]

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[24] Sibylle Kapferer, *supra* note 4.

[25] For example, *Belgium* (s. 56(2) of the Law of 15 December 1980 on the Access to the Territory, Stay, Residence and Removal of Aliens – in no case may a recognized refugee be returned to the country which he or she fled because his or her life or freedom was threatened there); *China* (s. 8(c) of the Law on Extradition 2002 – no extradition of refugees); *Latvia* (s. 22(2) of the Law on Asylum Seekers and Refugees of 1998 – no extradition of refugees to a country where there is a threat of persecution); *South Africa* (s. 2 of the Refugee Act 1998 – no extradition if as a result a refugee may be subjected to persecution on account of race, religion, nationality, membership of particular social group or political opinion, or their life, physical integrity or liberty would be threatened on account of external aggression, occupation, foreign domination or events seriously disrupting public order in either part or whole of that country); *Spain* (s. 4(8) of Law No. 4/85 on Passive Extradition – no extradition if the person sought has been granted refugee status). These Laws is referred to in Sibylle Kapferer, *supra* note 4, at 77 - 78.

[26] M. Cherif Bassiouni, *International Extradition: United States Law and Practice*, Oxford University Press, 2014, p.211.

The relationship between asylum and extradition is primarily illustrated through the application of the common principle: *non-refoulement*. As a recognized principle of customary international law, non-refoulement is the most important principle of asylum law which bars a State from sending back a person to a place of persecution. "Refugee law imposes a clear and firm obligation on States: under the principle of non-refoulement, no refugee should be returned to any country where he or she is likely to face persecution. This is the cornerstone of the regime of international protection of refugees".[27] The word *refoulement* originates from the French word "refouler" (return) and describes the act of making an individual return to the place from which they had left. The notion of non-refoulement is a rather modern one; originally introduced with the state practices used in protecting those fleeing dictatorial regimes such as the Ottoman Empire which existed around the 19th Century.[28] Protection of refugees based on the non-refoulement principle is specified in Article 33(1) of Refugee Convention, as follows:

> No Contracting State shall expel or return ("*refouler*") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.

The principle of non-refoulement applies to any person who is a refugee under the provisions of the 1951 Convention. Everyone who meets the inclusion criteria of Article 1(A)(2) of the 1951 Convention and does not come within the scope of one of its provisions determining those who are either not in need or not deserving of international protection. It serves to firstly safeguard those refugees whose situations are acknowledged by a State under the 1951 Convention and secondly those who strive to be recognized as "mandate refugees" by the UNHCR under its 1950 statute. Given the declaratory nature of refugee status recognition, the wing of non-refoulement also stretches to those who meet the criteria of Article 1 of the 1951 Convention but are yet to receive formal status recognition, especially including asylum seekers.[29]

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[27] Reinhard Marx, *Non-refoulement, Access to Procedure and Responsibility for Determining Refugee Claims* in Selina Goulbourne, Law and Migration, Edward Elgar Publishing, Cheltenham, 1998, p. 96l; for more see E. Lauterpacht and D. Bethlehem, *The scope and content of the principle of non-refoulement: Opinion, in E. Feller,* V. Türk and F. Nicholson (eds.), Refugee Protection in International Law: UNHCR's Global Consultations on International Protection, Cambridge University Press, Cambridge (2003), at pp. 87–177.

[28] Guy S. Goodwin-Gill, *The Refugee in International Law*, Second Edition, Clarendon Press, Oxford, 1996, pp.117-118.

[29] Sibylle Kapferer, *supra* note 1, para.217.

This non-refoulement principle is fully applicable in the context of extradition. This is evident from the wording of Article 33(1) of the 1951 Convention, which refers to expulsion or return "in any manner whatsoever".[30] Addressing various problems of extradition affecting refugees, the Executive Committee of the UNHCR's Programme *inter alia:*

"(b) reaffirmed the fundamental character of the generally recognized principle of non-refoulement;

(c) recognized that refugees should be protected regarding extradition to a country where they have well-founded reasons to fear persecution on the grounds enumerated in Article 1A(2) of the 1951 Convention;

(d) called upon States "to ensure that the principle of non-refoulement is duly taken into account in treaties relating to extradition and as appropriate in national legislation;

(e) expressed the hope that due regard is had to the principle of non-refoulement in the application of existing treaties relating to extradition."[31]

Generally, the non-refoulement principle is a mandatory bar to extradition reflected in treaties as well as national law. However, in exceptional cases, refugees may not be protected by the non-refoulement principle. Article 33(2) of the Refugee Convention stipulates: "The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country". Under this provision, a State may be permitted to expel or return a refugee or asylum seeker to a country where they face persecution on grounds of overriding reasons of national security and public safety.[32]

2. Extradition law and asylum law in the European Union

European States have a long tradition of providing a safe haven to the persecuted. The French Revolution in 1789 was the first instance of political offense

[30] See E. Lauterpacht and D. Bethlehem, "The scope and content of the principle of non-refoulement: Opinion", in E. Feller, V. Türk and F. Nicholson (eds.), Refugee Protection in International Law: UNHCR's Global Consultations on International Protection, Cambridge University Press, Cambridge (2003), at paras. 71-75.

[31] See UNHCR, Executive Committee, Conclusion No. 17 (XXXI) – 1980 on Problems of Extradition affecting Refugees, at paras. (b)–(e), (available at http://www.unhcr.org/cgibin/texis/vtx/refworld/rwmain ?docid=3ae68c4423).

[32] Sibylle Kapferer, *supra* note 1, para. 220

being excluded in extradition and was subsequently drafted in the 1828 Franco - Swiss Extradition Treaty.[33] The French government later declared in an 1841 circular that political crimes would be excluded from extradition and this was echoed in a similar Belgian circular.[34] Asylum policy appears to hold great importance in the general developing policies of EU countries, thus demonstrating the significance that the protection of fundamental rights has in Europe's core identity.[35] However, it is the fact that there are many changes in criminal policy, especially extradition law have impacted negatively on rights to asylum in the EU.[36] From the starting point as the European Convention on Extradition 1957 to the following statutes such as the Council of Europe's European Convention on the Suppression of Terrorism 1977 and Convention relating to extradition between the Member States of the European Union, supplementing the ECE, the fundamental rights were ensured and maintained. However, in the latest legal basis of the Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between the Member States, political offense, and nationality exception and non-discrimination rule were abolished (applied to the list of 32 crimes).[37] It may be argued that content regarding non-discrimination, the risk of ill-treatment and obligation to respect fundamental rights and legal principles were mentioned in recitals 10, 12 and 13 of the Preamble and Article 1(3) of EAW Framework Decision. However, it must be acknowledged that the recitals are non-binding and are unable to be coherently applied when no solid article for Member States to apply in a specific case is present.[38] Ultimately, as the EAW Framework Decision does not directly affect the Member States it is important to note that direct protection can only be ensured in the implementing of statutes and even so, these may fail to refer such guarantees or limit them. Besides, the exclusion of the dual criminality rule applied to 32 offenses listed in Article 2 of EAW Framework Decision also raise concerns about violation of the non-discrimination rule. As a result, it is undeniable that asylum policy in the EU has suffered negative influence from above mentioned provisions of the EAW Framework Decision. Because, in accordance with Article 1 and Article 33 of Refugee

[33] Sinha, *supra* note 9, at 20.
[34] Ibid.
[35] See UNHCR, *UNHCR and the European Union*, Brussels (2010), p.5.
[36] Vermeulen, *supra* note 5, at 602.
[37] See Susie Alegre and Marisa Leaf, "Mutual Recognition in European Judicial Cooperation: A Step Too Far Too Soon? Case Study – the European Arrest Warrant" (2004) 10 European Law Journal, p.212.
[38] See Massimo Fichera, "The implementation of the European Arrest Warrant in the European Union: law, policy and practice", 2011, Intersentia, Cambridge, p. 177.

Convention, the aforementioned issues are essential conditions for a person to be granted refugee status then, in this case, countries are prohibited from expelling or returning refugees (non-refoulement principle).

In comparison to prior European extradition treaties, this is a step backward in terms of human rights and refugees' protection in the EU region. For instance, ECE has no change with mandatory grounds for extradition denial in circumstances of the political offense and non-discrimination rule. Under Article 3(1) of the ECE, extradition shall not be granted if the offense in respect of which is requested is regarded by the requested Party as a political offense or as an offense connected with a political offense. As far as non-discrimination rule is concerned, Article 3(2) ECE stipulates that extradition shall not be granted if the requested Party has substantial grounds for believing that a request for extradition for an ordinary criminal offense has been made for the purpose of prosecuting or punishing a person on account of his race, religion, nationality or political opinion, or that that person's position may be prejudiced for any of these persons.

The provisions above mean that when a person is excluded from extradition on the basis of Article 3(1) and 3(2) of the ECE, he/she would have a higher chance of being accepted as a refugee in accordance with the Geneva Convention 1951 or freely leave the requested state for a third country. Unfortunately, the EAW Framework Decision has abolished these provisions in the article regarding grounds for non-execution of the European arrest warrant. Accordingly, political offense exception was de facto omitted in the Framework Decision and provisions on the non-discrimination rule moved to the Preamble of the Framework Decision. Hence, two important provisions relating to asylum were not enshrined directly in the Decision. Finally, the right of asylum in particular and human rights in general have been negatively affected by those changes.

As far as a relationship between asylum and extradition law is concerned, at its 54th meeting (28-30 April 2008), the Committee of Experts on the Operation of European Conventions on co-operation in criminal matters (PC-OC) discussed the question of the relationship between these two institutions and adopted a questionnaire dealing with the various issues identified. PC-OC decided to address this questionnaire

to all States who are Parties of the European Convention on Extradition.[39] 27 member States have replied to the questionnaire of which a group of countries are EU member states. The report of PC-OC resulted as follows:

16 Member States have no provisions regulating the relationship between extradition and asylum procedures in their national law.[40] In their replies to this question, 12 Member States referred to the fact that under their legislation, extradition of a person to the country of his/her origin is not possible if they are rightfully afforded asylum.[41] In most countries, the two procedures are governed by two separate sets of rules, although the outcome of the asylum process can influence the decision in the extradition procedure. Extradition matters often fall under the jurisdiction of the (criminal) courts whereas the granting of asylum and refugee protection is decided by an administrative entity (for example, the Federal Office for Migration and Refugees in Germany, l'Office Français de Protection des Réfugiés et Apatrides in France, and the Ministry of Interior in Slovenia)[42].

Finland mentioned article 7 of the EU Asylum Procedures Directive, which states that applicants have the right to remain in the Member States while the asylum application is pending. Portugal mentioned Council Directives 2004/83/CE on minimum standards for the qualification and status of third-country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted, and 2005/85/CE on minimum standards on procedures in Member States for granting and withdrawing refugee status.

When posed with the question "under your national law, can a person sought for extradition be extradited to his country of origin when that person has applied for asylum/is the subject of asylum procedures in your country?" 14 Member States [43] gave the answer that a final decision on an applicant's asylum application must have been given before extradition can be put into effect. France stated that technically, whilst an

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[39] PC-OC/INF 76, Information document based on a questionnaire on the PC-OC on the relationship between asylum procedures and extradition procedures, Strasbourg, 30/3/2011, p.5 (available at http://www.coe.int/t/dghl/standardsetting/pc-oc/Tools_implementation1_en.asp).

[40] Ibid. Albania, Denmark, Estonia, Finland, France, Georgia, Germany, Italy, Latvia, the Netherlands, Norway, Russia, Slovenia, Sweden, Switzerland, Turkey.

[41] Ibid. Armenia, Austria, Czech Republic, Hungary, Iceland, Lithuania, Poland, Portugal, Romania, Russia, Slovakia, Spain.

[42] Ibid.

[43] Ibid. p.6. Armenia, Denmark, Estonia, Finland, Georgia, Latvia, Lithuania, the Netherlands, Norway, Portugal, Slovakia, Slovenia, Spain, Turkey.

individual who has applied for asylum will not be extradited, it must be noted that the two processes of extradition and asylum will take place in parallel and furthermore independently. Hungary maintained that in this specific situation, extradition is only possible if a request is made by a third country identified in the Act of Asylum as a safe country. In 8 Member States, [44] extradition is possible, at least in theory, for those who have already applied for asylum but must further be taken into account that the court dealing with the extradition case will give consideration to the fact that asylum procedures would still be ongoing.

Regarding the question "What procedure has priority when a person having applied for asylum in your country is the subject of extradition proceedings?", 13 Member States responded that the asylum procedure has priority when this situation occurs[45]. Germany and France specified that although the asylum and extradition proceedings are two separate procedures which are carried out independently, suspension of the extradition procedure is possible awaiting the outcome of the asylum procedure. Five Member States have no regulation on which procedure has priority.[46]

The result of the questionnaire by the PC-OC showed that European countries have different points of view and internal laws in place when dealing with the relation between extradition and asylum and additionally more than half of them do not have regulations on such matter. However, for most of the countries that were questioned, the application of asylum seekers would have priority of consideration in comparison with the decision for extradition requests. It means that asylum right is respected in many European countries and these provisions conform to the Refugee Convention and 1967 Protocol. However, with the adoption and application of the EAW Framework Decision, the individual whose extradition is sought would have less chance to apply for asylum in the EU territory.

[44] Ibid. Austria, Czech Republic, Germany, Iceland, Italy, Poland, Sweden, Switzerland.
[45] Ibid. Albania, Estonia, Finland, Georgia, Hungary, the Netherlands, Norway, Lithuania, Russia, Slovakia, Slovenia, Spain, Turkey.
[46] Ibid. Czech Republic, Italy, Poland, Sweden and Switzerland.

3. Extradition law and asylum law in Vietnam

In terms of international law, Vietnam has signed 18 bilateral treaties on extradition and further treaties containing extradition provisions with other countries[47]. Vietnam is also a party to multilateral treaties including extradition provisions, namely three United Nation drug control treaties (1961 Single Convention on Narcotic Drugs, 1971 Convention on Psychotropic Substances, 1988 United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances); two Protocols to the UN Convention on the Rights of Child (Optional Protocol on the involvement of children in armed conflict and Optional Protocol on the sale of children, child prostitution and child pornography); the UN Convention against Transnational Organized Crime; the UN Convention against Corruption; 12 UN treaties against terrorism.[48] On a national level, extradition law with a specific procedure was formally regulated in the Chapter IV (Extradition) of the Law on mutual legal assistance 2007.[49]

The relationship between extradition and asylum was not mentioned in the above issued laws. In fact, asylum is an unfamiliar term in the system of Vietnamese law in both the theoretical as well as the practical perspective. Accordingly, studies on asylum seekers and refugees are difficult to find in Vietnamese books, journals and other academic resources. Vietnam is yet to become a Member State of the Refugee Convention 1951 and its 1967 Protocol or other treaties concerning asylum or asylum-seekers. A number of countries in the world have ratified or accessed these documents. According to UNHCR, by April 2011, the total number of State Parties to Refugee

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[47] See Nguyen Ngoc Anh, Nguyen Viet Hong va Pham Van Cong, *Dẫn độ - Những vấn đề lý luận và thực tiễn,* Nxb CAND, Hanoi, 2006, tr.95 [Nguyen Ngoc Anh, Nguyen Viet Hong and Pham Van Cong, *Extradition – Theoretical and Practical Issues*, People's Police Publisher, Hanoi, 2006, p.95].

[48] Convention on Offenses and Certain Other Acts Committed on Board Aircraft, signed at Tokyo on 14 September 1963; Convention for the Suppression of Unlawful Seizure of Aircraft, signed at the Hague on 16 December 1970; Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, signed at Montreal on 23 September 1971; Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents on 14 December 1973; Protocol on the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, supplementary to the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, signed at Montreal on 24 February 1988; Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, done at Rome on 10 March 1988; Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf, done at Rome on 10 March 1988; International Convention for the Suppression of the Financing of Terrorism, adopted by the General Assembly of the United Nations on 9 December 1999; International Convention against the Taking of Hostages, adopted by the General Assembly of the United Nations on 17 December 1979; International Convention for the Suppression of Terrorist Bombings, adopted by the General Assembly of the United Nations on 15 December 1997.

[49] Vietnam National Assembly, Law on Mutual Legal Assistance, issued 21/11/2007, entry into force 01/7/2008, Chapter IV. Extradition.

Convention was 144 and 145 were Member States of 1967 Protocol.[50] There is no formal information regarding refugees and asylum seekers residing in Vietnam territory. However, the number of Vietnamese asylum seekers and refugees in foreign countries like Australia, America and European States demands cooperation between Vietnam authorities and counterparts to solve the problems of concern. Hundreds of thousands of Vietnamese people have fled to foreign countries, especially Hong Kong, America, and Australia since 1975.[51] They are asylum seekers (fear of war), boat people and also economic migrants. A section of this group have been recognized as refugees and are now settled in many countries in the world, especially the United States, Australia, and European countries. The others were rejected and moved in to refugee camps. To cope with the problem, Vietnam has signed 16 bilateral treaties with other states on the repatriation of Vietnamese citizens.[52]

In terms of domestic law, Vietnam's authorizing office has also never issued any law in relation to asylum or refugee. Consequently, in practice, there have not been any applications of asylum seekers that have been granted in Vietnam.

Concerning asylum right, in some extents, Article 82 of the Vietnamese Constitution 1992 may be cited as a provision in connection with persons who have similar status with asylum seekers, as follows:

> Foreign nationals who are prosecuted for taking part in the struggle for freedom and national independence, for socialism, democracy and peace, or for engaging in scientific pursuits may be considered for granting of residence by the Socialist Republic of Vietnam.[53]

The above provision aims to defend foreign persons from punishment on account of their political opinion or acts alongside scientific cause in their country of origin. If they flee to Vietnam and apply for residence, Vietnamese authorities may grant asylum status for them in certain circumstances. When their domicile status is recognized, the Vietnamese State will not extradite them to the Requesting State or the

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[50] See http://www.unhcr.org/3b73b0d63.html (accessed 15/11/2013).

[51] See Milton Osborne, "The Indochinese Refugees: Cause and Effects", International Affairs (Royal Institute of International Affairs 1944-),Vol. 56, No. 1 (Jan., 1980), pp. 37-53 (available at http://www.jstor.org/stable/2615718)

[52] 16 treaties signed with: the Netherlands, Germany, Canada, Australia, Poland, United Kingdom, Slovakia, Switzerland, Norway, Czech, Ukraine, the United States, Sweden, Russia, Belgium, France (see http://lanhsuvietnam.gov.vn/Lists/BaiViet/B%C3%A0i%20vi%E1%BA%BFt/DispForm.aspx?List=dc7c7d75-6a32-4215-afeb-47d4bee70eee&ID=138, (accessed 15/11/2013).

[53] Vietnam National Assembly, Constitution 1992, Art.82.

third country. Unfortunately, this is a constitutional provision, merely a fundamental principle, so that it is not automatically applied in practice. Due to the tradition of Vietnamese law, authorities need a by–law (or sub-law) guidance document (e.g., decrees, circulars) to implement or execute laws or constitutional provisions in practice.[54] It is the fact that until now there has not been the procedure for asylum application in Vietnam[55] and as a result, the relation between extradition and asylum still fails to exist in Vietnam. Recently, the Vietnam National Assembly has passed the Law on immigration, migration, the residence of foreigners in Vietnam.[56] Under Article 39 of the Law, four cases shall be considered to grant permanent residence in Vietnam, as follows:

> (1) Foreigners have merits and contributions to the cause of defense and construction of Vietnam and were awarded medals or State honorable titles by Vietnam State.
>
> (2) Foreigners are scientists, experts who are temporarily residing in Vietnam.
>
> (3) Foreigners are guaranteed by their parents, spouses, children who are Vietnamese citizens and residing in Vietnam.
>
> (4) Stateless persons have been temporarily residing in Vietnam by the year 2000.

Some foreigners, especially stateless persons, may have a situation similar to asylum seekers. However, stateless persons are not recognized as nationals or refugees and thus may not be granted asylum status.[57] For this reason, they will often fall short of chance to receive the same protection as refugees do but the right of residency. They therefore may still become the object of an extradition request or continue to face deportation in certain cases.

Although there is no separate law on asylum, Vietnamese law on extradition and treaties between Vietnam and foreign countries on extradition also provide provisions to

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[54] See Matthieu Salomon and Vu Doan Ket, 2010, "Achievements and challenges in developing a law-based state in contemporaryVietnam: How to shoe a turtle?" in John Gillespie and Albert H.Y. Chen (eds.) *Legal Reforms in China and Vietnam: Acomparison of Asian Communist regimes*, London & New York: Routledge, p. 141; W.J. Duiker, "The Constitutional System of the Socialist Republic of Vietnam" in L.W. Beer (ed.), *Constitutional Systems in Late Twentieth Century Asia*, Seattle: University of Washington Press, 331.

[55] Vietnam does not have law or provisions in respect of asylum or refugees in accordance with the standard of the United Nation Convention Relating to the Status of Refugees 1951 and its Protocol 1967.

[56] Law on immigration, migration, residence of foreigners in Vietnam, entries into force on 01/01/2015.

[57] See John R. Campbell, *Nationalism, Law and Statelessness: Grand Illusions in the Horn of Africa*, Oxford: Routledge. (Routledge Explorations in Development Studies), 2013, p.11.

bar the surrender of persons who may have the similar status with asylum seekers. Those are regulations in respect of extradition refusal based on political offense exception and non-discrimination rule.

In international law, the political offense is traditionally considered as a ground for rejecting extradition. Similarly, in treaties on extradition, political offense exception is also a crucial legal basis for extradition refusal.[58] In Vietnam, political crime is provided in all bilateral treaties on extradition which are concluded between Vietnam and other states, for instance:

Treaty with South Korea:

> Extradition shall not be granted under this Treaty in any of the following circumstances: (a) when the Requested Party determines that the offense for which extradition request is an offense bearing political character.[59]

Treaty with India:

> Extradition shall not be refused if the offense of which it is requested is an offense of a political character.[60]

Treaty with Australia:

> Extradition may be refused if the offense for which extradition is sought is regarded by the Requested Party as a political offense. [61]

The non-discrimination rule is a widely accepted principle in laws and treaties regarding extradition. Traditionally, it is one of the mandatory grounds for extradition denial.[62] It protects a person against persecution on account of his race, religion, nationality, or political opinion or where that person's position may be prejudiced for any of these reasons.[63] Concerning non-discrimination rule, under the provisions of the

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[58] Edward M. Wise, "The Political Offense Exception to Extradition: The Delicate Problem of Balancing the Rights of the Individual and the International Public Order by Christine van den Wijngaert", *The American Journal of Comparative Law*, Vol. 30, No. 2 (Spring, 1982), p. 362.

[59] Art. 3(a), Treaty on extradition between the Socialist Republic of Vietnam and the Republic of Korea, signed 15/9/2003.

[60] Art. 4(1), Treaty on extradition between the Socialist Republic of Vietnam and the Republic of India, signed 12/10/2011.

[61] Art. 2(2), Treaty on extradition between the Socialist Republic of Vietnam and Australia, signed 10/4/2012.

[62] For example, see Art. 3(2), European Convention on Extradition (Paris, 13 December 1957, ETS. 24, in force 18/4/1960); Art. 5, European Covention on the Suppression of Terrorism (Strasbourg, 27/01/1977, ETS. 90, in force 04/8/1978); Art. 3, UN Model Treaty on Extradition, UN Doc. A/45/49(1990), 30 ILM 1407.

[63] M. Cherif Bassiouni (edt), *International Criminal Law: Multilateral and Bilateral Enforcment Mechanism,* (3rd ed, Martinus Nijhoff Publishers, The Netherlands, 2008), p. 353.

Vietnam Criminal Procedure Code 2003 (Article 344), extradition shall not be granted if the requested persons are residing in Vietnam for reasons of being possibly ill-treated in the requesting countries on the grounds of racial discrimination, religion, nationality, ethnicity, social status or political views (*non-discrimination principle*). To deal with the same issue, Article 35 (d) (Refusal of extradition) of Law on mutual legal assistance 2007 states specifically:

> The extradition request shall not be granted where the competent authorities of Vietnam have reasonable grounds to believe that the request for extradition has been presented with a view to prosecuting or punishing the person sought by reason of race, religion, sex, nationality, social status, or political opinions.

On an international level, bilateral treaties on extradition between Vietnam and other countries such as Australia[64], the Kingdom of Cambodia[65], and the Republic of Indonesia[66] also ensure a non-discrimination principle as follows:

Article 3 (1.a) (Exceptions to extradition) of the Treaty with Australia provides that extradition shall be refused if "the Requested Party has substantial grounds for believing that a request for extradition to an ordinary criminal offense has been made for the purpose of persecuting or punishing a person due to that person's race, ethnic origin, gender, language, religion, nationality, political opinion or another status, or that that person's position may be prejudiced for any of those reasons."

Article 3 (1.c) (Refusal of Extradition) of the Treaty with Cambodia specifies that extradition shall not be granted under this Treaty when "there are well-founded reasons that the request for extradition of an offense has been presented with a view to persecuting or punishing the person sought by reason of race, sex, language, religion, nationality, political opinion, or that person's position may be prejudiced for any of those reasons".

Article 3 (1.b) (Refusal of Extradition) of the Treaty with Indonesia stipulates that extradition shall not be granted where "the Requested Party has substantial grounds for believing that the request for extradition has been made for the purpose of prosecuting or punishing the person sought on account of that person's race, religion,

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[64] *Supra*, note 45.

[65] Treaty on extradition between the Socialist Republic of Vietnam and the Kingdom of Cambodia, signed 26/12/2013.

[66] Treaty on extradition between the Socialist Republic of Vietnam and the Republic of Indonesia, signed 27/6/2013.

nationality, ethnic origin, political opinion, or that person may, for any of those reasons, be subjected to unfair treatment in judicial proceedings."

In the treaties mentioned above, political offense exception and non-discrimination rule are specified as two principal grounds for extradition refusal in Vietnamese law. A person in these cases might not be extradited to the requested State but there is no capability for him to be recognized as an asylum in accordance with Vietnamese law and the principle of non-refoulement is thus not able to be ensured.

Conclusion

The aim of extradition is to bring fugitives to justice for their crime which they committed or were sentenced for in the requesting State. Asylum, on the contrary, has the purpose of protecting people from persecution in the country of their origin by granting them the refugee status in the residence country. Extradition and asylum have procedures with different legal standards, but they may interact or influence each other. In certain cases, the objective of extradition and asylum are the same person. Different countries or territories will have distinctive legal basis and experiences to deal with this circumstance. Thus, by evaluating EU law concerning extradition and asylum in comparison to Vietnam's practice, this chapter has discussed and found obstacles as well as challenges to each system.

EAW Framework Decision marked a milestone in the development of extradition legislation in the EU. In the light of this mechanism, surrender of fugitives is faster and more efficient.[67] However, a number of concerns surrounding human rights and asylum rights in particular, were raised due to the abolition of political offense exception and non-discrimination principle in clauses for mandatory and optional refusal of executing an arrest warrant in accordance with the EAW Framework Decision. Conversely, ECE still maintains both above mentioned rules. This elimination is not only a threat to the rights of refugees and asylum seekers in EU countries but also creates an unfair situation between those refugees who are in and those who are outside EU zone. "The enforcement of international law is better served by an extradition law that expressly accommodates the interests of human rights than by one that fails to acknowledge the extent to which human rights law has reshaped this branch of

[67] According to COM(2009)262, page 3, The European arrest warrant has greatly reduced the effort required in order to extradite criminals: it has brought the time taken to secure an extradition from about a year to between 11 days and six weeks.

international cooperation."[68] To harmonize changes of extradition law and guarantee asylum rights in the EU, political offense exception and the non-discrimination rule should be re-established as principal provisions of the EAW and surrender procedure. As a result of the responses by the 27 European States to the Questionnaire posed by PC-OC[69] that was previously mentioned, EU countries should take the relationship between extradition procedures and asylum procedures into consideration. A standard legal basis for refugee protection in the context of extradition would make cooperation between both institutions amongst EU countries more efficient and at the same time, ensuring conformation with international laws.

The relationship between extradition and asylum has never been a concern in Vietnam. There was no internal law on asylum in Vietnam and Vietnam has not accessed the Refugee Convention or 1967 Protocol yet. However, a number of Vietnamese asylum seekers and refugees in foreign countries cause problems which demand cooperation between Vietnamese authorities and counterparts. In the present era of integration and globalization, Vietnam is not an exception of being a destination for refugees from other states in the future. There is no doubt that the Vietnamese authorities will be facing these issues with increasing regularity in the years to come. The lack of a legal framework for asylum issues not only causes difficulties for immigration control but also negatively influences human rights in general. It is the fact that some states without national asylum systems consider a significant number of refugees and asylum seekers as illegal migrants. Consequently, they have the high risk of facing problems such as; detention, expulsion, *refoulement*, and other serious consequences. The lack of legal status also prevents the people concerned from accessing the labour market and basic services, including healthcare and education. Although Vietnamese law contains a constitutional clause and Law on immigration, migration and residence of foreigners in Vietnam, all related provisions only embrace some aspects of asylum regime and maintain a far different approach than asylum law. Hence, a law regarding asylum should be issued in Vietnam in which the status of asylum seekers and refugees is clearly interpreted. Besides, the relationship between extradition and asylum needs to be supplemented in the Extradition Chapter of

[68] J. Dugard, C. van den Wyngaert, "Reconciling Extradition with Human Rights", *The American Journal of International Law*, 1998, p. 187, at 188.
[69] Sibylle Kapferer, supra note 14.

Vietnamese Law on mutual legal assistance 2007. Accordingly, extradition may be barred in cases of the requested person being an asylum seeker or refugee.

On an international level, the Refugee Convention and 1967 Protocol are both necessary legal instruments to protect human rights and in particular, refugee's rights. Therefore, a large number of countries in the world have ratified or accessed these documents. It is time for Vietnam to consider the possibility of accessing the Refugee Convention in order to cooperate efficiently with other countries in the scope of asylum protection and safeguarding human rights.

Chapter 3
DISGUISED EXTRADITION

Introduction

Extradition is the traditional measure of surrendering of a person in view of prosecution or execution of a sentence in relation to the offense for which that person was sought for extradition. The legal basis for cooperation on extradition is the related international agreements as well as the national law of contracting parties. When no extradition treaty exists, then the principle of reciprocity would normally apply. After an extradition request is transmitted, the procedure of extradition will be governed by the domestic law of the requested State. In practice, many extradition cases require a lengthy, costly and complicated procedure and the result are often uncertain due to a variety of refusal grounds generated by the extradition law and other related laws. These impediments may cause difficulties for both the requesting State and the requested State. That is why in certain circumstances, where the extradition request is at risk of being barred or even be rejected, some countries avail their close diplomatic relations to use alternative procedures such as *deportation, expulsion* or other immigration rules to surrender or remove a person to the requesting country for the purpose of criminal prosecution or enforcement of a sentence. Most of these cases are named "*disguised extradition*". The question arises as to whether this sort of process is lawful and why it is used instead of the extradition proceedings. Deportation or expulsion is an administrative measure applied by every nation in the world. However, that a State deports a person with the purpose of extradition is a controversial issue. As far as international law is concerned, a number of treaties in connection with human rights namely, the International Covenant on Civil and Political Rights 1966[1] (Art.13), American Convention on Human Rights 1969[2] (Art.22), European Protocol 7 (1984) of Convention on Human Rights 1950[3] safeguard the removal of aliens lawfully in the host State's territory except in circumstances provided by law.[4] Furthermore, Article 5(1)(f)

[1] 999 UNTS 171 and 1057 UNTS 407 / [1980] ATS 23 / 6 ILM 368 (1967).

[2] OAS Treaty Series No. 36; 1144 UNTS 123; 9 ILM 99 (1969).

[3] Council of Europe, Protocol 7 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, 22 November 1984, ETS 117.

[4] For example, Protocol 7, Art.1 states that "1. An alien lawfully resident in the territory of a State shall not be expelled therefrom except in pursuance of a decision reached in accordance with law and shall be allowed:

a. to submit reasons against his expulsion,

of the Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (European Convention on Human Rights) prohibits a State from using the process of deportation to the second State with a view to achieving an illegal extradition indirectly to a third country. Some countries, for instance, Austria, Belgium, France, Germany and Italy prohibit this process in their domestic law.[5] However, the view that all cases of deportation and expulsion of fugitives are disguised extradition is dubious. It is challenging to distinguish between lawful deportation and the illegal case in association with the purpose of extradition in reality. In the context of legality and practice, a growing number of countries prefer applying administrative measures as alternatives for extradition on account of its efficiency.

It is the fact that research on disguised extradition has never been conducted in Vietnam. Nevertheless, due to the lack of a legal basis or the transparency of the law concerned, Vietnamese competent authorities may hand over fugitives to foreign counterparts through substitutes for extradition, for instance, deportation or expulsion. This chapter examines the application of surrender forms in the manner of alternatives for extradition and analyses the role and lawfulness of those measures in law and practice of the EU and Vietnam. Keeping this aim firmly in mind, the first section of this study will focus on analyzing the concept and characteristics of disguised extradition. In the following sections, the legal framework and practice with regard to this issue will be observed under the European Union's perspective in comparison with Vietnam's situation. The conclusion will highlight some study findings and suggest recommendations to deal with the "disguised extradition" issue in Vietnam.

1. "Disguised extradition" – a procedure other than extradition

Defining disguised extradition is a difficult task and there are inconsistent views concerning the notion and application of this process. The debates on such matters raise further questions: why do competent authorities apply this type of surrender instead of extradition process to the requested person? How do we distinguish between disguised

b. to have his case reviewed, and
c. to be represented for these purposes before the competent authority or a person or persons designated by that authority.

2. An alien may be expelled before the exercise of his rights under paragraph 1.a, b and c of this Article, when such expulsion is necessary in the interests of public order or is grounded on reasons of national security.".

[5] See D. Cameron Findlay, "Abducting Terrorists Overseas for Trial in the United States: Issues of International and Domestic Law", 23 Tex. Int'l L.J. 1, 1998, p. 7.

extradition and legal deportation or expulsion or other alternatives? What are the advantages and shortcomings of disguised extradition?

When a fugitive is transferred from one State to another for the purposes of criminal prosecution or enforcement of a sentence, extradition is a traditional and appropriate procedure. In practice, some States also resort to other forms of surrendering persons or obtaining jurisdiction over them. Some substitute for extradition, for example, deportation or expulsion, may constitute as extradition in disguise. According to M.C. Bassiouni, disguised extradition is a lawful surrender according to international law due to the fugitive being arrested under national judicial and/or administrative proceedings. However, Bassiouni also admitted that in certain aspects of the practice, disguised extradition may violate both international and U.S. law.[6] In certain circumstances, these alternatives are illegal under domestic law as well as international law. The term "disguised extradition"[7] refers to cases whereby the use of a particular power, with which it has been vested for another and different purpose, the State may give effect to a request for the surrender of a fugitive criminal which it is not otherwise lawfully authorized to do. Thus, a State applying its internal law to deport aliens may surrender an alien to his national state which has requested his surrender for trial or punishment.[8] The requested State may also simply surrender the wanted person without going through an extradition process. In other words, disguised extradition means that one State places a person in such a situation that he/she falls or might fall under the control of the authorities of another country which is interested in submitting that person to its jurisdiction for the purpose of prosecution or punishment. When the result of the said action results in the person coming under the control of agents of that other State, whether that person might be tried or punished or whether he/she may challenge such situation would depend on the law of the latter State.[9]

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[6] See M. Cherif. Bassiouni, *International Extradition: United States Law and Practice,* Oxford University Press; 6 edition (February 3, 2014), p.215.

[7] The term *extradition defuisée* was used as early as 1860 by a French court: Decocq, "La livrason des delinquants en dehors du droit commun de l'extradition", 53 R.C.D.I.P.411, 424 (1964) cited in I. Shearer, *Extradition in International law,* Manchester University Press, 1971, p.78.

[8] Paul O'Higgin, "Disguised Extradition: The Soblen case", *The Modern Law Review,* Vol.27, Sept. 1964, p.522; see also Aliens Order in Council, Gibraltar, 1873, 8s. 4 and 5; see *The Times,* September 7, 1882.

[9] See European Committee on Crime Problems, *Disguised Extradition, I.E surrender by other means, some idea to start a discussion,* PC-OC(2011)09rev, 16 May 2011, para.2.

I.A. Shearer argued that a true "disguised extradition" is one in which the vehicle of deportation is used with the prime motive of extradition.[10] The two questions which arise are: "(1) may a deportee challenge a deportation order specifying a particular destination on the ground that the purported deportation is in reality an extradition? And (2) is the use of deportation with the intention of, or with the *de facto* result of, affecting extradition objectively justifiable?"[11] It means that in this case the legal rights of deportee should be taken into consideration. Apparently, extradition provides the individual with certain safeguards (rule of specialty, double criminality) which are lacking in the case of deportation/expulsion. Besides, no rule is in place which acts to prohibit a State from the deportation of a suspected criminal to another State, especially that of their nationality, and subsequently stand trial there. Due to such act resulting in the deprivation of the rights usually attached to extradition, such practices are widely denounced. More specifically, his right to raise the political exception would not be granted. Many countries do, however, still carry out such practices despite their scrutiny.[12] The reasons States might agree on a "shortcut" or "bypass" of a formal extradition procedure through "other means" are various, for example, failure of an initiated extradition procedure; non-extraditable offenses or lengthy and complex procedures. These "other means" might fall into two categories: (1) legal proceedings include formally provided for the law, like expulsion or deportation; (2) illegal actions (both from an international law or/and a national law perspective), like forcible abduction and unlawful seizure of the person.[13]

It may be understood that apart from deportation or expulsion, methods employed to apprehend a person in the territory of another State includes unlawful seizure, abduction or kidnapping; sometimes without the knowledge of the host State. In other cases, foreign agents may operate with the acquiescence of, or in collaboration with, the authorities of the latter, for example, on the basis of security cooperation agreements. M. Cherif Bassiouni classifies forms of rendition outside the scope of extradition as follows:

"1. Abduction and kidnapping of a person by the agents of another state;

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[10] Ivan Anthony Shearer, *Extradition in international law*, (Manchester: Manchester University Press, 1971), p.78.
[11] *Ibid.*, at 79.
[12] International Law Association (ILA), *Report of the Commission on Extradition and Human Rights* in ILA, Report of the Sixty Sixth Conference 142, 1994, p.164.
[13] *Supra* note 9, para.3,4.

2. Informal surrender of a person by the agents of one state to another without formal or legal process;

3. The use of immigration law as a device to directly or indirectly surrender a person or place a person in a position where he or she can be taken into custody by the agents of another state."[14]

The definition of the aforementioned "other means" elaborated will clarify the different forms of alternatives for extradition which a country may apply in practice:

Often based on grounds where the alien is deemed undesirable or a threat to the State, expulsion is defined by a State's rejection of an alien's legal entry to remain[15].

Deportation is the removal from a State a person who illegally entered the territory of that State. In some countries, according to domestic legislations, deportation and expulsion have the same meaning and are usually provided for by domestic laws on immigration. Deportation in international practice is essentially the unilateral act of the deporting State. The motive behind it is to protect the interests of the deporting State and not, in fact, co-operation in the international suppression of crime.[16]

Abduction is the act where within State B, agents of State A, either with or without the consent or awareness of State B and furthermore without involvement from State B, apprehends the individual in question.[17]

Seizure's is defined in circumstances where agents of State A (where the individual is situated) apprehends the individual in question and subsequently surrenders them to agents of State B in proceedings deemed outside the formal or legal process.[18]

In some cases, one process may have a combination of both abduction and seizure, namely in cases where agents of both States are acting in co-operation.

2. Disguised extradition in the European Union

The application of disguised extradition is a controversial topic in the EU and it raises particular questions concerning the protection of human rights. Many EU

[14] M. Cherif Bassiouni, *International Extradition and World Public Order,* A.W. Stijhoff International Publishing Company B.V, 1974 p.121-122.
[15] See PC-OC (2011) 09rev.
[16] Id.
[17] Id.
[18] Id.

countries, for instance, Austria, Belgium, France and Italy, forbid disguised extradition in their law.[19] On an international level, Article 5(1)(f) of the European Convention on Human Rights[20] establishes grounds for the prohibiting of a State from using the process of deportation to a second State with a view of indirectly achieving an illegal extradition to a third State. In practice, the stance of the EU countries in relation to disguised extradition was addressed in some typical cases.

In the UK, one of the most famous cases occurred in 1882, when three Cuban ex-officers, who had taken part in one of the many unsuccessful uprisings against the Spaniards, escaped from a Spanish prison at Cadiz and fled to Gibraltar[21] on their way to the United States of America.[22] Upon the request of the local Spanish consul, they were arrested by the authorities of Gibraltar. Although the 1878 Anglo-Spanish Extradition Treaty prohibits the surrender of political offenders, the Aliens Order in Council a Gibraltar Magistrate ordered their deportation in response to the Spanish request. Consequently, the Gibraltar authorities handed the three Cubans over to the Spanish authorities, who had been notified of their imminent surrender. "This is a very clear illustration of disguised extradition. The surrender was made in response to a request, utilizing machinery provided for a very different purpose, since surrender under the machinery provided in the Extradition Treaty was legally not applicable. This incident caused an uproar in Parliament and over the next few years the British Government maintained steady pressure on the Spanish Government to return the Cubans. Ultimately they were liberated by the Spanish authorities."[23]

Another example is the Doherty case (INS v. Doherty, 60 U.S.L.W. 4085 (U.S. Jan. 14, 1992). Doherty was involved in the murder of a British Security Forces captain in Belfast, Northern Ireland. Whilst living in the US, where Doherty illegally entered, The UK put forward an extradition request. As Doherty's crimes were considered a political offense, and extradition to the UK would thus result in a life imprisonment

[19] See D. Cameron Findlay, *supra* note 5.

[20] Convention for the Protection of Human Rights and Fundamental Freedoms

[21] is a British Overseas Territory located on the southern end of the Iberian Peninsula at the entrance of the Mediterranean.

[22] See O'Higgins, *supra*, note 8, p.522.

[23] See O'Higgins, *supra*, note 5, p.523; see also authorities cited P. O'Higgins, "I Unlawful Seizure and Irregular Extradition" Vol. I. D. 277. (1960) 3-1 *B.Y.I.L.* 279-320 at p. 312, note 2.

sentence being served to Doherty, the competent court subsequently denied the request. "What could not be achieved by extradition was accomplished via deportation."[24]

The Soblen case is one of the most famous cases illustrated for disguised extradition by application of deportation. The entirety of the citing description made by M.C. Bassiouni is as follows: [25]

> "Dr. Soblen was accused of espionage in the United States. Released on bond, he fled to Israel, claiming asylum and citizenship as a Jew under the Israeli Law of Return. Israel…found that Dr. Soblen was not qualified for Israeli citizenship and placed him on a flight to New York. Interestingly, there were no other passengers aboard except US marshals. In flight, close to England, Dr. Soblen attempted suicide. The plane landed in Great Britain and Dr. Soblen was taken to hospital. The US wanted him but the was not an extraditable one (political) under the bilateral treaty of 1931. But Great Britain found that Dr. Soblen had not been legally admitted into the country and ordered his departure on the first available plane of the day, presumably to be returned to Israel. It so happened that there were no flights for Israel that day and the first flight out was to New York, aboard the same plane that took Soblen from Israel".

Great Britain had clearly deported Soblen as a de factor extradition with the true motive of extradition. This case is a typical example of "disguised extradition".

In practice, disguised extradition may lead to violations of the European Convention on Human Rights. When a case is submitted, the European Court on Human Rights (ECtHR) will hear the case and release the decision. The case of Bozano v. France[26] is also considered as an explicit example of disguised extradition which was judged by the ECtHR. The case involved France, Switzerland and Italy but the ECtHR decision was centered around Bozano v. France, 18th December 1986 (no. 9990/82).[27] After the French court of appeals in Limoges had denied Italy's request for Bozano's extradition, he was picked up without any formal process in the streets of Grenoble by French police, handed over to a Swiss police officer and finally extradited to Italy. An interesting point to note is that extradition to Italy was denied by the French court under

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[24] See *Supra* note 5, para.6; see more on Jennifer M. Corey, "Immigration and Naturalization Service v. Doherty: the Politics of Extradition, Deportation, and Asylum", 16 Md. J. Int'l L. 83 (1992). Available at: http://digitalcommons.law.umaryland.edu/mjil/vol16/iss1/5; M. Cherif Bassiouni, *International Extradition: United States Law and Practice* (6th ed., Oxford Uni.Press, 2014), p.208.

[25] *Supra* note 4, p.79-80; *supra* note 8, para.6.

[26] Bozano v France, Merits, App No 9990/82, A/111, (1991) 9 EHRR 297, IHRL 3091 (ECHR 1986), 18th December 1986, European Court of Human Rights [ECtHR]

[27] *Supra* note 8, para.9.

the circumstance that Bozano was acquitted at his first instance trial in Italy and was then found guilty on appeal, in absentia, which is a procedure that does not exist in France (in case of trial in absentia a new trial is carried out once the person is arrested). Although Italian and French police authorities had agreed to have Bozano returned to Italy, there was no way in which that could have been accomplished. The ECtHR found that there had been a violation of Article 5 of the Convention with regards to Bozano's deprivation of liberty in view of delivering him to the Swiss authorities which was deemed as unlawful and "amounted in fact to a disguised form of extradition designed to circumvent the negative ruling" of the French court, that denied extradition (§ 60 of the ECtHR decision). In this case the European court found that there had been a use of disguised extradition, but the true substance of the violation derived from having deprived Bozano's liberty for a certain period of time, which may not always occur in analogue circumvention of extradition procedure.

A question arises whether there is any room for the application of disguised extradition in the EU. In 2011 the PC-OC held a meeting to discuss disguised extradition with the participants from Italy, Czech Republic and Belgium (62nd plenary meeting)[28]. Mr. Erik Verbert, an expert from Belgium, gave an example of an actual case concerning extradition and deportation. The case can be summarized as follows:

A Belgian national accumulated a combined prison sentence amounting to 21-years in Belgium for drug offenses. He was located in Cape Town and a Red Notice was thus issued. As is the case with all common law countries, a Red Notice is not considered as a valid provisional arrest request in South Africa. Police cooperation revealed that the fugitive lived in Cape Town under a false identity and it emerged that he had entered SA using a false passport and obtained a visa. Since obtaining an extradition from SA is near-impossible, the Belgian police pursued the possibility of having the wanted person *removed* from SA to Belgium. During this process, the utmost care was taken to leave local law enforcement authorities (in Cape Town) excluded from the case and all communications were therefore handled through a single reliable Interpol Pretoria officer. The fugitive was also transferred from Cape Town to Pretoria. The immigration law was duly applied and the fugitive was put on a plane to Brussels, escorted by SA immigration officers. SA required Belgium to pay for the removal and the accommodation of the two officers in Brussels. Any reference to an extradition

[28] See PC-OC (2011) 09rev.

process was carefully avoided during the whole proceeding. The Belgian police never requested the provisional arrest or the extradition. The fugitive was finally arrested at the airport; his lawyer subsequently never raised or contested the legality of his apprehension.

In the following meeting in 2012, under the result of a discussion surrounding the relationship between extradition and deportation (disguised extradition), the PC-OC addressed that:

> "It was underlined that according to the case law of the ECtHR, the decision of a state to bypass the more stringent procedures of extradition by expelling a person to a country that wishes to prosecute and/or punish that person (disguised extradition) does not constitute, as such, a violation of the European Convention on Human Rights (ECHR). The state may choose to extradite or to deport/expel. In both cases it is essential that the procedure applied has a legal basis in law and that the decision does not infringe any specific rights of the person concerned laid down in the Convention."

3. Disguised extradition in Vietnam

"Disguised extradition" has never been discussed by legal researchers or practitioners in Vietnam. The related law and other legal documents do not prohibit the surrender of fugitives to the country which is pursuing them for prosecution or enforcement of the sentence. In practice, when a person violates administrative or immigration laws of Vietnam, the competent authorities may legally hand over that person to the country of which that person is a citizen by using either deportation or expulsion procedures under Vietnamese law. There is no distinction between deportation and expulsion in Vietnam's perspective and two proceedings are used interchangeably. While under EU laws, deportation is an administrative procedure regulated by immigration rules, Vietnamese law thus stipulates deportation application is twofold: (1) a criminal punishment according to Article 32 of the Criminal Code 1999[29] and (2) an administrative punishment (provided by Decree of Government No.15/2009/ND-CP dated 13 February 2009 on the application of deportation under administrative procedure). Although no cases of disguised extradition have been formally named in Vietnam there is also no evidence to assure that it has ever occurred.

[29] Article 32 (Deportation): Deportation means to order sentenced foreigners to depart from the territory of the Socialist Republic of Vietnam. Deportation is applied by courts either as a principal penalty or an additional penalty, depending on each specific case.

In practice, on the basis of cooperation between Vietnamese police and foreign counterparts, a fugitive could be surrendered with a simpler and faster procedure, such as deportation or expulsion in order to prosecute or execute a sentence.

Conclusion

It is clear that the relationship between extradition and other alternatives, especially legal proceedings like deportation or expulsion, is complex. In many cases, it is difficult to conclude whether disguised extradition actually occurs or not. When considering an extradition request, it is vital to distinguish between the legal situation of the State seeking the person's return to it for the purposes of prosecution or enforcement of a sentence on one hand (often the State of nationality of the person sought) and the legal situation of the State that is to issue the return (in one way or the other) of that person to the first State or at least the person's removal from its own territory. Disguised extradition, in some aspects, is a violation of international law on human rights. The assessment conducted by this chapter has showed that without strict control from the EU competent authority, illegal extradition could happen in many cases due to all alternatives being faster, cheaper and simpler in comparison to extradition process. Nevertheless, in certain cases, there is an interesting coincidence between extradition and deportation or expulsion. A country, if the conditions for deportation are met, could legally deport a person to the State which requests him/her for prosecution or execution of sentence.

To prevent infringements concerning human rights, which include, but are not limited to, violations regarding disguised extradition in the surrender procedure, Vietnamese competent authorities need to strictly execute the provisions of the Law on mutual legal assistance 2007. Nevertheless, from the experiences of the EU as well as the Council of Europe, according to specific cases, Vietnamese authorities may apply immigration law, where possible, with a view to cooperating with the foreign party in surrendering the requested persons to and from Vietnam.

Chapter 4
EXTRADITABLE OFFENSES

Introduction

For different types of the legal basis for extradition, the alleged offense for which extradition is requested must be either listed among the extraditable offenses in both a treaty and within the national legislation. Where an agreement does not exist between States, extradition is based on the reciprocity rule and the offense must be mutually recognized as extraditable by both States.[1] When a country requests another country to extradite a person for prosecution or execution of a sentence, the requested State will consider whether his/her offense is extraditable or not pursuant to the provision of a relevant treaty and its domestic law. Evaluating required offenses is a significant step of extradition procedure from the moment a country receives the formal request for extradition and supporting documents in respect of the person whose extradition is sought. Over the past ten years, provisions on extradition in Vietnam and the European Union (EU) have changed considerably.[2] The reform of related legislation in Vietnamese extradition laws has outlined the formal extradition procedure. Nevertheless, as far as extraditable offenses are concerned, the conflict between national provisions and treaties regarding extradition to which Vietnam is a contracting party should be discussed and clarified in order to find appropriate solutions. In the EU, the principle of mutual trust has been a cornerstone of the establishment of the Framework Decision on the European Arrest Warrant and the surrender procedures between the Member States (EAW Framework Decision). Apart from the strength of the "new fast-track extradition system", the Framework, notwithstanding, has raised debates on several issues of which the abolition of double criminality rule to the list of 32 offenses[3] is an example. This chapter will examine provisions concerning extraditable offenses in Vietnamese law and identify to what extent they connect to the similar issue found in

[1] M. Cherif Bassiouni, *International Extradition: United States Law and Practice* (6th ed., Oxford Uni.Press, 2014) p.507.

[2] In term of domestic law, extraditable offenses were firstly provided in Vietnam Law on mutual legal assistance 2007. In the EU, Framework Decision of 13 June 2002 on the European Arrest Warrant and the surrender procedures between Member States (2002/584/JHA), OJ L 190, 18.7.2002, took effect in 2004, replace for the European Convention on Extradition 1957, 13 December 1957, 359 UNTS 273 (entered into force 18 April 1960) and other corresponding EU laws on extradition.

[3] Art. 2(2) EAW Framework Decision.

the case of the European Union. Some suggestions in order to tackle shortcomings regarding provisions on extraditable offense in Vietnam will be addressed in the conclusion section.

1. Extraditable offenses

Both domestic law and international agreement regarding extradition are legal bases of extraditable offenses. Competent authorities of a country would decide to respond to an extradition request from another country by examining whether the fugitive's offense is extraditable or not. Basically, extraditable offenses in bilateral treaties follow the double criminality rule which means that these offenses are punishable under the laws of both contracting countries.[4] Similarly, multilateral treaties with respect to extradition establish extraditable acts which are recognized by signatory States. Extraditable offenses are typically interpreted in one of two ways: (1) requiring that the offense charged be identical to an offense provided in the treaty; or (2) not requiring that the offense charged be equal to the offense listed in the treaty but requiring that the acts underlying the criminal charge sustain a charge similar in nature under the laws of the requested State.[5] As far as presentation is concerned, extraditable offenses are usually prescribed in the form of *threshold* or *enumeration*, or both, due to different types of national law system as well as purposes, scope and nature of treaties concerned.

In this respect, the threshold is the general limitation for the level of offenses seriousness and serving the time of sentence left under which a competent authority determines an offense is extraditable or not. Generally, the minimum period is a one-year punishment of imprisonment or severe penalty (for prosecution) and at least four months left to serve (for execution of sentence). For instance, Article 2(1) of the UN Model Treaty on Extradition provides: "For the purposes of the present Treaty, extraditable offenses are offenses that are punishable under the laws of both Parties by imprisonment or other deprivation of liberty for a maximum period of at least one/two year(s), or by a more severe penalty. Where the request for extradition relates to a person who is wanted for the enforcement of a sentence of imprisonment or other

[4] Satya D. Bedi, *Extradition in International Law and Practice*, Rotterdam, 1966, p.69.
[5] *Supra*, note 1, p.508.

deprivation of liberty imposed for such an offense, extradition shall be granted if a period of at least four/six months of such sentence remains to be served."[6]

On the contrary, the enumerative formula includes a list of offenses which may be punishable by two contracting States (bilateral treaties) or more contracting States (multilateral treaties). In this sense, the principle of double criminality plays a key role in ensuring the cooperation between signatories of treaties. On the basis of principle of mutual recognition, the EAW Framework Decision is the only legal instrument which abolishes verification of the dual criminality rule to the list of 32 offenses. Especially, under Article 2(2) of the EAW Framework Decision, the issuing Member State which issued arrest warrant could define punishable offenses.[7]

Regarding the designation of provisions on extraditable offenses, some scholars defined two methods that have the same manner but little difference in expression: *enumerative* and *eliminative*.[8] The enumerative method for naming and defining offenses has a limiting effect, confining the application of the treaty to the listed offenses. The eliminative method, which is indicative rather than limitative, specifies as extraditable those offenses that under the laws of both States are punishable by an agreed degree of severity, usually a minimum penalty.

2. Extraditable offenses in the European Union law

Extraditable offenses are always one of the most important issues in extradition law. The European Convention on Extradition 1957 (ECE) prescribes extraditable offenses in Article 2 with threshold form as follows:

> "Extradition shall be granted in respect of offenses punishable under the laws of the requesting Party and of the requested Party by deprivation of liberty or under a detention order for a maximum period of at least one year or by a more severe penalty. Where a conviction and prison sentence have occurred or a detention order has been made in the territory of the requesting Party, the punishment awarded must have been for a period of at least four months."[9]

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[6] See Art.2, United Nation, Model Treaty on Extradition, A/Res/45/116, 14/12/1990 (available at www.un.org/documents/ga/res/45/a45r116.htm)

[7] Art.2(2) of the Framework Decision on the European Arrest Warrant and the surrender procedures between Member States 2002 abolished double criminality rule to 32 offenses which punishable in the issuing Member State by a custodial sentence or a detention order for a maximum period of at least three years and as they are defined by the law of the issuing member State.

[8] See Ivan Anthony Shearer, *Extradition in international law*, (Manchester: Manchester University Press, 1971) 133-136; see also M. Cherif Bassiouni, *supra note 1*, pp. 509-512.

[9] Art. (2), European Convention on Extradition 1957.

A combination of threshold and enumeration formulas of extraditable offenses was applied in the EAW Framework Decision. Extraditable offenses, now defined as "the offenses that shall be or may be surrendered in accordance with the EAW", have a crucial dissimilarity in comparison to the corresponding issue in the European Treaty on Extradition. Accordingly, Article 2 states that a European Arrest Warrant may be issued for acts punishable by the law of the issuing Member State by a custodial sentence or a detention order for a maximum period of at least 12 months or, where a sentence has been passed or a detention order has been made, for sentences of at least four months. These time limits are the same with the related provisions of ECE (at least one year and four months, respectively). *Custodial sentence* is generally defined as a judicial sanction involving a deprivation of liberty for the period of time that a person must stay in prison. The EAW Framework Decision does not give the explanation of this term. According to the Framework Decision 2008/909/JHA on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measure involving deprivation of liberty for the purpose of their enforcement in the EU[10], *custodial sentence* is understood as the sentence involving deprivation of liberty imposed for a limited or unlimited period of time on account of a criminal offense on the basis of criminal proceedings.[11] The EAW Framework Decision also does not include a definition of *detention order.* According to the ECE, detention order means "any order involving deprivation of liberty which has been made by a criminal court in addition to or instead of a prison sentence."[12]

Article 2(2) of the EAW Framework Decision enumerates 32 offenses which could be surrendered according to EAW without the consideration of principle of double criminality. This is one of the most remarkable provisions of EAW Framework Decision. Specifically, the EAW would be executed under the terms of the EAW Framework Decision and without verification of the double criminality of the act when these offenses are punishable in the issuing Member State by a custodial sentence or a detention order for a maximum period of at least three years and as they are defined by the law of the issuing Member State. However, double criminality can still apply to

[10] Council Framework Decision 2008/909/JHA of 27th November 2008, Official Journal of the European Union, L 327/27 of 05/12/2008.
[11] *Ibid.*, Art. 1(b).
[12] Art.25 of the ECE.

other offenses which are not on the list, meaning that in such case the act has to be a crime under the law of both the issuing State and the executing State.[13]

Is enumerative method a consistent and effective form for provisions concerning extraditable offenses? It possibly limits the scope of cooperation in extradition area between two or more countries with a list of certain offenses, but it is more explicit and easier for authorities to apply in reality. The enumerative provisions are popular in common law countries like the UK and the US. Compared to the traditional style in which extraditable offenses must be on the grounds of the double - criminality principle, there is a change in enumeration provisions of the EAW where an offense defined by the law of an EU Member State issued arrest warrant is adequate for surrendering. Upon this provision, extradition requests would be carried out faster and more efficiently between EU countries.

The formality and structure of the article on "extraditable offenses" are a strength point of the EAW Framework Decision. Besides, the rationale behind this particular rule is that the offenses listed are part of an "acquis of criminal acts" that have been criminalized in every EU Member State.[14] However, as far as the content of these provisions is concerned, there are controversial issues which attract discussions and debates among scholars, legal experts and practitioners. The abolishment of the double criminality rule applied to 32 offenses in Art. 2(2) EAW Framework Decision is one of the most controversial issues. Accordingly, if a particular activity falls within the list of offenses in the EAW Framework Decision, and is punishable by the issuing Member State by a custodial sentence or a detention order for a maximum period of three years, double criminality will not be checked.[15] This provision has raised concerns about the violations of human rights and the non-discrimination rule. The abandonment of the obligation to verify the dual criminality rule, which used to be an essential part of the traditional extradition system, has led to much criticism because it is likely to increase the current lack of clarity across the whole system whilst also the possibility to of creating serious conflicts at times of national implementation.

[13] Art. 2 (4) EAW Framework Decision.

[14] Gert Vermeulen, 'How Far Can We Go In Applying The Principle of Mutual Recognition?' in Cyrille Fijnaut & Jannemieke Ouwerkerk (eds), 'The Future of Police and Judicial Cooperation in the European Union' (2010) Koninklijke Brill NV, p. 241, 243.

[15] Joanna Apap and Sergio Carrera, "European Arrest Warrant – A Good Testing Ground for Mutual Recognition in the Enlarged EU?", *CEPS Policy Bief No. 46/February 2004,* p. 8.

With regards to this issue, *Advocaten voor de Wereld*[16], a Belgium non-government organization, has brought to Belgian Constitutional Court the question of whether Article 2(2) of the Framework Decision in so far as it sets aside verification of the requirement of dual criminality for the offenses listed therein, was compatible with the then Article 6(2) Treaty on the European Union (TEU). More specifically, the organization questions was put forward the principle of legality in criminal proceedings and with the principle of non-discrimination[17].

The enumeration of offenses in the legislative tool may be criticized due to a lack of explanation of rationale for choosing precisely which crimes fall within its scope. Also, it should be acknowledged that at present there is not an agreed common definition of any criminal activity, either at EU or international levels. This may lead to undesirable situations that undermine the human rights and civil liberties of the targeted fugitive.[18] Most of the offenses provided for in Article 2 (2) of the EAW Framework Decision are vague, as some limits of the offenses are not clear and descriptions of some offenses are not even defined in some legal systems in the EU Member States, or even punishable.[19] For example, abortion in nearly all circumstances is a criminal offense in some Member States (for example, Ireland) but not others. Euthanasia and assisted suicide are crimes in some Member States but not the Netherlands. In the Netherlands, certain activities in relation to particular drugs are not criminalized.[20] Euthanasia or abortion may qualify as grievous bodily harm by the legislation in some States while Belgian law has purposely excluded this. It is clear that the vagueness of the terms may provide them with a higher degree of flexibility, but it is also a source of potential ambiguity. The broad definitions of which the Article 2 list relies on carry the risk of conferring too many discretionary powers to the judicial authorities, without taking into account the importance of clear legal standards.

Furthermore, abolishment of double criminality can be seen as jeopardizing the legal security of citizens and violating the legality principle. Foreseeability cause

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[16] Case C-303/05 Advocaten voor de Wereld [2007] ECR I-3633.

[17] See Valsamis Mitsilegas, "The Limits of Mutual Trust in Europe's Area of Freedom, Security and Justice: From Automatic Inter-State Cooperation to the Slow Emergence of the Individual", *Yearbook of European Law*, Vol. 31, No. 1 (2012), p. 337.

[18] See Joanna Apap and Sergio Carrera, *supra* note 21, at 9.

[19] See Mark Mackarel, "The European Arrest Warrant – the Early Years: Implementing and Using the Warrant" (2007) 15 *European Journal of Crime, Criminal Law and Criminal Justice* 37, p. 44.

[20] A Review of United Kingdom's Extradition Arrangements (Following Written Ministerial Statement by the Secretary of State for the Home Department of 8 September 2010), 30/9/2011, note. 171, p. 186 (This report is also available online at http://www.homeoffice.gov.uk/).

problems regarding foreign law when considering that double criminality would normally ensure that the act is an offense under both laws of the requested and requesting State under extradition law.[21]

Regardless of critical points of view gained, it must be noted that the EAW Framework Decision is established on the basis of a mutual recognition rule. The practice proves that the EAW Framework Decision has strengthened the effectiveness of the cooperation in fighting crimes between the EU Member States. However, the EU should take into further consideration the controversial issues regarding provisions of the EAW Framework Decision with the aim to have appropriate adjustments.

3. Extraditable offenses in Vietnamese law

The Criminal Procedure Code 2003 was the first legal document covering extradition issue in Vietnam.[22] Nevertheless, provisions of this Code are only general principles of extradition which are specified in two articles, namely Article 343 (*Extradition in order to examine penal liability or execute judgments*) and Article 344 (*Refusal to extradite*). Extraditable offenses are only formally defined in the Law on mutual legal assistance 2007.[23] Accordingly, Article 33 of the Law specifies:

> 1. Extraditable offenses are offenses punishable under the criminal laws of both Vietnam and the requesting state in force at the time of extradition by imprisonment for a period of at least one year, for life imprisonment, or for death, or has been sentenced by the court of the requesting State to imprisonment and the remaining term of imprisonment to be served is at least six months.
>
> 2. It shall not matter whether the laws of both Vietnam and the requesting state place the conduct referred to in paragraph 1 of this Article within the same category of offense or denominate the offense by the same terminology;
>
> 3. Where the offense referred to in paragraph 1 of this Article has been committed outside the territory of the requesting state, extradition shall be granted if it is a criminal offense under the Penal Code of Vietnam.

[21] See Elies van Sliedregt, "The Dual Criminality Requirement" in: Nico Keijzer and Elies van Sliedregt (eds). *The European Arrest Warrant in Practice* (2009) TMC Asser Press, p. 60 – The European Court Justice has however held in the Advocaten voor de Wereld case that the legality principle does not apply to extradition and surrender procedures (Van Sliedregt).

[22] Vietnamese Criminal Procedure Code, adopted by National Assembly on 26/11/2003, entered into force 01/7/2004.

[23] Vietnam Law on mutual legal assistance, adopted by National Assembly on 21/11/2007, entered into force 01/7/2008.

In accordance with the above provisions, the eliminative method was used to specify extraditable offenses with the minimum penalty for prosecution being one year and at least six months for the execution of a sentence. This time limit for the former, one year (12 months), is similar to provisions of ECE and the EAW Framework Decision.[24] The distinction is the term serving of sentences in Vietnamese law being a minimum of six months compared to four months in the EU's rule.

In terms of extraditable offenses, a major point of variation between Vietnam and the EU is the imposition and application of the death penalty. Vietnamese criminal law currently imposes the death penalty on particularly serious offenses and, in accordance with the above Article 33(1), extraditable offenses are also included in this category of punishment. On the contrary, the EU has abolished the capital punishment for all offenses. The above distinction between Vietnam and the EU countries may cause difficulties for both sides when concluding extradition treaties. It also a challenge when Vietnam ratifies multilateral treaties which enshrine the death penalty as grounds for refusal of extradition. Where Vietnamese competent authorities accept the death penalty as a refusal on grounds for extradition in treaties with other countries, national law (the Criminal Code and Law on mutual legal assistance) will be violated. For example, the European Treaty on Extradition 1957 stated in Article 11 (Capital punishment) that:

> if the offense for which extradition is requested is punishable by death under the law of the requesting Party, and if in respect of such offense the death-penalty is not provided for by the law of the requested Party or is not normally carried out, extradition may be refused unless the requesting Party gives such assurance as the requested Party considers sufficient that the death-penalty will not be carried out.

Pursuant to this provision, when Vietnam negotiates an extradition treaty with one of the ECE Member States, the issue concerning "death punishment" is only approved by two parties if Vietnam agrees with the rule: extradition requests for offenses which are punishable by death penalty will be refused unless it is not executed in Vietnam. In practice, in purpose to strengthen cooperation in dealing with criminal matters alongside other foreign countries, Vietnam has accepted these provisions in

[24] For example, Art. 2(1) Framework Decision on EAW stipulates: "A European Arrest Warrant may be issued for acts punishable by the law of the issuing Member State by a custodial sentence or a detention order for a maximum period of at least 12 months or, where a sentence has been passed or a detention order has been made, for sentences of at least four months".

several extradition treaties, namely treaties with Russia[25] and Australia[26]. Although these provisions clearly contravene to Vietnamese national law, the Vietnam competent authority approved to conclude treaties under the supremacy principle of international law to national law. These treaties will be the precedent for similar international agreements in the future. However, there has been no mechanism to implement provisions concerning the death penalty in the mentioned treaties within Vietnam to date. Vietnamese national law on extradition needs to resolve problems with regards to death penalty to facilitate provisions of extradition concerned.

Additionally, offenses with the manner of freedom deprivation prescribed in the above-mentioned Article 33(1) are only imprisonment punishable meanwhile pursuant to ECE and EAW Framework Decision, extraditable offenses in European countries may lead to a detention order for a maximum period of one year or superseded by a more severe penalty.[27] Under this provision, a country could extradite not only a person who has committed an offense which is punishable by an imprisonment penalty but also the detention order. The term *detention order*, as well as custodial sentence, is generally understood as a judicial sanction. As far as concept of this issue is concerned, the Framework Decision on the EAW does not enshrine the definition of this term but it is taken from the European Convention on Extradition. It provides that the expression detention order means any order involving deprivation of liberty which has been made by a criminal court in addition to or instead of a prison sentence. Vietnamese criminal law does not have a punishment such as a "detention order" and, as a result, this kind of deprivation of liberty is also not stipulated in the Vietnamese Law on mutual legal assistance 2007. For this reason, the Vietnamese authority has to take into consideration this sanction when concluding extradition treaties with the EU countries or executing other agreements containing the similar provisions with these countries.

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[25] Additional Protocol to Treaty between the Socialist Republic of Vietnam and the Russian Federation on mutual legal assistance in civil and criminal matters (signed 25/8/1998) supplemented point 6 in Art. 63(1): "The extradition shall not granted if the offense for which extradition is requested is punishable by death under the law of the requesting State but the requesting State does not assure with the requested State that the death penalty will not be carried out." (Protocol was signed 23/7/2003, entry in force 27/7/2012).

[26] Art.3(1)(d) Treaty between the Socialist Republic of Vietnam and Australia on extradition (signed 10/4/2012, in force 07/4/2014) stipulates that extradition shall be refused if "the offense with which the person sought is accused or convicted, or any other offense for which that person may be detained or tried in accordance with this Treaty, carries the death penalty under the law of the Requesting Party, unless that Party undertakes that the death penalty will not be imposed or, if imposed, will not be carried out"

[27] See Art. 2(1), European Treaty on Extradition; Art. 1(1) EAW Framework Decision.

So far as an international level is concerned, all bilateral treaties with respect to extradition between Vietnam and foreign countries consist of provisions on extraditable offenses. The list of specific provisions providing extraditable offenses in the bilateral treaties containing extradition provisions of which Vietnam is a contracting party includes: article 60 of the Treaty with Lao; article 53 of the Treaty with Soviet Union; article 62 of the Treaty with Czechoslovakia; article 58 of the Treaty with Cuba; article 58 of the Treaty with Hungary; article 59 of the Treaty with Bulgaria; article 52 of the Treaty with Poland; article 62 of the Treaty with Russia; article 50 of the Treaty with Ukraine; article 54 of the Treaty with Mongolia; article 69 of the Treaty with Belarus; article 33 of the Treaty with North Korea; article 2 of the Treaty with South Korea; article 2 of the Treaty with Algeria; article 2 of the Treaty with India; article 2 of the Treaty with Australia.[28]

The above treaties only define extraditable offenses according to punishable capability and level of severity under the laws of both countries. The enumerative method was not applied. For instance, paragraph 1 and 2 of Article 2 of the Treaty on extradition between Vietnam and Republic of Korea[29] addresses:

> 1. For the purposes of this Treaty, extraditable offenses are offenses which, at the time of the request, are punishable under the laws of both Parties by deprivation of liberty for a period of at least one year or by a more severe penalty.
>
> 2. Where the request for extradition relates to a person sentenced to deprivation of liberty by a court of the Requesting Party for any extraditable offense, extradition shall be granted only if a period of at least six (6) months of the sentence remains to be served.

Pursuant to multilateral treaties[30] containing extradition provisions of which Vietnam is a Member State, extraditable offenses are stipulated under the enumeration form. They are article 36, paragraph 1 and 2 a) ii) of UN Single Convention on Narcotic Drugs, 1961; article 22, paragraph 2, point b of UN Convention on psychotropic substances, 1971; article 6, paragraph 2 of UN Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, 1988 (Convention 1988) article 5, paragraph 1 UN Optional Protocol on the sale of children, child prostitution and

[28] See the list of treaties in connection with extradition of which Vietnam is a member State in the Appendix 1 and Appendix 2 of Chapter 1.

[29] Treaty on extradition between the Socialist Republic of Vietnam and the Republic of Korea, signed 15/9/2003, in force 19/4/2005.

[30] See the list of multilateral treaties containing extradition provisions of which Vietnam is a member State in the Appendix 3 of Chapter 1.

pornography, 2000. However, Vietnam reserved all of above provisions regarding extradition at the time of ratification or accession. In 2009, Vietnam withdrew the reservation concerning Article 5(1) of the Optional Protocol on the sale of children, child prostitution and pornography. In the future, in order to enhance the effectiveness of the Vietnamese extradition system, especially in international cooperation, Vietnamese authorities should consider withdrawing all reservations with respect to extradition provisions of the treaties concerned.[31]

Conclusion

The establishment of flexible and efficient provisions for extraditable offenses in domestic law and international law is objectives of legislators and practitioners of every country in the world. This Chapter has identified that applying both threshold and enumeration methods seem the most suitable method for building provisions of extraditable offenses. However, from the EU's experiences in respect to this issue, enumeration method appears to work better with the bilateral treaty than multilateral treaty on extradition. In a legal document like the EAW Framework Decision, a list of extraditable offenses would not be effective without explicit explanation between the Member States. The abolition of dual criminality with the list of 32 offenses in the EAW Framework Decision is still a controversial issue in the EU. Although this provision has a strong basis in the principle of "mutual recognition", problems concerning human rights should be taken into account. For non-EU States, double criminality has always been a major rule of extradition law to date and Vietnam is not an exception.

Other findings of this chapter are shortcomings of the Vietnamese extradition law in respect to extraditable offenses and what Vietnam could learn from EU's experiences. The result of the study showed that integration of threshold and enumeration forms in an article on extraditable offenses is an example which Vietnam could refer to in order to find a suitable way of application in the building and developing of law on extradition or concluding treaties on extradition with other countries. Currently, law experts of Vietnam and nine ASEAN Member States[32] are

[31] See more in See Nguyen Ngoc Anh, Nguyen Viet Hong, Pham Van Cong, Dan do – Nhung van de ly luan va thuc tien, (Hanoi, Nhà xuất bản CAND, 2006), tr.85 [trans: Nguyen Ngoc Anh, Nguyen Viet Hong, Pham Van Cong, Extradition, Theoritical and Practical Issues, Hanoi, People's Police Publisher, 2006, p.85.]

[32] See http://www.asean.org/asean/asean-member-states/ (accessed 07 May 2015).

discussing to draft a model treaty on extradition for the region.[33] Enumeration associated with threshold in provisions of the EAW Framework Decision may be a useful reference for the process of building provisions of an extradition treaty between ASEAN countries. However, the exclusion of the dual criminality rule to the listed offenses is still a controversial issue in the implementation of the EAW Framework Decision. It appears that double criminality is a primary principle which would help to harmonize distinction of political and legal systems among ASEAN Member States.

On a national level, the Vietnamese Law on mutual legal assistance should supplement provisions on extraditable offense where the highest punishment is the death penalty and thus develop procedures for implementation in practice. In Vietnam, the proceeding is complicated because only the President has the power to grant an amnesty, aided by advice from competent authorities, to persons who were sentenced to death. The Vietnam Criminal Procedure Code provides specifically this procedure. Therefore, in the case of extradition, a private process should be established in the Law on mutual legal assistance.

[33] The proposal to establish an ASEAN extradition treaty as envisaged by the 1976 Declaration of ASEAN Concord as stipulated in the Vientiane Action Programme, and the consequent decision by the 6th ASEAN Law Ministers Meeting that ASLOM would examine modalities for a model ASEAN extradition treaty. See para. 31 http://www.asean.org/?static_post=joint-communique-of-the-39th-asean-ministerial-meeting-amm-kuala-lumpur-25-july-2006-2 (accessed 8 March 2014).

Chapter 5
REFUSAL OF EXTRADITION

Introduction

An extradition request is usually considered and examined on the basis of certain conditions which are provided in the relevant treaties and domestic law of a country. When one or more of these requirements are not met, the requested State usually resorts to its discretion to refuse extradition the person sought. In accordance with international law and national law regarding extradition, the denial of extradition could fall into two categories: mandatory and optional grounds. Traditionally, countries refuse extradition owing to grounds such as the death penalty, political offense, nationality, military crime and a non-discrimination rule. Due to changes in socio-economic development and situation of terrorism as well as transnational crime in the world, especially after 9/11 terrorist attack in the US, many countries and territories in the world, typically the European Union (EU), have changed security policy to strengthen international cooperation with criminal matters. The regional framework for extradition in the EU has been adjusted dramatically to serve the fight against terrorism. A number of issues concerning extradition was affected by the new policy, one of those being provisions in association with refusal grounds for extradition. In the EU region, the Framework Decision on the European Arrest Warrant and the surrender procedures between Member States[1] (EAW Framework Decision) adopted in 2002 has replaced the corresponding provisions[2] in the field of extradition. The legal instruments have been taken over since the entry into force of the EAW Framework Decision including: European Extradition Treaty 1957 and its additional protocols; European Convention on the suppression of terrorism of 27 January 1977; the Agreement between the 12 Member States of the European Union Communities on the simplification and modernization of methods of transmitting extradition request of 26 May 1989; Convention of 10 March 1995 on simplified extradition procedure between the Member

[1] Framework Decision of 13 June 2002 on the European Arrest Warrant and the surrender procedures between Member States (2002/584/JHA), OJ L 190, 18.7.2002 (hereinafter EAW Framework Decision). The Framework Decision uses "surrender procedure" for "extradition procedure" with simpler and faster procedures. Besides, "requesting Party" replaced by "issuing Member State" and "requested Party" replaced by "executing Member State".

[2] See Art. 31(1), EAW Framework Decision.

States of the European Union; Convention of 27 September 1996 relating to extradition between the Member States of the European Union; Title III, Chapter 4 of the Convention of 19 June 1990 implementing the Schengen Agreement of 14 June 1985 on the gradual abolition of checks at common borders. Along with this change, political offense, extradition of nationals and some other issues are no longer the refusal grounds for surrender procedure among EU member states. There were controversies over how new provisions concerning exceptions impact human rights among the EU Member States. In Vietnam, on the contrary, regarding the similar issues, on the basis of extradition treaties to which Vietnam is a contracting party, refusal grounds of extradition such as the death penalty, political offense, extradition of own nationals, military offense and other exceptions are still important bases for refusing extradition requests in extradition treaties signed by Vietnam. These differentiations may cause obstacles for Vietnam in the process of negotiating or concluding treaties on extradition with the EU Member States and other countries in the world which have the similar provisions on the above-mentioned issues.[3] Furthermore, the Vietnamese law on extradition has its own shortcomings as well as obstacles and the provisions to bars on extradition is one of the major concerns. The Law on mutual legal assistance, the legal basis for extradition proceeding in Vietnam, was adopted in 2007 and entered into force in 2008 but the implementation of articles with respect to the denial of extradition has not been evaluated adequately. Practically, there has not been any extradition request refused by Vietnamese authorities in accordance with grounds for denial since the adoption of the Law on mutual legal assistance. Another weakness is that some denial grounds for extradition is provided in an extradition treaty to which Vietnam is a signatory but has not transformed into domestic law. This chapter will compare various laws on grounds for refusal of extradition between the EU and Vietnam. Firstly, it evaluates the strengths and obstacles of both systems and concludes with suggestions for modifications that are suitable for corresponding issues in the current Vietnamese law on extradition that are designed strengthen the system in the fight against international crimes.

[3] Vietnam agreed article on death penalty exception in treaties on extradition with Australia and Russia. Capital punishment is provided in the Vietnam Criminal Code and this is not a ground for refusing extradition request under Law on mutual legal assistance 2007. Vietnam authorities have not applied this provision in practice so far, however the contradiction between extradition treaties and domestic law doubtlessly cause difficulties for the implementation of treaties and this obstacle should be taken into consideration.

1. Death penalty

Capital punishment is one of the traditional grounds for refusing extradition request in international law as well as municipal law. Pursuant to statistics of Amnesty International, more than two-thirds of the countries in the world have already abolished the death penalty in law or practice. Total abolitionist states in law or practice are at 141 with retentionist countries at 57.[4] There is a trend that the number of countries retaining the death penalty is lowering year by year and the execution of this sentence in practice was decreased too.[5] These changes are illustrated by the noticeable increase of international treaties on human rights, and extradition treaties in particular, which limit or block the cooperation in criminal matters or the extradition of fugitives for whom the highest penalty is capital punishment. The International Covenant on Civil and Political Rights (Civil and Political Rights Covenant), adopted by the U.N. General Assembly in 1966[6], in Article 6 establishes restrictions and safeguards on the death penalty in countries which have not abolished it. According to this article, a "sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime [....] This penalty can only be carried out pursuant to a final judgment rendered by a competent court". It also stresses that a sentence of death shall not be imposed for crimes committed by persons below eighteen years of age and shall not be carried out on pregnant women.[7]

In 1989, the United Nations General Assembly adopted the Second Optional Protocol to the International Covenant on Civil and Political Rights[8] (Second Optional Protocol) acknowledging a worldwide effort to abolish capital punishment for all purposes and obligating each State party to "take all necessary measures to abolish the death penalty within its jurisdiction."[9]

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[4] See http://www.amnesty.org/en/death-penalty/abolitionist-and-retentionist-countries (access 12 September 2014).

[5] *Id*.

[6] International Covenant on Civil and Political Rights, Dec. 19, 1966, art. 14, 999 U.N.T.S. 171, 176-77, 6 I.L.M. 368, 372-73 (1967).

[7] *Id*. art. 6(5), 6 I.L.M. at 370.

[8] Second Optional Protocol to the International Covenant on Civil and Political Rights, Aiming at the Abolition of the Death Penalty, G.A. Res. 44/128, U.N. GAOR 3d Comm., 44th Sess., Annex, Agenda Item 98, U.N. Doc. A/44/128 (1989). As of November 4, 2015, there are 81 state parties to the Second Optional Protocol, while three states have signed but not yet ratified it.

[9] Second Protocol, *supra* note 6, art. 1(2).

In the same year, the Convention on the Rights of the Child[10], adopted by the U.N. General Assembly, obligates state parties to "recognize that every child has the inherent right to life." (Article 6(1)). Furthermore, the Convention provides that "neither capital punishment nor life imprisonment without possibility of release shall be imposed for offenses committed by persons below eighteen years of age."[11] More importantly, no "reservation incompatible with the object and purpose" of the Convention on the Rights of the Child is allowed.[12]

As noted above, international law also promotes the abolition of the death penalty indirectly[13]. Many States that have abolished capital punishment refuse to extradite individuals to States which still maintain the death penalty. Abolitionist States may also refuse to participate in other forms of legal assistance that could facilitate the imposition of capital punishment in a retentionist State. Consequently, States retaining the death penalty are indirectly pressured into reducing or eliminating it entirely.

1.1. Under EU law

Europe is a flagship representative of the worldwide trend to eliminate the death penalty.[14] The European Convention for the Protection of Human Rights and Fundamental Freedoms ("European Convention on Human Rights"), which entered into force in 1953, recognized capital punishment as an exception to the right to life. Subsequently, Protocol No.6 to the European Convention on Human Rights; abolishing the death penalty in peacetime, was adopted in April 1983.[15] The Protocol has been ratified by 45 members of the Council of Europe since the end of 2006. It is perceived as the first international instrument abolishing the death penalty in the world and, accordingly, "Europe exports its philosophy by refusing extradition to States on other continents where capital punishment still exists".[16] In 2003, the Council of Europe continued to adopt Protocol No. 13 to the Convention for the Protection of Human

[10] Convention on the Rights of the Child, *GA.* Res. 44/25, U.N. GAOR, 44th Sess., Supp. No. 49, at 167, U.N. Doc. A/44/736 (1989), 28 I.L.M. 1448.

[11] *Id. art.* 37, 28 I.L.M. at 1470.

[12] *Id.* art. 51, 28 I.L.M. at 1475-76.

[13] William A.Schabas, "Indirect Abolition: Capital punishment's Role in Extradition Law and Practice", 25 Loy. L.A. Int'l & Comp. L. Rev. 583 (2003).

[14] Ved P.Nanda, "Bases for refusing International Extradition Requests, Capital Punishment and Torture", Fordham. J.Int'l L. Vol.23, 1374 (1999).

[15] Available at http://www.coe.int/en/web/conventions/full-list/-/conventions/rms/090000168007952b (accessed 12 September 2014).

[16] See M. Cherif Bassiouni, *International Law: Multilateral and bilateral enforcement*, vol.2, p.364 (2008).

Rights and Fundamental Freedoms, concerning the abolition of the death penalty in all circumstances.[17] Since then, the second legally binding instrument has been ratified by 44 Member States.

Member States of the EU are also an integral part of the Council of Europe. Under provisions of the Protocols No.6 and No.13, the EU countries no longer apply the capital punishment and this punishment becomes a ground for extradition refusal. The European Convention on Extradition 1957 (ECE) provides at Article 11 (Capital punishment) that "if the offense for which extradition is requested is punishable by death under the law of the requesting Party, and if in respect of such offense, the death-penalty is not provided for by the law of the requested Party or is not normally carried out, extradition may be refused unless the requesting Party gives such assurance as the requested Party considers sufficient that the death-penalty will not be carried out." Pursuant to this article, the requested State would probably grant extradition under assurance by the requesting State that the death-penalty will not be executed. The assurance given may vary according to the country concerned and even according to the particular case. Generally, this situation results in one of the following three possible outcomes:

> (1) letters from relevant legal representatives of the requesting state giving assurances that the death penalty will not be imposed; (2) bilateral extradition treaties explicitly including the promise from the requesting state not to apply the death penalty after the extradition; or (3) a refusal by the state to extradite.[18]

It may be, for example, a formal procedure positioned to not implement the death penalty, a procedure that informs the head of State the possibility of the penalty's withdrawal or even a simple statement crafted to transpose a message stating the recommendation or requirement of that individual's return if indeed they are condemned to death. In any case, it is at the requested Parties discretion to form a decision on whether the assurances given are adequate to provide the request.

Although the ECE provides a possibility to extradite a fugitive whose highest sentence is death punishment in the conditional case, in practice, from some EU countries' point of view, the extradition in this instance may lead to violating Article 3

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[17] Available at http://www.coe.int/en/web/conventions/full-list/-/conventions/rms/0900001680081563 (accessed 12 September 2014).

[18] Ved P.Nanda, *supra* note 14, at 1370.

of the European Convention on Human Rights (ECHR) which prohibits inhuman and degrading treatment. The *Soering v. United Kingdom*[19] case is an example of the controversy related to this issue. In that case, Soering, a German citizen arrested in Great Britain, was faced with the death penalty if extradited to Virginia, the United States. The German government also requested Soering's apprehension, because Germany's laws permit extraterritorial prosecution of nationals for certain crimes. Germany had abolished the death penalty in 1949 while Virginia still retained this punishment. Subsequently, the European Court of Human Rights ruled that Soering's extradition to the United States, without an assurance that the death penalty would not be imposed, constituted a violation of Article 3 of the European Convention on Human Rights.[20] The Court stated that, even if the death penalty could not be considered contrary to the Convention[21], extradition would violate Article 3 of ECHR and thus enable inhuman or degrading treatment as a result of Soering's danger of the "death row phenomenon". In terms of this issue, David A. Sadoff defines:

> The "death row phenomenon" is a legal – not a clinical - term perhaps best generally defined as a combination of circumstances to which a prisoner would be exposed to if he was sentenced to death and placed on death row. The two key circumstances underpinning the phenomenon are the harsh, dehumanizing condition of confinement and the prolonged period of detention an inmate may endure on death row.[22]

Evidence gathered surrounding the situations of those sentenced to death in Virginia frequently reveal a long wait for execution, from six to eight years, alongside harsh conditions and treatment. Despite acknowledgment of the potential benefits and possible well-intentioned implementation, the court pointed out that, "the consequence is that the condemned prisoner has to endure for many years the conditions on death row and the anguish and mounting tension of living in the ever-present shadow of

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[19] Soering v. United Kingdom, 161 Eur. Ct. H.1t (ser. A) (1989), 98 I.L.R. 270 (1989).

[20] Soering v. United Kingdom, App. No. 14038/88, 11 Eur. Ct. H.R. 439, 502-03 (1989). The Court. however, did not respond favorably to Amnesty International's *amicus curiae,* which invited the Court to consider Article 3 of the Convention as having implicitly repealed the death penalty reference in Article 2(1). Only one judge on the Court agreed with such a bold and innovative interpretation. *Id.* at 473-74, 504-05.

[21] The death penalty alone would not have constituted a violation of the Convention, on account of Article 2 (1) permits the death penalty and the United Kingdom did not ratify the 6th Additional Protocol, which abolishes the capital punishment.

[22] See David D. Sadoff, "International Law and the Mortal Precipice: A legal policy Critique of the Death Row Phenomenon", 17 TUL. J. INT'L & COMP. L. 77, 2008, pp. 81-82.

death".[23] As can be seen from the Soering's case that "death row phenomenon" was considered inhuman and degrading treatment in accordance with the provision of Article 3 of the ECHR and become basis of extradition refusal.

The *Soering* decision was submitted to the Committee of Ministers of the Council of Europe, which oversees the implementation of court rulings pursuant to Article 54 of the European Convention on Human Rights. The United Kingdom reported to the Committee that, on July 28, 1989, it had informed U.S. authorities that it would refuse extradition for an offense that might impose the death penalty. The United States later answered "in the light of the applicable provisions of the 1972 extradition treaty, United States law would prohibit the applicant's prosecution in Virginia for the offense of capital murder"[24]. The Committee then agreed that the United Kingdom had respected the judgment and exercised its functions under the Convention. Consequently, Soering was extradited to Virginia, where he pled guilty to two charges of murder, and for which he was sentenced to ninety-nine years in prison.

In Italy, the case of Venezia (ITA-1996-2005)[25] under jurisdiction of the Italian Constitutional Court, went even further, stating that it is conflicting with the Italian Constitution for Italy to help execute penalties which cannot be imposed for any offense in Italy (namely, the death penalty and punishments contrary to human precepts). In this case, the Italian Constitutional Court held that under no circumstances would Italy extradite an individual to a country where the death penalty existed, despite the United States' assurances. They determined that the prohibition of the death penalty in Italy is unconditional. A person may not be extradited to a State where they may be susceptible to the death penalty, even when "adequate assurances" are provided by the requesting State that this will not be the case.

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[23] *Soering*, 11 Eur. Ct. H.R. at 478:
The Court concluded:
"Having regard to the very long period of time spent on death row in such extreme conditions, with the ever present and mounting anguish of awaiting execution of the death penalty, and to the personal circumstances of the applicant, especially his age and mental state at the time of the offense, the applicant's extradition to the United States would expose him to a real risk of treatment going beyond the threshold set by Article 3. A further consideration of relevance is that in the particular instance the legitimate purpose of extradition could be achieved by another means, which would not involve suffering of such exceptional intensity or duration [i.e., extradition to Germany, where the death penalty would not be imposed"

[24] *See* Richard B. Lillich. *The Soering case,* 95 AM. J. INT'L L. 128, 141.

[25] Venezia v. Ministero di Grazia e Giustizia, Corte Costituzionale, Sentenza No. 223, 25–27 June 1996.

In the EU, the Framework Decision on the European Arrest Warrant and the surrender procedures between Member States (EAW Framework Decision) was adopted in 2002 without any article on the "death penalty" exception. However, its Preamble, at recital (13), specifies that "no person should be removed, expelled or extradited to a State where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment."[26] Under this point, the death penalty continues to presently be grounds for refusal of extradition in the European Union countries. Keeping this issue in mind, Article 13 of the Extradition Agreement between the European Union and the United States of America[27], which was signed on 25 June 2003, provides that extradition for an offense punishable with death in the requesting, but not the requested State, may be granted on the condition that the death penalty shall not be imposed on the person sought, or if for procedural reasons of such condition cannot be complied with, on condition that the death penalty, if imposed, shall not be carried out. Moreover, Pursuant to Article 3(1)(j) of the Agreement, the EU Member States may apply the provision of capital punishment contained therein in place of, or in the absence of bilateral treaty provisions. Whilst it appears, according to the wording of Article 13, that extradition to the United States of America is decided at the discretion of the European States, it must be acknowledged that there are requirements as a result of Protocols No. 6 and 13 to ECHR which impose the carrying out of such obligations by all EU Members States.

1.2. Under Vietnamese law

The death penalty is one of the principal punishments provided in the Vietnamese Penal Code. In accordance with Article 35 (Death penalty) of this Code, the death penalty is a special penalty only applied to persons committing particularly serious crimes. The death sentence shall not apply or carry out to juvenile offenders, pregnant women and women nursing children under 36 months old at the time of committing crimes or being tried. Vietnamese criminal law currently imposes the death penalty as the highest punishment for very serious offenses such as murder, robbery, and illicit trafficking of narcotic drugs. In 2009, Vietnam amended the Penal Code,

[26] See http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32002F0584:EN:NOT

[27] Agreement on Extradition between the European Union and the United States of America, L 181, 19/07/2003, p. 27

reducing the number of crimes punishable by death to 22 from 29.[28] To comply with the Penal Code, in the light of Article 33 of Law on mutual legal assistance 2007, apart from imprisonment punishment, the extraditable offense may be the offense punishable by a capital penalty.[29]

The retention of the death penalty may cause difficulties when Vietnam concludes or ratifies an extradition treaty with countries which have abolished the death penalty, especially European countries as well as the EU Member States. In practice, the EU competent authority shall firmly refuse extradition request from Vietnam with respect to the use of the death penalty, unless Vietnamese authority assures that this penalty would not be executed. In this situation, for the purpose of successfully extraditing the requested person to Vietnam and proceeding against him/her, the solution is agreeing with conditions of not imposing or carrying out the death penalty in a specific bilateral treaty on extradition. In 2010, Vietnam and Russia ratified Protocol on a supplementation of the Treaty on mutual legal assistance in civil and criminal matters between Vietnam and the Russian Federation (signed 2003) in which the two countries agreed to add a provision in respect of death penalty (paragraph f) in Article 63 about mandatory refusal of extradition cases. The provision states that extradition shall be refused if the punishment for the offense of which the extradition is requested for is the death penalty, unless the requesting country assures that it will not be imposed or carried out on that offender. Similarly, an article on this issue with the same content is formulated in the Extradition Treaty between Vietnam and Australia which was concluded in 2012.

However, the Vietnamese law on extradition has not specified how to proceed with the above-mentioned matter so that the implementation in practice would be challenged. The lack of legal basis shall bar authorized organs or persons from applying the provision of the above Protocol. In accordance with provisions of the Vietnamese Constitution, the President has the power to grant the pardon to the person sentenced to

[28] See Thanh Nien News, January 22, 2015, "Is Vietnam ready to abolish death penalty?", (http://www.thanhniennews.com/politics/is-vietnam-ready-to-abolish-death-penalty-37916.html)

[29] Article 33, Vietnam Law on mutual legal assistant 2007 provide as follow:

"1. Extraditable offenses are offenses punishable under the criminal laws of both Vietnam and the requesting state in force at the time of extradition by imprisonment for a period of at least one year, for life imprisonment, or for death, or has been sentenced by the court of the requesting State to imprisonment and the remaining term of imprisonment to be served is at least six months".

death.[30] In purpose to surrender fugitives from an abolitionist country back to Vietnam, the competent authority has to establish an appropriate mechanism for issuing undertaking which does not result in the imposing or execution of the death punishment. The Vietnam Criminal Procedure Code and Law on mutual legal assistance should supplement provisions on a procedure of assurance over the death penalty regarding extradition offense.

2. Political offense

There is no universally accepted definition of what constitutes a "political offense".[31] It is generally understood that political offense, or offense that has political character, is the offense against the security of a State which has political motivations and/or purposes. Pursuant to opinions shared by several scholars and practitioners, there are two main types of political offense.

The "pure" political offense is typically perceived as an offense that is conducted against the government. It has been described as constituting "a subjective threat to a political ideology or its supporting structures without any of the elements of a common crime. It is labeled a "crime" because the interest sought to be protected is the sovereign". "Pure" political crimes, as such, have most typically been limited to crimes considered as acts of treason, sedition or espionage. As consistently maintained by authorities and courts, because it is deemed that such "pure" crimes can be thus considered political, they therefore do not subject the individual to extradition.[32]

A "relative" political offense is thus defined by the operation of one or more common crimes pertinent to and in aid of the political goal of the individual. Generally,

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[30] Vietnam Constitution of 28 November 2013, Article 88 (3): the State President has the power "to grant pardons and on the basis of resolutions of the National Assembly, to proclaim an amnesty" (English version is available to download at http://www.constitutionnet.org/files/final_constitution_of_vietnam_2013-english.pdf).

[31] M. Garcia-Mora, *International law and Asylum as a Human Right*, (Public Affairs Press), 73-102 (1956).

[32] Charles L.Cantrell, "the Political Offense Exemption in International Extradition: Comparison of the United States, Great Britain and the Republic of Ireland, Marquette" *.L.R.*Vol.60, 780 (1977); see more on Bassiouni, "Ideologically Motivated Offenses and the Political Offenses Exception in Extradition - A Proposed Juridical Standard for an Unruly Problem", 19 *Depaul L. REV*, at 245. "There are to be identified purely political offenses, which are directed against the form and political organization of the State", Re Campora, 25 I.L.R. 518 (Supreme Court, Chile 1957); Harvard Research in International Law, Extradition, 29 *Am. J. INT'L L*. Supp. 113; Garcia-Mora, "Treason, Sedition and Espionage as Political Offenses Under the Law of Extradition", 26 *U. PITT. L. REV*. 65 (1964); and L. Deere, "Political Offenses in the Law and Practice of Extradition", 27 *AM. J. INT'L L*. 247 (1933).

in their attempt to classify such acts as political, this form of political crime causes the most difficulties for the courts in their ruling. The interpretation of the robustness and closeness of the link between common crime and political objective is subject to the interpretation constructed by the domestic courts of each nation. As a result, there is no accepted rule applicable to all countries, but rather a "hodgepodge collection" of principles often dictated by political events and changing circumstances.[33]

Many treaties on extradition provide that political offense shall not be granted to extradite request.[34] As far as the concept of political offense is concerned, the rise of revolutionary ideology in the mid-18th century "urged a new openness to political offenders."[35] France was one of the first countries to codify the right to political asylum in its 1793 Constitution.[36] Accordingly, the Constitution guaranteed political asylum to those who were forced to flee their countries while fighting for liberty.[37] With the rise of this new political ideology, establishing not only the right to revolt but to adopt violence against one's country of oppression and subsequent encouraged entitlement to seek refuge in doing so, the modern concept of the exception of political offenders to extradition was established in general political understanding by the mid-19th century. In 1833, the first Extradition Act in the world was adopted in Belgium and this country was also the first to bar the political offender from extradition.[38]

From practical and theoretical perspectives, not all political offenses are protected by national as well as international law. In 1856, Belgium was the first to establish an exception to the political offense exception which provided that the assassination or attempted assassination of a head of State, or her family members, was extraditable *per se*. The creation of this so-called *"clause de'attentat"* marked the

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[33] I. Oppenheim, International Law 707 (8th ed. H. Lauterpacht, ed., 1958).

[34] Article 3(1) of the European Convention on Extradition of 1957 provides that "extradition shall not be granted if the offense in respect of which it is requested is regarded by the requested Party as a political offense or as an offense connected with a political offense." Similar provisions are contained in Article 4(4) of the Inter-American Convention on Extradition (1981), Article 4(1) of the ECOWAS Convention (1984) and Article 12(1)(a) of the London Scheme for Extradition (1966 and 2002).

[35] Christine Van den Wijngaert, *The Political Offense Exception to extradition*, 9 (1980).

[36] *See* Oppenheim's International Law § 415, at 950 (Robert jennings & Arthur Watts eds., 9th ed. 1992) (hereinafter Oppenheim's); I. A. Shearer, "International Legal Notes", 68 *AusTL. LJ*. 451, 451 (1994).

[37] *Id.*

[38] *See id.* at 163; Valerie Epps, "The Validity of the Political Offender Exception in Extradition Treaties in Anglo – American jurisprudence", 20 *HARV. INT'L LJ*. 61, 63 (1979).

beginning of the attempt to define political offenses.[39] This term became widely accepted throughout Western Europe, and today the depolarization approach has become the most common way the Member States have dealt with the political offense exception to extradition. In examining the history of extradition law, it becomes clear that the duty to extradite in international law comes mostly from treaties concerned, and that the right to extradite is derived from a State's sovereign right to deny asylum. Therefore, extradition law is an exception to the general principle of asylum, and the political offense exception is a reservation of a state's right to refuse to extradite for certain crimes.[40]

From the 1970s onward, an increasing number of offenses have been declared non-political for the purposes of extradition in regional and international conventions dealing with terrorism-related crimes, thus precluding the application of the political offense exemption by the requested State. The adoption of other international anti-terrorism instruments during the 1970s and 1980s have instituted a duty to either prosecute or extradite, rather than opting for "de-politicising" the offenses covered. Some States declare these offenses to be "non-political" under national law. Moreover, as noted above, courts in some countries have held that terrorist acts which indiscriminately endanger the lives and physical integrity of civilians do not qualify as political offenses.

1.1. Political offense exceptions in the EU law

In Europe, traditional extradition treaties contain a mandatory political offense exception. According to the Benelux Extradition Treaty (Article 3) and the ECE (Article 3.1), extradition would not be granted if the offense which is requested, is regarded by the requested party as a political offense or as an offense connected with a political offense.[41] Apart from this, the Article 3.3 of ECE specified an exception of political

[39] *See* Christine Van den Wijngaert, *supra* note 35, at 15. For example, the 1957 European Convention on Extradition provides in Article 3, that "(the taking or attempted taking of the life of a Head of State or a member of his family shall not be deemed to be a political offense for the purposes of this Convention."

[40] Christine Van den Wijngaert, *supra* note 35, at 45. It should be noted that the political offense exception is not the only exception to extradition commonly found in bilateral and multilateral treaties. *Id.* The principle of dual criminality provides that a fugitive will not be extradited unless the charge qualifies as an offense (usually a "serious" offense) in both the requesting and the requested states, has been an important part of extradition law. Other exceptions are the right to refuse to extradite a national of the requested state, and the principle of specialty which provides that the requesting state must guarantee that it will only prosecute the fugitive for the extraditable crime for which extradition was requested.

[41] Gert Vermeulen (2002). "Criminal Policy aspects of the EU's (Internal) Asylum Policy", *Law and European Affairs*, vol.5, pp. 602-612.

offense is that the taking or attempted taking of the life of a Head of State or a member of his family shall not be deemed to be a political offense for the purposes of this Convention. On the grounds of provisions in Art.3 of ECE, Ivan A. Shearer classified three categories of political offenses: "(1) the 'purely political offense', which is an act directed solely against the political order; (2) the *délit complexe,* where the same act is directed at both the political order and private rights (e.g. the 'hi-jacking' of a privately owned aircraft for political purposes); and (3) the *délit connexe,* which is in itself not an act directed against the political order but which is closely connected with another act which is so directed (e.g. fraudulently obtaining paper in order to print subversive literature)".[42]

Furthermore, European law and practice have departed significantly from the traditional approach towards the political offense exceptions with the general trend moving towards restricting, if not excluding, the applicability of the exception in relation to violent criminal actions altogether.[43] The Additional Protocol of 15 October 1975 to the European Convention on extradition also sets forth for the application of Article 3 of the Convention. Accordingly, political offenses shall not be considered to include the crimes against humanity specified in the Convention on the Prevention and Punishment of the Crime of Genocide 1948 and war crimes in Geneva Red Cross Convention 1949. Besides, to strengthen the combat against terrorism, the European Convention on the Suppression of Terrorism (ECST) 1977 also set forth a limited number of serious, terrorism–related, offenses as political offenses. In 1996, the EU Convention on Extradition went further with the provision that no offense may be regarded by the requested Member State as a political offense, as offenses connected with political offenses or as offenses with political motives (Art.5). Pursuant to this Convention, Member States can declare that there is only an obligation to extradite with regard to offenses referred to in Article 1-2 ECST (Art. 5.2a) - without the reservations according to Art.13 ECST – and with the regard to offenses of conspiracy or association – which correspond to the description of behavior referred to in Art. 3.4 – to commit one or more offenses referred in the Articles 1-2 ECST (Art. 5.2.b). [44]

[42] Ivan M. Shearer, *Extradition in International Law,* Manchester University Press, 1971, pp.181-182.
[43] M. Cherif Bassiouni, *International Law: Multilateral and bilateral enforcement*, vol.2, p.358 (2008).
[44] See Gert Vermeulen, *supra*, note 41, at 607.

The above changes of limitation of political offense exception started from the *Moreno-Garcia case* in which Belgium refused to extradite Moreno and Garcia, a Basque couple suspected of participation in ETA activities. This decision influenced the diplomatic relation between Belgium and Spain at that time and strongly influenced the EU negotiation process on the new EU extradition convention in 1996. [45]

To strengthen the fight against cross-border crimes, especially international terrorism, in 2002, the EU states reached on the adoption of the Framework Decision on the European Arrest Warrant and the surrender procedures between the EU Member States which replaced for ECE provision in the EU zone. This Framework Decision has abolished political offense in refusal grounds for extradition. In the past, some scholars had a view that the role of the political offense exception in Western Europe has been a current and constant encouragement to terrorism[46] because offenders may escape successfully from punishment. Nevertheless, the concern is now how to protect fugitive's fundamental human rights when it is suspected that the requesting States may violate relevant provisions of ECHR.[47] That is why with the present abolition of political exemption in the EAW Framework Decision, the human rights of political fugitives would be at risk in if issued in the Member States of the EU as they would be tried and sentenced by the domestic law of the requesting country where they committed a political crime.

1.2. Political offense exceptions in the Vietnamese law

Vietnamese law does not define what political offense is and there is no existence of an official concept of this genre of offense in any legal document. Up until the year 2003, Vietnam had not considered political crime as a ground for the denial of extradition request in national law and bilateral treaties of which Vietnam is a contracting party. Although the Criminal Code 1999 of Vietnam stipulated in Chapter XI (Crime of Infringing upon National Security) crimes with the political characteristic such as treason, rebellion, espionage and terrorism, Vietnamese scholars and

[45] Ibid.

[46] See Van Den Wijngaert, *supra* note 35, at 23.

[47] See Renuka E. Rao, "Protecting Fugitives' Rights While Ensuring the Prosecution and Punishment of Criminals: An Examination of the New EU Extradition Treaty", 21 *B.C. Int'l & Comp. L. Rev*. 244 (1998). In this page, Renuka E. Rao have the opinion that in eliminating the political offense exception, the European Union ignores the fact that human rights treaties will not necessarily trump the extradition treaty when the international obligation to refuse extradition on grounds of potential human rights violations conflicts with the treaty obligation to extradite.

practitioners have never mentioned them as the political offenses. Consequently, the Vietnamese Law on mutual legal assistance 2007 does not specify political offense exception in the articles concerning extradition refusal.

On an international level, the article with respect to political offenses was excluded in mutual legal assistance bilateral treaties containing extradition provisions between Vietnam and the former socialist countries in Eastern Europe. In fact, at that time, no political offense exemption was outlined in extradition agreements between the States of Eastern Europe during the Soviet bloc era.[48] Since 2003, to fulfill requirements of international cooperation, upon the request of contracting countries, for the first time in the history of the development of extradition law, Vietnam has agreed to provide political offenses exemptions in the bilateral extradition treaty with the Republic of Korea (Article 3). The followings are extradition treaties with India (Article 4) and Algeria (Article 4). For instance, Article 3(1)(a) of the Treaty between Vietnam and South Korea addresses that extradition shall not be granted "when the requested party determines that the offense for which extradition request is an offense bearing political character". Similarly to the situation of death penalty exception, once again, Vietnam domestic law lacks the domestic establishment for implementing provisions in connection with political offenses exception in the bilateral treaties on extradition. With the insufficient legal framework and shortcomings of practice as well as limited researches on extradition institution, Vietnam is usually a passive party in the process of drafting and negotiating articles of extradition treaties with other countries. Consequently, some provisions in the signed agreements contradict to domestic law or go further with the adoption of new issues which not ever regulated in Vietnam law.

As far as political offenses exception in extradition is concerned, *Nguyen Huu Chanh v. Vietnam* is a controversial case regarding a fugitive sought by Vietnam authority. In 2006, Vietnam requested Korea to extradite fugitive Nguyen Huu Chanh, the leader of the so-called "Free Viet Nam" organization; a group of criminals who carried out acts of terrorism against the country.[49] Nguyen, who was living in the US, was arrested during a visit to Seoul in April after he was accused by the Vietnamese authorities of attempting to overthrow the Vietnamese government with through the

[48] See G.S. Goodwin-Gill, *The Refugee in International Law*, 2nd edn., Clarendon Press, Oxford, 1996, p.60.

[49] See Viet Nam News, Court ask Rok to reconsider extraditing allege terrorist, 25/10/2006, available at http://vietnamnews.vn/in-bai/158516/court-asks-rok-to-reconsider-extraditing-alleged-terrorist.htm

participation and planning of a series of events attacking the Vietnamese government's presence overseas. During the proceedings, a Vietnamese prosecutor ruled that Nguyen was responsible for a failed attempt to blow up statues of Ho Chi Minh in 1999 and the placing of placing of explosives at the Vietnamese Embassy in Thailand in 2002. A message was sent to the Republic of Korea (RoK) Justice Minister via. the RoK embassy in Vietnam by the Supreme People's Procuracy resulting in the arrest of Nguyen by Korean police as he travelled to Seoul in April. "Nguyen is accused of being involved in 13 attempted terrorist acts in Vietnam, but the (South Korean) court has finally decided to regard him as a political prisoner in consideration of a bilateral extradition treaty". Despite the fact that Chanh's bombing was not successful, extradition of the individual was still applicable with reference to the respected regulated laws of both Vietnam and the RoK, international legislation and pre-existing extradition agreements that had been established between the two countries. "Vietnam is not a signatory of the International Convention for the Suppression of the Financing of Terrorism" it noted, dismissing the prosecution's claims that Nguyen should be an exception to the principle of non-extradition of political prisoners. Finally, the Seoul High Court refused to extradite Chanh to Viet Nam, saying that Chanh had committed a political crime and Viet Nam was yet to ratify the United Nations convention against terrorism.

A request for the explanation of refusal of extradition of alleged terrorist, Nguyen Huu Chanh, was sent by Vietnam to the Republic of Korea's Justice Minister. A judgment was made by the Vietnamese Supreme People's Procuracy, claiming that the reasons submitted by the Korean authorities were neither robust enough nor adhered to the provisions of the extradition agreement signed between Vietnam and the RoK on September 15, 2003. The Supreme People's Procuracy, Vietnam's representative on extradition matters, were certain that the relevant authorities had produced sufficient, acceptable evidence of Chanh's criminal activities linked to terrorism, which included threat to civilian lives and those under international protection, with ample time to prove Chanh committed terrorism as stipulated in Article 84 of the Vietnam Criminal Code. The Vietnamese authorities thus urged the RoK Justice Minister for a revaluation of the refusal yet as a result diplomatic tensions grew and mounted as the existing extradition treaty between Hanoi and Seoul appeared to be undermined.

Through the extradition case of Nguyen Huu Chanh, two issues regarding international law have arisen of which the Vietnam competent authority should take into consideration: (1) establishing a clear definition and interpretation of political offense in criminal law and treaties on extradition with RoK as well as other countries; (2) enhancing the accession and implementation of multilateral treaties in relation to extradition provisions with a view to building sufficient legal framework for international cooperation in fighting transnational crimes and terrorism. Besides, the Vietnamese Law on mutual legal assistant should supplement provisions on political crime and consider political offense exception as an essential principle of extradition law.

3. Extradition of nationals

Non-extradition of nationals is one of the crucial principles in traditional extradition.[50] Generally, most countries refuse to extradite their own nationals. However, the application of this refusal ground varies from country to country. Whereas, under common law, the nationality of the requested person does not normally pose an obstacle to extradition, civil law countries have traditionally refused to extradite their own nationals, usually in mandatory terms. Most regional extradition conventions provide for the possibility of refusing extradition on the grounds that the person sought is a national of the requested State, for example, Article 4(a) of the European Convention on Extradition (1957); Article 7 of the Inter-American Convention on Extradition (1981); Article 10(1) of the ECOWAS Convention (1984).

Refusing extradition of nationals originated from the principle of the State's sovereignty. All countries have a responsibility to protect the legal rights of its own citizens. Non-extradition of national theory has a close relation with extra-territorial jurisdiction bases on the active personality principle. Every State has jurisdiction to stipulate law and proceed against all the offenses committed to whole or in part within their territory.[51] The Harvard Research describes the territorial principle as follows:

> [A] Crime is committed "in whole" within the territory when every essential constituent element is consummated within the territory; it is committed "in part within the

[50] See Ivan Anthony Shearer, *Extradition in International Law* (Manchester: Manchester University Press), 1971, pp. 94-132; M. Cherif Bassiouni, *International Extradition: United States Law and Practice* (4th ed., Dobbs Ferry, N.Y: Oceana Publications), 2002, pp. 682-689.

[51] See Christopher L. Blakesley, "A conceptual framework for extradition and jurisdiction over extraterritorial crimes", *Utah Law Review*, 688, 1984.

territory" when any essential constituent element is consummated there. If is committed either "in whole or in part" within the territory, there is territorial jurisdiction. [52]

Today, crimes seem to have lost their territorial nature due to the globalization tendency and the development of transportation in the world. It is the fact that an offender could commit a crime in one country and easily move across the border to another country with a view to escaping punishment. Besides, a national of one country may constitute a crime abroad and afterward come back his/her country of origin or flee to the third State. Because of this practice, the enhancement of international cooperation in criminal matters and extraterritorial criminal jurisdiction has become a demand for countries all over the world. Extraterritorial jurisdiction, in this case, is determined on the basis of the active personality principle. Accordingly, the nationals of a State are subject to its law even when they are abroad, that the reputation of a State is damaged by offenses committed by its nationals in foreign countries, that a person is most familiar with the law of the State of which he is a national and that his prosecution is the necessary corollary to his not being extradited. Most member States of the Council of Europe are empowered under their criminal law to exercise jurisdiction over their nationals, and at least, in respect of certain offenses, certain States are also empowered to exercise jurisdiction over persons having a habitual residence in their territory.[53] With this extraterritorial jurisdiction, countries tend to prosecute their nationals rather than extradite their nationals to a country where these persons committed crimes.

1.1. Under the EU law

In Europe, there was a tradition that nationals were not extradited. The first extradition treaty in which the exemption of national was provided is the treaty of 1834 between Belgium and France. French treaty practice after 1843 has influenced other extradition treaties on provisions of own national exemption.[54] The European Convention on Extradition 1957 (ECE) continues to ensure the jurisdiction of Member States over offenses committed abroad by their nationals. Article 6(1)[55] of ECE gives

[52] Harvard Research in International Law, "Jurisdiction with Respect to Crimes", 29 *Am. J. Int'l. L*. 495 (Supp. 1935).
[53] See *Explanatory Report of European Convention on the transfer of Proceedings in Criminal Matters*, (available at http://conventions.coe.int/treaty/en/reports/html/073.htm).
[54] See Ivan A. Shearer, *Non – Extradition of Nationals*, 275; *With the exception of the treaty of 1843 with Great Britain and the United States*: see further infra, 282
[55] a. A Contracting Party shall have the right to refuse extradition of its nationals.

the contracting parties the right to refuse extradition of their nationals. In a case where the requested Party does not extradite its national, it shall at the request of the requesting Party submit the case to its competent authorities in order for those proceedings to possibly be taken if they are considered appropriate (Art.6(2)).[56] However, nationality as a refusal ground only applies to those Member States which have made a declaration to that effect, which is to be renewed every five years. As indicated earlier, there is no general obligation to prosecute in such cases, although the possibility of refusing to extradite citizens may be coupled with a duty to prosecute them in the courts of the requested State. Sometimes this is made conditional upon a request by the State which has unsuccessfully sought extradition. The requested State must inform the requesting State of the outcome of the prosecution. Austria, Germany, Greece and Luxembourg have declared that they will not extradite nationals. Denmark has stated that extradition of a national may be refused. Belgium, Finland, the Netherlands, Portugal, Spain and Sweden will grant the extradition of nationals only under certain conditions.

The situation in the EU changed when the EAW Framework Decision was adopted in 2002. Similar to political offense matter, in an integrating Europe, the arguments for an extradition refusal based on nationality were becoming vacuous. All EU Member States seemed willing to examine the possibilities for the extradition of nationals within the Union.[57] The EAW Framework Decision provides at Art.5(2) that an EU country may surrender its national or resident of the issuing Member State to be tried with the understanding that after doing so, the individual shall be returned to the executing Member State in order to serve there the custodial sentence or detention order. Besides, Article 4(4) of the EAW Framework Decision (grounds for optional non-execution of the European Arrest Warrant) addresses that the extradition may not

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b. Each Contracting Party may, by a declaration made at the time of signature or of deposit of its instrument of ratification or accession, define as far as it is concerned the term "nationals" within the meaning of this Convention.
c. Nationality shall be determined as at the time of the decision concerning extradition. If, however, the person claimed is first recognized as a national of the requested Party during the period between the time of the decision and the time contemplated for the surrender, the requested Party may avail itself of the provision contained in sub-paragraph a of this article.

[56] If the requested Party does not extradite its national, it shall at the request of the requesting Party submit the case to its competent authorities in order that proceedings may be taken if they are considered appropriate. For this purpose, the fi les, information and exhibits relating to the offense shall be transmitted without charge by the means provided for in Article 12, paragraph 1. The requesting Party shall be informed of the result of its request.

[57] Gert Vermeulen, "EU Conventions enhancing and updating traditional mechanisms for judicial cooperation in criminal matters", *International Review of Penal Law,* Vol.77, P.76-77, 2007.

granted if a national or a resident of the executing Member State and that State undertakes to execute the sentence or detention order by its domestic law.

While the EAW Framework Decision was implemented in the national legislation of all Member States by April 2005, there have been controversial views as well as legal challenges to the its validity, both before the domestic courts and the European Court of Justice. These cases have had the effect of restricting the use of the EAW Framework Decision by some Member States until the legal problems are rectified under the relevant national law and in one case, the premise under which the EAW Framework Decision has been established is currently under challenge.[58] One of the most important debates was the extradition of nationals. The EAW Framework Decision permitted the Member States to surrender its own nationals but provisions of Constitution and Basic Law of countries like German, Poland and Cyprus prohibited extradition of nationals.[59] Due to this reason, judicial authority in the above countries decided not to execute provisions of EAW Framework Decision which were against their constitution. To incorporate the EAW Framework Decision into domestic law and to solve the obstacle, Germany, Poland and Cyprus finally had to amend Constitution and the basic laws to allow extradition of its own nationals. This change raised arguments among legal experts and judiciary authorities in the above countries. On the other hand, this is also one of the difficulties which EU states it had to face in the early days of the EAW Framework Decision implementation.

a) Under Vietnamese law

In accordance with the Vietnamese Criminal Procedure Code 2003 (Article 344)[60] and the Law on mutual legal assistance (Article 35)[61], extradition would be refused if the person whose extradition is requested for is a Vietnamese citizen. The same provision is prescribed in the Extradition Treaty between Vietnam and Korea (Article 6) and India (Article 6). However, where extradition is refused solely on the basis of the nationality of the person sought, the requested State shall, at the request of the requesting State, submit the case to its authorities for prosecution. Generally, non-

[58] Mark Mackarel, "The European Arrest Warrant – the early years: implementing and using the warrant", *E.J.Cr*., 15(1), p.55 (2007)
[59] *Supra note* 39, at 56-57.
[60] The bodies with procedure-conducting competence of the Socialist Republic of Vietnam may refuse "The persons requested to be extradited are citizens of the Socialist Republic of Vietnam".
[61] The agencies conducting criminal proceedings of Vietnam shall not grant extradition in any of the following circumstances: "a) The person whose extradition is requested is a Vietnamese citizen".

extradition of nationals is mandatory ground for extradition refusal in Vietnamese law. In the light of the Vietnamese Constitution adopted in 2013 by the National Assembly, this principle continues to be consolidated by the provision of Art. 17(2) as follows:

"Vietnamese citizens shall not be expelled or extradited to other nations".

According to provisions of the Constitution and Law concerned, non-extradition of nationals is considered as one component of mandatory grounds for denial of extradition in Vietnam.

At present, the Association of Southeast Asian Nations (ASEAN)[62] of which Vietnam is a Member State, is building a framework of extradition between Member States. In my view, the provision of the EU permitting extradition of a national to another Member State and the later return of him/her to the State where he/she is national, according to the procedure of transfer of sentenced person, may be a useful reference for ASEAN countries in the process of drafting extradition treaty. If this happens, Vietnam may have to consider amending the provision regarding non-extradition of nationals in the Constitution 2013.

4. Military offense

4.1. Under the EU law

A considerable number of bilateral treaties and national statutes expressly prohibit granting extradition for acts punishable under the military law of the requesting State. There are, however, two conditions which limit this exemption, namely: (1) that the acts charged do not constitute a crime under the ordinary law of the requesting State, and (2) that the acts do not constitute a violation of the laws of war which would be international crimes. In accordance with Article 4 (Military offenses) of the European Convention on Extradition 1957, extradition for offenses under military law which are not offenses under the ordinary criminal law is excluded from the application of this Convention.

Along with the similar changes with the political offense and extradition of national, provisions concerning military offense exception are not stipulated in the EAW Framework Decision. As a result, military offense exemption is no longer a bar to

[62] An international organization includes ten countries in the Southeast Asia namely, Brunei, Cambodia, Indonesia, Lao PDR, Malaysia, Myanmar, Philippines, Thailand and Vietnam, see more at http://www.asean.org/asean/asean-member-states (accessed 09 December 2014)

extradition among the EU Member States. The absence of the military offense exception in the EAW Framework Decision authorizes this kind of crime to become an extraditable offense. There was no particular reason for the abolition of exemption for this offense in the EAW Framework Decision. It is possibly a step of the simplifying procedure of surrender in the EU and limiting grounds for refusing enforcement of EAW between the Member States.

4.2. Under Vietnamese law

There has not been a separate law on military offense in Vietnamese law. The Vietnamese Criminal Code 1999[63] stipulates crimes relating to the military in Chapter XXIII (Crimes of infringing upon the duties and responsibilities of army personnel). These provisions are likely lead to the understanding that military offense is similar to other ordinary criminal offenses. As far as extradition exception is concerned, Law on mutual legal assistance 2007 does not prescribe military offense as one of the refusal grounds for extradition. Traditionally, many countries in the world refuse to extradite military offenders and some of them are contracting parties to extradition agreements with Vietnam. For instance, Vietnam has agreed to prescribe military offense in Article 4(4) (Discretionary Refusal of Extradition) of the Extradition Treaty with the Republic of Korea. Accordingly, extradition may be refused under this Treaty "when the offense for which extradition is requested is a crime under military law, which is not also an offense under ordinary criminal law."

The problem here is, as mentioned above, that Vietnam does not have a separate law for military offense. At present, military crimes are regulated in the Chapter XXIII (Crimes of infringing upon the duties and responsibilities of army personnel) of the Vietnamese Penal Code. In this sense, the military offense may be considered as an ordinary criminal offense in the Penal Code regardless, according to Vietnamese law, military forces have a separate system of justice containing investigation offices, prosecuracies and courts. Consequently, it is unclear whether Vietnam may apply Article 4(4) of the Treaty on extradition with Korea because the absence of the "military law" in its law system.

[63] Vietnam Criminal Code adopted by National Assembly on December 21, 1999 (amended and supplemented a number of articles in 2009), available at http://moj.gov.vn/vbpq/en/Lists/Vn%20bn%20php%20lut/View_Detail.aspx?ItemID=610 (English version).

Traditionally, most of the countries in the world issue a separate law on military law containing punishments for military crimes. This is a legal basis for the denial of extradition in treaties concerned. To conform to agreements on extradition of which Vietnam is a contracting party, Vietnam should split chapter XXIII out of the Criminal Code in order to establish a new law on military offense.

5. Non-discrimination rule

Non-discrimination principle originated from provisions regarding human rights institutions. Traditional extradition treaties contain a mandatory non-discrimination rule in addition to the political offense exception[64]. These grounds for refusal are commonly referred to as the "discrimination clause". It is closely related to the *non-refoulement* provision of Article 33(1) of the 1951 Refugee Convention. The Non-discrimination principle is regulated in most of the treaties concerning extradition. The Inter-American Convention on Extradition (1981) provides for refusal of extradition if the requested State determines that it is sought for an ordinary criminal offense prosecuted for political reasons (Article 4(4)) or if it can be inferred from the circumstances of the case that persecution for reasons of race, religion or nationality is involved, or that the person may be prejudiced for any of these reasons (Article 4(5)). Article 13(1)(a) of the London Scheme for Extradition (1966 and 2002) provides for mandatory refusal of extradition in cases where an extradition request is made for the purpose of prosecuting or punishing the person on account of race, religion, sex, nationality or political opinions, or if he or she may be prejudiced at trial or punished on those grounds. A discrimination clause is also included in some regional and international anti-terrorism conventions. Article 5 the European Convention on the Suppression of Terrorism (1977) contains a provision modeled on Article 3(2) of the European Convention on Extradition (1957). A number of treaties in connection with fighting terrorism consider discrimination as a bar to extradition namely Article 9(1) of the International Convention against the Taking of Hostages (1979), Article 12 of the International

[64] See Gert Vermeulen, *supra*, note 41, at 608; see also A. Helton, "Harmonizing Political Asylum and International Extradition: Avoiding Cacophony", 1:3 *Georgetown Immigration Law Journal*, 1986, p. 457: "In countries where human rights violations occur, political opponents of the government are often charged with criminal law violations. These charges serve as a pretext for arbitrary detention, sometimes without proper trial or due process of law Governments that wish to take reprisals against their political opponents living in exile [can] simply charge them with a violation of criminal law in order to secure their extradition."

Convention for the Suppression of Terrorist Bombings (1997), Article 15 of the International Convention for the Suppression of the Financing of Terrorism (1999)

5.1. Under EU law

In the ECE, the rule of non-discrimination is specified in paragraph 2 of Article 3 (Political offense) instead of stipulating in a separate section, as follows:

> The same rule shall apply if the requested Party has substantial grounds for believing that a request for extradition for an ordinary criminal offense has been made for the purpose of prosecuting or punishing a person on account of his race, religion, nationality or political opinion, or that that person's position may be prejudiced for any of these reasons.

The above paragraph allows the requested Party to refuse extradition for an ordinary criminal offense if it considers that the request for extradition was made with a view to prosecuting or executing a sentence to a person because of his race, religion, nationality or political opinion. The requested Party can adopt the same attitude if it considers that the position of the person claimed might be prejudiced for political reasons.

When the EAW Framework Decision was adopted in 2002, the political offense exception and the non-discrimination rule were excluded in its formal provisions. Instead of that, the Article (1(3)) of the EAW Framework Decision regulates that each Member State must comply with the 1951 Geneva Convention. This Article states that the Framework Decision shall not have any impact on amending the obligation to respect fundamental rights and fundamental legal principles as enshrined in Article 6 of the Treaty on European Union, specifying further that "the Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms".[65] The similar content was regulated in the Preamble of the Framework Decision at recital 12. Accordingly, the EAW Framework Decision ensures fundamental rights and observes the principles endorsed in the Article 6 of the Treaty on European Union and reflected in the Chapter VI of the Charter of Fundamental Rights of the European Union. Nothing in this Framework Decision may be interpreted as prohibiting refusal to surrender a person for whom a European Arrest Warrant has been issued when there are reasons to believe, on the basis of objective elements, that the said arrest warrant has

[65] See Gert Vermeulen, *supra*, note 41, at 609.

been issued for the purpose of prosecuting or punishing a person on the grounds of his or her sex, race, religion, ethnic origin, nationality, language, political opinions or sexual orientation, or that that person's position may be prejudiced for any of these reasons. Nevertheless, there is little doubt that a recital of the preamble is not binding in comparison to an article. As mentioned above, the annulment of political offense exception with the underlined offenses in Part 2 (Political Offense) above, the abolishment of the non-discrimination rule in the articles of the EAW Framework Decision seems not to be a suitable change for the protection of human rights in the EU.

Besides, some other views also claim that Article (2(2)) of the EAW Framework Decision stipulating a list of 32 extraditable offenses without verification of the double criminality do not conform with Art.6 of TEU and, more specifically, with general principles of equality and non-discrimination. For this reason, on 22 June 2004, a local organization "Advocaten voor de Wereld" submitted an annulment application of the Belgian legislation on the EAW to the Belgian Constitutional Court (Cour d'Arbitrage).[66]

In short, the exclusion of the discrimination rule in articles of the EAW Framework Decision has had an adverse influence on the protection of lawful rights of fugitives in the EU in particular, human rights in general.

5.2. Under Vietnamese law

Based on the provisions of the Vietnamese Criminal Procedure Code 2003 (article 344), extradition shall be barred if the person whose extradition is requested is residing in Vietnam for reasons of being possibly ill-treated in the extradition-requesting countries on the grounds of racial discrimination, religion, nationality, ethnicity, social status or political views (*non-discrimination principle*). The Law on mutual legal assistance 2007 provides in Article 35 (d) (Refusal of extradition) a similar provision. Accordingly, the extradition request shall not be granted where the competent authorities of Vietnam have reasonable grounds to believe that the request for extradition has been presented with a view to prosecuting or punishing the person sought on account of race, religion, sex, nationality, social status, or political opinions. Bilateral treaties on extradition between Vietnam and other countries such as Korea, India, and Algeria also provided in this principle.

[66] Artur Gruszczak, *European Arrest Warrant – Achievement and Dilemmas,* paper presented to the seminar held at the European Center Natolin. 10 (2006).

From the practice of EU law on extradition, especially experience of implementing EAW Framework Decision, it is necessary for Vietnam to maintain a non-discrimination principle in extradition law as this principle conforms with Human Rights institutions.

6. Fiscal offenses

Fiscal offenses to some extent may be considered as a special case of extradition exceptions. Under provisions of the ECE (Article 5)[67], fiscal offenses are offenses in connection with taxes, duties, customs and exchange. The requested state has the right to decide whether to extradite or not and the decision is based on standard requirements in which dual criminal rule is considered. The content of this article thus lends authorized power to Parties to arrange amongst themselves for the extradition of fiscal matters if they so wish to do. In doing so, a previous established arrangement between Parties is required. As a result of this article deriving from a discussion evaluating the idiosyncrasies within each State regarding these laws, it was unable to be provided in a more obligatory, binding form. Extradition in these cases, however, remains subject to the conditions as laid down in the Convention. The offense concerned must, therefore, be one punishable both by the law of the requested Party and by the law of the requesting Party pursuant to Article 2. This draft of Article 5 is inspired by Article 6 of the Franco-German Convention on Extradition. It is left to the Contracting Parties to determine the meaning to be attributed to the word "decided", which could refer just as well to an agreement requiring ratification as to a mere exchange of letters, or any other act that could be considered a joint decision.[68]

In 2002, the EAW Framework Decision changed provisions relating to fiscal offense toward more expansionary measures under which taxes or duties, customs and exchange and execution of the European Arrest Warrant shall not be refused on the grounds that the law of the executing Member State does not impose the same kind of tax of duty or does not contain the same type of rules with regards to taxes, duties and custom and exchange regulations as the law of the issuing Member State.

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[67] Extradition shall be granted, in accordance with the provisions of this Convention, for offenses in connection with taxes, duties, customs and exchange only if the Contracting Parties have so decided in respect of any such offense or category of offenses.

[68] See Council of Europe, *Explanatory notes on the Council of Europe convention and protocols and minimum standards protecting persons subject to transnational criminal proceedings*, 2006, p.23.

In the Vietnamese extradition law, fiscal offense is a new concept which has never been mentioned before. Law on mutual legal assistance 2007 provides grounds for refusal of extradition without the existence of these crimes. Nevertheless, the fiscal offenses appear in bilateral treaties on extradition between Vietnam and other countries. For instance, Article 2(4) of the Treaty on extradition between Vietnam and Korea stipulates that where extradition of a person is sought for an offense against a law relating to taxation, customs duties, foreign exchange control or other revenue matters, extradition may not be refused on the grounds that the law of the requested Party does not impose the same kind of tax or duty or does not contain a tax, duty, customs or exchange regulation of the same kind as the law of the requesting Party. In this case, the gap between domestic law and international law on extradition is clear and should be narrowed by expedient acts.

Fiscal offenses are also a primary issue of traditional extradition. To execute extradition treaty in practice and to cooperate effectively with other countries, Vietnamese authorities should provide provisions relating to fiscal offenses in the Law on mutual legal assistance 2007.

7. Place of commission

Territorial jurisdiction is one of the essential bases for a country to consider whether to grant extradition or not. Concerning the place of crimes committed in the European as well as EU legal instruments, Article 7 of the ECE and Article 4(7) of the EWA Framework Decision stipulates a similar optional ground for refusal of extradition. According to Article 7 of the ECE:

> 1. The requested Party may refuse to extradite a person claimed for an offense which is regarded by its law as having been committed in whole or in part in its territory or in a place treated as its territory.
>
> 2. When the offense for which extradition is requested has been committed outside the territory of the requesting Party, extradition may only be refused if the law of the requested Party does not allow prosecution for the same category of offense when committed outside the latter Party's territory or does not allow extradition for the offense concerned.

Paragraph 1 of this Article permits a Party to refuse extradition for an act committed in whole or in part within its territory or in a place considered as its territory. Under this paragraph, it is for the requested Party to determine in accordance with its

law whether the act could be judged by its jurisdiction. Thus, for example, offenses committed on a ship or aircraft of the nationality of the requested Party may be considered as offenses committed on the territory of that Party.

Paragraph 2 was inserted to take into account the law of countries which do not allow extradition for a crime committed outside the territory of the requesting Party. This paragraph provides that extradition may be granted if the offense has been committed outside the territory of the requesting Party, unless the laws of the requested Party do not authorize prosecution for an offense of the same kind committed outside its territory, or do not grant extradition for the offense which is the subject of the request.

Under Article 4(7) of the EAW Framework Decision, no difference is made on provisions concerning place of commission in comparison to ECE. Specifically, the executing judicial authority may refuse to execute the EAW where the EAW relates to offenses which:

> (a) Are regarded by the law of the executing Member State as having been committed in whole or in part in the territory of the executing Member State or in a place treated as such; or
>
> (b) Have been committed outside the territory of the issuing Member State and the law of the executing Member State does not allow prosecution for the same offenses when committed outside its territory.

This refusal ground for extradition has not been stipulated in the Vietnamese Law on mutual legal assistance so far. On the contrary, all extradition treaties concluded by Vietnam cover this issue as an optional ground for refusing extradition. For instance, pursuant to Article 4(1) of Extradition Treaty between Vietnam and Republic of Korea, extradition may be refused "when the offense for which extradition is sought is regarded under the law of the Requested Party as having been committed in whole or in part within its territory". The distinction between national and international legal basis should be tackled by the supplementation of this issue in an article concerned with the Vietnamese Law on mutual legal assistance.

8. Refusal of extradition on the grounds of offender's age

The criminal law of many countries usually imposes a range of different punishments based on age of the offenders, especially for the young and old age. With reference to traditional extraction law, extremity of age or ill heath do not constitute as

satisfactory or accepted exceptions by treaty law. In applicable multilateral conventions, however, the sole reason for the possibility of postponement of transfer and extradition lies in causes linked to health. As a result, international instruments concerning criminal matters usually only set forth separate provisions for persons whose age is under 18 years old. The exceptions applied to the elderly are only found indirectly in provisions with respect to the case of poor health condition.

With respect to the issues surrounding minors or elderly in extradition, there are no provisions in the ECE to allow granting of extradition or not in this situation. However, after the entry into force of ECE, the Council of Europe adopted the Resolution (75) 12 on the practical application of the ECE. Article 1 of this Resolution stated that in the case of a minor aged under 18 at the time of the request for the extradition and to be an ordinarily resident in the requested state, the competent authorities of the requesting and the requested states shall take into account the interests of the minor to give the final decision. Where the extradition is likely to impair his or her social rehabilitation, they shall endeavor to reach an agreement on the most appropriate measures. Besides, in term of the age of offenders, in the recent resolutions, recommendations and discussions, the PC-OC has taken further into consideration humanitarian issues and the rights of the individual concerned.[69]

In the EU, the EAW Framework Decision stipulates a provision in respect of the minor in Article 3 about mandatory refusal of extradition as follows:

> The judicial authority of the Member State of execution shall refuse to execute the European Arrest Warrant if the person who is the subject of the European Arrest Warrant may not, owing to his age, be held criminally responsible for the acts on which the arrest warrant is based under the law of the executing State.

The phrase "owing to his age" mentioned above means that in circumstance the fugitive is a minor, request of extradition shall be rejected. As far as the age of the person whose extradition is sought is concerned, some European countries such as Andorra, Armenia, Belgium, and Denmark ratified ECE and had a declaration that extradition shall or may not granted for the reason of fugitive's age and health. [70] In the

[69] See Council of Europe (2006), *Extradition: European Standard*, p.17.

[70] See http://www.conventions.coe.int/Treaty/Commun/ListeDeclarations.asp?NT=024&CM=8&DF=23/05/ 2012&CL=ENG&VL=1

case of the EAW Framework Decision, the age of the fugitive is defined under the law of the executing State.

Refusal of extradition regarding the elderly is usually based on humanitarian reason. The requested State denies surrendering the older individual in association with poor condition of health with the aim of ensuring that he/she will not be subjected to serious threat to life or severe conditions of imprisonment in the requesting State.

In Vietnam, the Law on mutual legal assistance 2007 has no provisions concerning the minor and elderly in extradition proceedings. Treaties on extradition to which Vietnam is a contracting party mention this issue in association with humanitarian concern. For instance, according to Article 4(3) of the Extradition Treaty between Vietnam and Republic of Korea, extradition may be refused "when, in exceptional cases, the requested Party while also taking into account the seriousness of the offense and the interests of the requesting Party deems that, because of the personal circumstances of the person sought, the extradition would be incompatible with humanitarian considerations". The Vietnamese Law on mutual legal assistance should supplement these provisions in the forthcoming time and in this case, the related provisions of the EAW Framework Decision are good references.

9. Non bis in idem

Non bis in idem[71] is a Latin phrase meaning; "not twice in the same". In criminal law, *non bis in idem* is a fundamental principle providing that a person would not be prosecuted twice or multiple times for the same offense which he committed before. The principle has a long history and exists in many forms in national systems of law. The earliest known reference to the *non bis in idem* principle originated from approximately 355 BC when Demosthenes had the view that "the laws forbid the same man to be tried twice on the same issue".[72] In common law, the principle is known as "double jeopardy", and it is believed that the principle "is as old as the common law itself".[73] The principle featured prominently in the struggle between King Henry II and

[71] Some scholars and legal documents prefer to use the term "ne bis in idem". Actually, the two versions are in fact regarded as interchangeable. For example, the principle is described in the title to Article 9 of the ECE as "non bis in idem".

[72] See Bas Van Bockel, Jean Monnet Fellow, Robert Schuman, *Two perspectives on the realization of the European non bis in idem principle,* working paper, Center for advance Studies, European University Institute.

[73] See J. Hunter, "Development of the Rule against Double Jeopardy", *Journal of Legal History* 5 (1984).

St. Thomas Beckett in the 12th century AD.[74] King Henry enacted a series of legislative procedures called The Constitutions of Clarendon which amongst other things allowed convicted former clergymen who had been tried before ecclesial courts to be further tried and punished before a secular court.

In European law, the *non bis in idem* principle is applied in many cases concerning criminal matters, especially extradition. Upon the *non bis in idem* rule, extradition shall or may be refused if the person sought has been prosecuted or sentenced by a final decision or, the proceedings terminated in accordance with the law of the requested Party. European Convention on Extradition 1957 prescribed at Article 9 (*non bis in idem*) that "extradition shall not be granted if a final judgment has been passed by the competent authorities of the requested Party upon the person claimed in respect of the offenses or offenses for which extradition is sought. Extradition may be refused if the relevant authorities of the requested Party have decided either not to institute or to terminate proceedings in respect of the same offense or offenses." The first sentence of this article, which is mandatory, covers the case of a person on whom final judgment has been passed, i.e. who has been acquitted, pardoned, or convicted. Extradition should therefore be refused because it is no longer possible to re-open the case, the judgment in question having acquired the authority of *res judicata*. The word "final" used in this article indicates that all means of appeal have been exhausted. It was understood that judgment by default is not to be considered a final decision, nor is the judgment *ultra vires*. The second sentence, which is permissive, covers the case of a person with regard to whom a decision has been taken, precluding or terminating proceedings, particularly the case in which it has been decided that there are no grounds for prosecution *(ordonnance de non-lieu).* In these circumstances extradition can be refused, but, if new facts or other matters affecting the verdict come to light, this provision cannot be applied, and the person must be extradited unless the requested Party proceeds against him under the terms of pending proceedings for the same offenses. The case of a person proceeded against and finally acquitted or convicted was not provided for by the Committee of Experts, on the grounds that all the Member States of the Council have adopted the principle of *non bis in idem* in their domestic law.

[74] See M. Friedland (1969), *Double Jeopardy*, Clarendon Press, Oxford.

Non bis in idem provisions are also found in Article 3, paragraph 2 of the EAW Framework Decision 2002. Accordingly, the executing judicial authority of a Member State shall refuse to execute the EAW if the requested person has been finally judged in a Member State in respect of the same acts, provided that where a sentence has been imposed, the sentence has been served, is being served, or can no longer be served. Article 4, paragraph 2 of the EAW Framework Decision refers to criminal proceedings being executed in the requested State as an optional ground for refusal of an EAW, and paragraph 5 of this Article allows for optional refusal if a third State has finally judged the requested person.

Vietnam considers *non bis in idem* as a noteworthy principle of international cooperation in criminal matters. In terms of extradition, the principle is specified in both obligatory and optional grounds for extradition refusal. Under the provisions of the Vietnamese Criminal Procedure Code 2003 (article 344), extradition shall not be granted if the person sought for penal liability examination has been convicted by the courts of Vietnam under legally valid judgments for the criminal acts stated in the extradition requests or the cases have been ceased. Similarly, the Vietnamese Law on mutual legal assistance 2007 establishes this matter in forms of the mandatory ground for extradition refusal when the person whose extradition is requested for prosecution has been convicted under a final judgment by a Vietnamese court for the conduct to which the request relates or the case has been suspended according to the criminal procedural law of Vietnam (Article (35)(1)(c)). In extradition treaties between Vietnam and foreign countries, *non bis in idem* principle is stipulated in both mandatory and discretionary grounds for extradition refusal. For example, within the Extradition Treaty between Vietnam and Korea Republic, this rule specified in Article 3 (1b)[75] and Article 4(2)[76].

Comparing Vietnam and the EU extradition law on the *non bis on idem* rule, the similarities exist in both mandatory and optional ground of refusal. However, the scope of application of the EAW Framework Decision is broader with the acceptance of a final judgment of the third State to the requested person as an optional ground for

[75] (b) when the person sought is being proceeded against or has been tried and convicted or acquitted in the territory of the Requested Party for the offense for which his extradition is requested;

[76] 2. when the person sought has been finally acquitted or convicted in a third State for the same offense for which extradition is requested and, if convicted, the sentence imposed has been fully enforced or is no longer enforceable.

extradition refusal. This provision should be considered to supplement in Vietnamese law.

10. Lapse of time

In accordance with the criminal law of every country in the world, all stages of criminal proceedings would be conducted in a specified time. Accordingly, the prosecution or execution of a sentence will be suspended or barred for the reason of lapse of time. In international law, this ground has become a principal provision for an exception in treaties on extradition[77] and mutual assistance in criminal matters. Generally, States establish similar stipulations on this issue, however, the time limits vary pursuant to the criminal law of the requested State or the requesting State.

The European Convention on Extradition (ECE) provides that a contracting party will refuse extradition of a person claimed on the basis of the domestic law of either the requesting or the requested Party, which cover the application of lapse of time regarding extradited offense. Specifically, Article 10 of ECE states:

> Extradition shall not be granted when the person claimed has, according to the law of either the requesting or the requested Party, become immune by reason of lapse of time from prosecution or punishment.

This provision is mandatory grounds for refusal of extradition applied among signatory parties of the ECE. It means under the law of the requesting State as well as the requested State, extradition is denied when prosecution or punishment of the offense for which extradition is requested has been barred owing to the lapse of time. In this sense, the final decision would be taken into consideration under the law of both the States concerned. In discussions concerning the implementation of the ECE, most experts had the view that "it is not for the requested Party to determine whether immunity by reason of lapse of time had been acquired in the territory of the requesting Party, but it should request a decision on this question directly from the requesting Party itself."[78]

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[77] "One of the most common exemptions from extradition relates to offenses for which prosecution or punishment is barred by lapse of time, usually referred to as barring by "lapse of time", prescription, or statute of limitation. A provision prohibiting extradition in such cases appears in most treaties and laws dealing with the subject of extradition", see M. Whiteman (1963), *Digest of International Law*, Government Printing Office, Washington, p.859.

[78] Council of Europe, Extradition – Explanatory notes and minimum standards, p.27, available to download at http://www.coe.int/t/dghl/standardsetting/pc-oc/978-92-8716076-8.pdf.

In the EAW Framework Decision 2002, lapse of time issue is not referred to directly in provisions on grounds for extradition refusal. Instead of that, Article 4(4) stipulates that the EAW would be refused to execute where the criminal prosecution or punishment of the requested person is statute-barred according to the law of the executing Member State and the acts fall within the jurisdiction of that Member State under its own criminal law.

In Vietnamese extradition law, lapse of time appears in both internal law and international law. Article 35(1)(b) of Law on mutual legal assistance addresses that extradition shall not grant if, under the law of Vietnam, the person whose extradition is requested cannot be prosecuted or does not have to serve the sentence imposed due to the lapse of the statute of limitations, or for other legitimate grounds. Concerning this matter, the Extradition Treaty between Vietnam and Republic of Korea[79] at Article 3(1)(c) states that "extradition shall not be granted when the prosecution or the punishment for the offense for which extradition is requested would have been barred by prescription of the lapse of time under the law of the Requested Party had the same offense been committed in the Requested Party." The same provision with Article 35 of Law on mutual legal assistance has been embodied in the Treaty on extradition between Vietnam and India.[80] Accordingly, two contracting parties agreed that extradition shall not be granted if the person whose extradition is requested cannot be prosecuted due to the lapse of the statute of limitations.

Although the wording or form of expression varies from national law to international law, provisions concerning lapse of time, a ground for extradition refusal, is basically identical between Vietnamese the EU laws on extradition. This rule also conforms to the principal principle of international criminal law.

11. Pending proceedings for the same offenses

In extradition law, surrender may be barred if the person claimed is being prosecuted in the requested State for a crime in connection with requested offense. The ECE prescribes this matter at Article 8 that "the Requested Party may refuse to extradite the person claimed if the competent authorities of such Party are proceeding against him

[79] Treaty on extradition between the Socialist Republic of Vietnam and the Republic of Korea, signed 15/9/2003, entered into force 19/4/2005.

[80] Treaty on extradition between the Socialist Republic of Vietnam and the Republic of India, concluded 12/10/2011, in force 12/8/2013.

in respect of the offense or offenses for which extradition is requested". The ECE therefore consider this case as an optional base for extradition denial. Under the above article, which in general relates to offenses committed outside the territory of the requested Party, extradition may be refused if the person claimed is already being proceeded against by the requested Party for the offenses for which extradition is requested. A question arises over when a Party has just received a request for extradition could it still itself proceed against the person claimed if it was permitted by its laws to take proceedings for the offense? In this case, the interpretation adopted by European experts is that a country could then refuse extradition, but must start proceedings before taking the decision to refuse extradition. The proceedings referred to in Article 8 are to be taken in the broadest sense as covering summons, arrest and all other judicial proceedings.

The same provision continues to appear in Article 4 (2) of the EAW Framework Decision and it is one of the optional grounds for non-execution of the EAW. Pursuant to this norm, an EAW may be refused if the requested person is being prosecuted in the executing Member State for the same offense with the offense on which the EAW is based.

Vietnam Law on mutual legal assistance stipulates the similar provision with the optional ground of extradition refusal when the person whose extradition is requested is being prosecuted in Vietnam for the offense for which extradition is sought (Article 35(2)(b). Extradition treaties to which Vietnam is a signatory also specify this matter with different characteristics of refusal. For instance, the Extradition Treaty between Vietnam and Korea set forth this issue in the sphere of mandatory grounds for extradition refusal at Article 3(1)(b). Accordingly, extradition shall be denied when "the person sought is being proceeded against or has been tried and convicted or acquitted in the territory of the Requested Party for the offense for which his extradition is requested". This issue is formulated as a discretionary ground in the Extradition Treaty with Australia[81]. Article 3(2)(d) of this Treaty specifies that extradition may be refused where "a prosecution is respect of the offense for which extradition is sought is pending in the Requested Party against the person whose extradition is sought". Generally, pending proceedings for the same offenses is always a crucial base for refusal in

[81] Treaty between the Socialist Republic of Vietnam and Australia on extradition, signed 10/4/2012.

extradition law and treaties. As a consequence, there are no differences on this issue between the extradition frameworks of Vietnam and the EU.

Conclusion

This chapter has provided an overview of points of strength as well as shortcomings or challenges of law with respect to denial grounds for extradition in Vietnam and the EU. Generally, similarities on some main exceptions of extradition are noticeable. Nevertheless, the recent development of the EU extradition law has raised considerable questions which Vietnam should take into consideration. For a more integrated Europe, extradition law of EU States has changed with the purpose of simplifying extradition procedure and improving the effectiveness of fighting against crimes, especially terrorism and transnational crimes. The EAW Framework Decision with the application of the principle of mutual recognition among the Member States has replaced traditional extradition procedure in the EU by a faster and simpler surrender based on EAW. With the adoption of the EAW Framework Decision, the clear trend in the EU is the limitation of refusal cases of extradition, especially the traditional matters like political offense and extradition of nationals were excluded in the new mechanism. Although these changes have resulted in some huge achievements, several issues need to be revisited, namely the assurance of human rights and the conflict as well as the differences between EAW Framework Decision and the Constitution law of some EU Member States. On Vietnam's side, competent authorities should amend some provisions concerning extradition refusal, especially the Law on mutual legal assistance 2007 to facilitate the implementation of the related articles in extradition treaties to which Vietnam is a contracting party. Supplementations should concentrate on refusal grounds of extradition, namely the death penalty, political offense exception, military offense and at the same time, maintaining provisions regarding non-discrimination rule in order to ensure human rights.

Chapter 6
PROVISIONAL ARREST

Introduction

In accordance with provisions of national law or treaties on extradition, when a country receives a formal request for extradition from another country, its competent authorities would consider the arrest of the person whose extradition is sought and continue to carry out extradition procedure. In urgent cases, to prevent fugitives from fleeing, the provisional arrest would be applied on the basis of agreements between the requesting country and the requested country or multilateral treaties to which these countries are signatories. From a practical perspective, a provisional arrest request is an urgent request to apprehend a person prior to receiving the formal request for extradition. It is the fact that a provisional arrest request is only appropriate when there are grounds to believe that the fugitive may flee to another country and thus escape punishment for his committed crime. The arrested person would be released where the requested state does not receive a formal extradition request from the requesting state within a particular period of time. Provisional arrest, due to its significant role, is stipulated in almost internal laws and international laws concerning extradition. The necessity of provisional arrest in international cooperation is undeniable but with regard to this matter, different States or territories hold distinct views on how to establish or execute this sort of apprehension in practice. In Vietnam, provisional arrest became a controversial topic in the process of drafting law concerning extradition. Finally, this issue was not regulated in the Law on mutual legal assistance in 2007, the current formal legal basis for extradition procedure in Vietnam. Regarding the European region, provisional arrest was specified in the European Convention on Extradition 1957. However, in the European Union (EU) level, the necessity of provisional arrest raises a question while a new "fast-track extradition mechanism" was established by the 2002 Framework Decision on the European Arrest Warrant and the surrender procedures between Member States. This chapter will discuss issues surrounding provisional arrest and evaluate the legal basis for this kind of apprehension in the European Union in comparison to Vietnam. Under research findings acquired, the study will evaluate to what extent the European Union standard connects to the enhancement of stipulations

regarding provisional arrest in Vietnam. On the basis of the research findings, some consistent recommendations for the Vietnamese extradition law will be suggested in the conclusive section.

1. Provisional arrest in extradition

1.1. Definition

Provisional arrest of a fugitive is a common elementary step of the extradition process. A provisional arrest has been defined as "a temporary arrest made prior to, and in contemplation of an extradition request, pursuant to a treaty which authorizes it and for the limited period of time provided for in the treaty. The arrest is made pursuant to a warrant issued by a judge or magistrate."[1] This stage is established as an interim measure pending a formal extradition request.[2] In addition, "informality and urgency are the essential characteristics of provisional arrest."[3]

Provisional arrest is usually provided in treaties concerning extradition. Accordingly, the competent authorities of the requested state would temporarily arrest fugitives before the requesting state submits a formal extradition request. Its purpose is to prevent the fugitive's flight from the requested state before the requesting state has an opportunity to present the full request. Commonly, provisional arrest requires only a statement by the requesting state that the person is accused or convicted of an extraditable crime, a brief summary of the facts, proof of identity, and an assurance that the complete extradition request will be submitted within the period specified in a treaty; generally within a limited number of days after the fugitive is arrested.[4] If the formal extradition request is not made by the treaty's time limit, the requested state may release the fugitive from custody. Failure to submit the request by the treaty deadline will not ordinarily bar the requesting state from submitting a following request for extradition. However, since the provisional arrest will have alerted the fugitive to the

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[1] See M. Cherif Bassiouni, *International Extradition: United States Law and Practice* (3d ed. 1996), p. 675.

[2] *Ibid.*

[3] See Jeffrey M. Olson, "Gauging an Adequate Probable Cause Standard for Provisional Arrest in Light of Parretti v. United States", 48 *Cath. U. L. Rev*. 161 (1999), pp. 164-165 (Available at: http://scholarship.law.edu/lawreview/vol48/iss1/9).

[4] For example, Art. 12(4), Treaty on extradition between the Socialist Republic of Vietnam and the Kingdom of Cambodia state: "A person arrested upon such an application shall be set at liberty upon the expiration of sixty (60) days from the date of that person's arrest if a request for extradition, supported by the document specified in Article 8 of this Treaty, has not been received".

possibility of extradition, once released he may flee before the formal request is submitted.

Because provisional arrests are applied in cases of urgency, it follows that a request for provisional arrest might be made very quickly. Though the fugitive has been charged with or convicted of multiple crimes, the provisional arrest request may refer to only one or some, but not all, of the crimes for which extradition ultimately will be sought. Notwithstanding that, the provisional arrest request does not address the full range of crimes; the requesting state may include additional related or unrelated crimes in its subsequent formal request for extradition.

1.2. Provisional arrest requests and the INTERPOL Red Notice

The arrest of alleged fugitives may be sought through international channels of police collaboration. Thus, the Member States of the International Criminal Police Organization (INTERPOL) may request the arrest of international fugitives with intention of their extradition through "Red Notices"[5], based on an arrest warrant or court order issued by a judicial authority in the requesting State. Under the law of some countries, such "Red Notices" constitute a valid request for provisional arrest.[6] Where this is not the case, the requesting State must issue a request for provisional arrest after it has been informed that the location of such wanted person is within the territory of the requested State. In either case, the "Red Notice" is not of itself an arrest warrant but forms the basis on which the judicial authorities of another State decide whether or not to authorize the provisional arrest of the wanted person.[7] Even when a country does not consider Red Notices as a sufficient basis for arrest, custom or immigration officers

[5] INTERPOL Notices are international requests for cooperation or alerts allowing police in member countries to share critical crime-related information. Notices are published by INTERPOL's General Secretariat at the request of National Central Bureaus and authorized entities, and can be published in any of the Organization's official languages: Arabic, English, French and Spanish. In the case of Red Notices, the persons concerned are wanted by national jurisdictions for prosecution or to serve a sentence based on an arrest warrant or court decision. INTERPOL's role is to assist the national police forces in identifying and locating these persons with a view to their arrest and extradition or similar lawful action (see http://www.interpol.int/INTERPOL-expertise/Notices).

[6] According to the US National Central Bureau of INTERPOL, Audit Report 09-35, September 2009, p. 11, "for approximately one-third of the member countries a Red Notice serves as a provisional arrest warrant", but that the US itself, like the UK, does not treat it as such.

[7] "Red notices" are circulated among member States in paper form and, for countries with the necessary technical equipment, through Interpol's restricted-access website. Member States can also request that their "red notices" be placed on the public website. See "'Wanted by Interpol' goes live on the Internet", Interpol Press Release CPN°01/00/COM&PR, 25 February 2000, available at: http://www.interpol.int/Public/ICPO/PressReleases/PR2000/PR200001.asp.

may have powers to hold an individual in the area of administrative detention.[8] Then, the requesting country can have sufficient time to make a formal request for a provisional arrest warrant.

INTERPOL serves as a liaison for national police organizations to exchange information about international fugitives from justice. There have been 190 current member countries that take part in INTEPOL.[9] The Red Notice is sometimes referred to by the media as "international warrant". Particularly, INTERPOL issues Red Notices, which include warrants issued by a country, and transfer them to all Member States through its own information system in order to arrest the person specified in the notice. In practice, a number of countries recognize Red Notices as provisional arrest warrants or an effective channel for sending extradition requests. Therefore, the Interpol channel plays an important role in supporting the arrest of fugitives in extradition and fighting against international crimes in general.

1.3. Effectiveness of provisional arrest and the risk of false arrest[10]

As noted above, provisional arrest plays a vital role in preventing the requested person from fleeing. Besides, it is an efficient tool to combat cross-border crimes. However, with its own features, provisional arrest includes potential risks which negatively impact human rights. Because provisional arrest requests are made in cases of urgency, they seldom include enough sufficient information on which to base a determination of probable cause.[11] Therefore, in issuing an arrest warrant under the provisional arrest clause of a treaty, judicial authorities must rely on the representations of a foreign government. In other words, the existence of urgency is determined according to the representations of the requesting State. An authority has postulated that the only prerequisite for a provisional arrest warrant is a statement that an order exists in the requesting country.[12] For this reason, when there are mistakes on the behalf of the

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[8] For instance, the United Kingdom Immigration Act 1971, Schedule 2, para.16.

[9] See http://www.interpol.int/Member-countries/World (access 25/01/2015).

[10] This issue is discussed further in Chapter 7 of this Thesis (Wrongful arrest and compensation responsibility).

[11] Probable cause is based on facts and circumstances that would lead a judicial authority to believe that an actual crime has been or is being committed by the suspect. It simply means that the police officer had a "reasonable belief" that the person committed a crime, see more at https://www.law.cornell.edu/wex/probable_cause

[12] See Joan Presky, "The Provisional Arrest Clauses of Extradition Treaties: Are They Constitutional", 11 *Loy. L.A. Int'l & Comp. L. Rev*. 657 (1989), p. 670 (available at: http://digitalcommons.lmu.edu/ilr/vol11/iss3/9).

requesting countries, the requested person may become a victim of wrongful arrest or detention.

2. Provisional arrest in the European Union extradition law

In practice, many international instruments contain clauses allowing provisional arrests in cases there is a danger that the fugitive will flee to a country other than that the territory he/she is being located. The European Convention on Extradition 1957 (ECE)[13] provides *provisional arrest* in Article 16 as follows:

> Article 16 – Provisional arrest
>
> 1. In case of urgency the competent authorities of the requesting Party may request the provisional arrest of the person sought. The competent authorities of the requested Party shall decide the matter in accordance with its law.
>
> 2. The request for provisional arrest shall state that one of the documents mentioned in Article 12, paragraph 2.a, exists and that it is intended to send a request for extradition. It shall also state for what offense extradition will be requested and when and where such offense was committed and shall so far as possible give a description of the person sought.
>
> 3. A request for provisional arrest shall be sent to the competent authorities of the requested Party either through the diplomatic channel or direct by post or telegraph or through the International Criminal Police Organization (Interpol) or by any other means affording evidence in writing or accepted by the requested Party. The requesting authority shall be informed without delay of the result of its request.
>
> 4. Provisional arrest may be terminated if, within a period of 18 days after arrest, the requested Party has not received the request for extradition and the documents mentioned in Article 12. It shall not, in any event, exceed 40 days from the date of such arrest. The possibility of provisional release at any time is not excluded, but the requested Party shall take any measures which it considers necessary to prevent the escape of the person sought.
>
> 5. Release shall not prejudice re-arrest and extradition if a request for extradition is received subsequently.

Pursuant to Article 16, the provisional arrest will be applied in the case of urgency and upon the request from the requesting State. The requested State will make

[13] Council of Europe, European Convention on Extradition, ETS. 24, 13 December 1957, entered into force 18 April 1960 (available at http://conventions.coe.int/Treaty/en/Treaties/Html/024.htm).

decisions in accordance with its internal law. Conditions of the claim for provisional arrest including the confirmation of sending a request for extradition, supporting documents and corresponding information regarding the offense that was committed by the person sought. The transmission of the request may be executed through the diplomatic channel or direct by post or telegraph or through the International Criminal Police Organization (Interpol) or by any other means affording evidence in writing or accepted by the requested Party. There have been a number of INTERPOL's member countries, notably Spain, Italy and Poland, which consider a Red Notice as a valid appeal for provisional arrest. Furthermore, Interpol maintains status as a formal instrument for the imparting of requests for provisional arrest in some bilateral and multilateral extradition treaties, including the Economic Community of West African States Convention on Extradition, the United Nations Model Treaty on Extradition and the European Convention on Extradition.[14] In contrast, some member states of ECE, namely the United Kingdom does not recognize Red Notices as a basis for provisional arrest. However, INTERPOL is always admitted as an efficient channel for co-operation between European countries in combating international crimes. In several formal meetings of the Committee of Experts on the Operation of European Conventions on Co-operation on Criminal Matters (PC-OC), the INTERPOL representatives proposed a recommendation of the recognition of Red Notices as the basis for provisional arrest. Issues of human rights were brought up concerning the use of Red Notices where there is not sufficient flow of information between the Member States concerned and INTERPOL. Many experts on the one hand expressed the opinion that the official bilateral channels should always be used because formalities must be respected. On the other hand, they did, however, recognize that INTERPOL's go-between role was indispensable in practical terms.[15]

The requested state will set free the temporarily arrested person if the requesting State fails to transfer the formal request and supporting documents for extradition. In terms of this matter, Article 16(4) of ECE specifies the cases and conditions for the release of the requested person from provisional arrest. There are two time limits

[14] See http://www.interpol.int/INTERPOL-expertise/Notices (access 15/12/2014).

[15] See 34th PC-OC meeting (3-5 February 1997), report: paragraphs 45-48 referred in Council of Europe, Extradition European Standards (Explanatory Notes on the Council of Europe convention and protocols and minimal standards protecting persons subject to transnational criminal proceedings), p. 42, (is available to download at http://www.coe.int/t/dghl/standardsetting/pc-oc/978-92-8716076-8.pdf).

provided; the optional limit of 18 days and the obligatory limit of 40 days, the expiry of which sees the person arrested allowed to be set free on account of the requested country not yet receiving the request for extradition and relevant documents as mentioned in Article 12 of ECE. This paragraph also stipulates that the arrested person may be released before the time limit, but that the requested country shall take any measures which it considers necessary to prevent the escape of the person sought. Under Paragraph 5 of the same Article, the release of the person arrested shall not preclude re-arrest and extradition subsequently in the territory of the requested State.

Concerning law application for provisional arrest, Article 22 of ECE provides that the procedure regarding extradition and provisional arrest shall be governed solely by the legislation of the requested Party.

Provisional arrest and detention pending extradition, on the one hand, effectively supports extradition procedure and limits cases of fugitives escaping but, on the other hand, raises questions relating to human rights and legal rights of a person arrested in detention time. As a result, the Committee of Ministers recommends governments of Member States Parties to the ECE as follows:

> "a. be guided in the practical application of the convention by the following principles:
>
> 1. time spent in custody pending extradition should be deducted from the sentence in the same manner as time spent in custody pending trial;
>
> 2. where the requested party considers that the duration of detention pending extradition is disproportionate to the sentence to be enforced or the penalty likely to be incurred upon conviction, it should consult the requesting party with a view to ascertaining whether the request for extradition is maintained. The requesting party should inform the requested party without delay;
>
> b. examine their legislation with a view to enabling persons who have suffered unjustified detention pending their extradition to claim compensation under the same conditions as those governing compensation for unjustified pre-trial detention." [16]

Before the entry into force of the EAW Framework Decision, apart from the related provisions of the ECE, the EU Member States may consider the notifications

[16] See Council of Europe, Extradition European Standards (Explanatory Notes on the Council of Europe convention and protocols and minimal standards protecting persons subject to transnational criminal proceedings), pp. 41-42.

specified in Article 95 of the Schengen Convention[17] as request for provisional arrest. The Schengen *acquis* affirms the role of the alert in the Schengen Convention. Article 64 of the Convention states: "An alert entered into the Schengen Information System in accordance with Article 95 shall have the same force as a request for provisional arrest under Article 16 of the European Convention on Extradition of 13 September 1957 or Article 15 of the Benelux Treaty concerning Extradition and Mutual Assistance in Criminal Matters of 27 June 1962, as amended by the Protocol of 11 May 1974."

In 2002, the European Union adopted the Framework Decision on the European Arrest Warrant and the surrender procedures between the Member States.[18] This Framework Decision supersedes traditional extradition which is provided in ECE and other legal instruments regarding extradition between EU countries. Certainly, extradition proceedings in ECE may still be in force and applied among EU countries and European countries (non-member State of EU) as well as between these European countries.

In accordance with provisions of the EAW Framework Decision, provisional arrest was not regulated. It is said that the procedure of executing the European Arrest Warrant (EAW) is simpler, faster and provisional arrest becomes not too necessary. On the basis of mutual recognition principle, the requesting Party issues an EAW and the requested Party will execute it as soon as applicable.

In contrast with the European Convention on Extradition (ECE), which differentiates in Art.16 (Provisional Arrest) between the request of the provisional arrest of the person sought and the request for extradition, the EAW Framework Decision provides for the new possibility of issuing the arrest and surrender jointly. On the other hand, the EAW Framework Decision also establishes, by way of definition, the need for the EAW to be a judicial decision, leaving aside those decisions that have an administrative characteristic.

It may be understood that when a Party requests another Party to surrender a person who is found on its territory by issuing the EAW (judicial decision), this Party will then automatically proceed the arrest and surrender of this person to the issuing

[17] 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 on the Gradual Abolition of Checks at their Common borders

[18] Council Framework Decision 2002/584/JHA of 13 June 2002 on the European Arrest Warrant and the surrender procedure between Member States, OJ L 190 18/07/2002.

Party.[19] The new provision arises a question concerning the necessity of "provisional arrest". The problem here is that before the requested Party receives the EAW, how shall the situation of the person sought then absconding to the other Member States be prevented? This matter was mentioned in the *Final report on the fourth round of mutual evaluations - The practical application of the European Arrest Warrant and corresponding surrender procedures between Member States.*[20] Pursuant to the Report, a mechanism for "provisional arrest" under the EAW was not envisaged in the EAW Framework Decision. Finland raised this question in relation to instances in which a fugitive leaves the jurisdiction of a Member State immediately after having committed a crime (prior to the EAW) and is traced to a plane/ferry due to land in another Member State. The Council of the European Union agrees that the possibility of establishing a mechanism for provisional arrest under the EAW in cases of urgency shall be examined by its appropriate preparatory bodies (Recommendation 15).[21] Subsequently, the Council concluded: "In respect of Recommendation 15, on the possibility of establishing a mechanism for provisional arrest under the EAW in urgent cases, Member States should take legislative action at national level, insofar as this matter creates particular difficulties in practice."[22] As a result, instead of being supplemented in the EAW Framework Decision, the provisional arrest would be governed by the municipal law of Member States. The above conclusion seems to assert the present effectiveness of EAW and provision arrest is thus unnecessarily supplemented. The Schengen Information System (SIS) is efficient in supporting EAW transmission from the issuing State to the executing State. However, it is adequate to take advantage of multiple channels of information to combat crimes, especially transnational crimes. Furthermore, national legislation on provisional arrest varies from country to country so that conflicts of law may cause problems for cooperation among EU Member States

[19] Art. 1, EAW Framework Decision.

[20] The Report has been discussed in the Council preparatory bodies, at the MDG meetings of 24 April and 13 May 2009, the CCM meeting of 6 May 2009, the CATS meeting of 20 May 2009, the JHA Counselors meeting of 25 May 2009, and lastly by COREPER on 27 May 2009, where delegations agreed on the current version of the document. However, the Netherlands maintained its general reservation to the text.

[21] *Supra*, note 5, page 19.

[22] See Council of the European Union, Council conclusions on follow up to the recommendations in the final report on the fourth round of mutual evaluations concerning the European Arrest Warrant and surrender procedures among the member states of the EU, 3018th JUSTICE and HOME AFFAIRS Council meeting Luxembourg, 3 June 2010.

when implementing EWA. In brief, this hurdle will still be a concern of the Council of the European Union in the future discussions.

3. Provisional arrest in the Vietnamese extradition law

Provisional arrest plays a key position in extradition procedure and, as a consequence, it is thus established in the majority of treaties and national law which focus on extradition. However, this measure is a controversial issue in the case of the Vietnamese extradition law. The term "provisional arrest" has never been mentioned in the domestic law regarding extradition of Vietnam. From the Criminal Procedure Code 2003[23] to the Law on mutual legal assistance 2007[24], extradition procedure has been established in Vietnamese law with the absence of articles with respect to provisional arrest. Actually, in the process of drafting Law on mutual legal assistance 2007, there were debates on whether or not "provisional arrest" should be provided. Some experts and members of the Vietnam National Assembly held the view that provisional arrest does not conform to Vietnam law. Upon the urgency of provisional arrest, they believed it is similar to provisions on the urgent arrest of Criminal Procedure Code 2003.[25] Accordingly, in the following cases, urgent arrests can be undertaken:

> a) When there exist grounds to believe that such persons are preparing to commit very serious or exceptionally serious offenses;
>
> b) When victims or persons present at the scenes where the offenses occurred saw with their own eyes and confirmed that such persons are the very ones who committed the offenses and it is deemed necessary to immediately prevent such persons from escaping;
>
> c) When traces of offenses are found on the bodies or at the residences of the persons suspected of having committed the offenses and it is deemed necessary to immediately prevent such persons from escaping or destroying evidences.[26]

Nevertheless, the above provisions only apply to persons who committed crimes in Vietnam in accordance with explicit conditions in certain circumstances. Under domestic law, even when they consider provisional arrest as a form of "temporary arrest", there is no legal framework for specifying this issue in the Law on mutual legal

[23] National Assembly, Criminal Procedure Code, adopted 26/11/2003, entered into force 01/7/2004.

[24] National Assembly, Law on Mutual Legal Assistance, adopted 21/11/2007, entered into force 01/7/2008.

[25] Although "provisional arrest" means temporary arrest pending official extradition procedure, a number of Vietnamese legal experts claim it a kind of "emergency arrest" on the basis of its urgency.

[26] Art. 81 of Criminal Procedure Code 2003.

assistance.[27] Consequently, they concluded that "provisional arrest" is unlawful under Vietnamese law. Moreover, they also claimed that the arrest before receiving a formal request for extradition may cause the arbitrary and false arrest to the requested person. If wrongful arrest or detention occurs, the primary concern is how Vietnamese authorities would respond to a compensation claim from the arrested person.[28] Finally, Law on mutual legal assistance was adopted in 2007 with the absence of provisions on provisional arrest. Article 41 (Preventive measures to secure extradition) of this Law provides that *upon an official request from a foreign state for extradition of a person,* the competent authority of Vietnam may take preventive measures stipulated by the law of Vietnam and international treaties to which Vietnam is a party to secure the consideration of the request for extradition. This article means that apprehension of the person whose extradition is sought shall be executed after Vietnamese authorities receive a formal request for extradition from the requesting State.

On the contrary to national law, *provisional arrest* article is specified in every bilateral treaty on extradition between Vietnam and foreign countries. The first treaty containing the extradition provisions of Vietnam, the Treaty on mutual legal assistance with the former Socialist Republic of Soviet Union[29], mentioned provisional arrest as follows:

> "Article 58. Arrest before receiving the request for extradition
>
> 1. If it is unable to postpone, upon the request of one Contracting State, other Contracting State may arrest a person even if not yet receiving the request for extradition specified in Article 55. The request for arrest should refer to the arrest warrant or the sentence in force and specify the request for extradition shall be forwarded to the Requested State at the soonest. The arrest warrant may be transmitted via post, telecommunication and other means
>
> […]

[27] Art.86 of Criminal Procedure Code states: "Custody may apply to persons arrested in urgent cases, offenders caught red-handed, offenders who confessed or surrendered themselves or persons arrested under pursuit warrants."

[28] The issues in respected to compensation in extradition are elaborated in the Chapter 7 of my Thesis.

[29] Treaty on legal mutual assistance in civil, family and criminal matters between the Socialist Republic of Vietnam and the Socialist Republic of Soviet Union, concluded 10/12/1981, ratified 22/12/1981.

Similarly, Article 9 (Provisional Arrest) of Extradition Treaty between Vietnam and Republic of Korea[30] addresses: "In case of urgency, a Party may request the provisional arrest of the person sought pending the presentation of the request for extradition. A request for provisional arrest may be transmitted through the diplomatic channel or directly between the People's Supreme Procuracy of the Socialist Republic of Vietnam and the Ministry of Justice of the Republic of Korea". Pursuant to a recent Report of Ministry of Public Security, Vietnam has concluded around 18 bilateral treaties on extradition or treaties containing extradition provisions with other States. All of these agreements embrace articles on the application of provisional arrest in extradition.

To illuminate characteristics of provisional arrest in the treaties signed by Vietnam, the following paragraph focuses on comparing this issue in Vietnam and the EU legislation. Because the EAW Framework Decision eliminated provisional arrest in its procedure, the concerned provisions of the European Convention on Extradition would be the object of the comparison.

In terms of transmission of the request, similarly to provisions of ECE, the request for provisional arrest may be sent through the diplomatic channel or directly to the Central Authority (for instance, Treaties with Korea, India, and Algeria) or INTERPOL (provided in the treaty with Australia). Apart from some common grounds, in comparison to provisions of European Convention on Extradition, provisional arrest stipulated in the treaty which Vietnam has signed is more specific, especially documents supporting the request for provisional arrest containing a list of information or statements. This distinction may stem from a bilateral treaty in comparison to a multilateral agreement. The time limit for the release of individuals arrested is also a different point. ECE provides two types of time limits which are 18 days since the day the requested Party has not received the request for extradition and supporting documents and a second of 40 days in any event. Meanwhile in treaties between Vietnam and foreign countries, the time for setting free from provisional arrest depends on the law of each country but the common point is that only one deadline is given. For

[30] Treaty on extradition between the Socialist Republic of Vietnam and the Republic of Korea, signed 15/9/2003, entered into force 19/4/2005.

example, the time limit in a treaty with Korea is 45 days[31], with Algeria, 40 days[32] and with both India[33] and Australia[34] being 60 days.

Interestingly, despite contradictions between international law and national law, the provisional arrest is still implemented by authorized persons and offices of Vietnam. Before the adoption of Law on mutual legal assistance 2007, extradition was governed by the Inter-ministerial Circular No.139 on 12/3/1994.[35] Accordingly, the Vietnamese central authority for extradition is the People's Supreme Procuracy. The authority in charge of arresting the requested person and executing decisions related to extradition is the Ministry of Interiors (now Ministry of Public Security). There was no formal procedure for extradition in this time. The Circular 139 provided general responsibilities of concerned ministries, but no specific procedure was mentioned. To implement bilateral treaties on extradition, authorized ministries instituted their internal regulations which were accepted between them.

Within the Ministry of Interiors, INTERPOL National Central Bureau for Vietnam (INCB for Vietnam), a section of the General Police Department, was empowered to carry out decisions concerning extradition, including provisional arrest warrants.[36] Vietnam has been a member state of INTERPOL since 1991 and the INCB for Vietnam was founded in 1993. One of its duties is coordinating the arrest and extradition of fugitives located in Vietnam, and of Vietnamese fugitives located in other INTERPOL member countries.[37] In this period, Vietnam informally recognized the Red Notice of INTERPOL as a legal basis for provisional arrest pending extradition procedure. When receiving Red Notice and request for provisional arrest from a foreign

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[31] *Id*, Art. 9(4).

[32] Art. 9(5), Convention Relative a L'Extradition Entre La Republique Socialiste Du Vietnam et La Republique Algerienne Democratique et Populaire, concluded 14/4/2010, entered into force 31/12/2010.

[33] Art. 9(4), Treaty on extradition between the Socialist Republic of Vietnam and the Republic of India, concluded 12/10/2011, in force 12/8/2013.

[34] Art. 10(4), Treaty on extradition between the Socialist Republic of Vietnam and Australia, concluded 10/4/2012, in force 07/4/2014.

[35] See Thong tu lien Bo Tu phap – Vien kiem sat nhan dan toi cao – Toa an nhan dan toi cao – Bo Noi vu - Bo Ngoai giao so 139/TT-LB ngay 12/3/1984 ve viec thi hanh Hiep đinh Tuong tro tư phap va phap ly ve cac van de dan su, gia đinh va hinh su da ky giua nuoc ta voi Lien Xo va cac nuoc xa hoi chu nghia [Inter-ministerial Circular No.139/TT-LB on 12/3/1984 between Ministry of Justice, People's Supreme Procuracy, People's Supreme Court, Ministry of Interiors, Ministry of Foreign Affairs on implementation of Treaties on mutual legal assistance in civil, family and criminal matters between Vietnam and Soviet Union and Socialism Countries.] (hereinafter Circular 139).

[36] See Nguyen Ngoc Anh, Nguyen Viet Hong, Pham Van Cong, Dan do – Nhung van de ly luan va thuc tien, (Hanoi, Nha xuat ban CAND, 2006), tr.119-121 [Nguyen Ngoc Anh, Nguyen Viet Hong, Pham Van Cong, Extradition, Theoretical and Practical Issues, Hanoi, People's Police Publisher, 2006, pp. 119-121.]

[37] See http://www.interpol.int/Member-countries/Asia-South-Pacific/Vietnam (accessed 15/12/2014).

State, INCB for Vietnam cooperated with other police forces to arrest and detain the requested person. The procedure of provisional arrest was in accordance with the arrest procedure specified in the Criminal Procedure Code. In practice, after receiving a request for provisional arrest through Interpol Red Notice or other official channels from other countries, INCB for Vietnam would arrest the requested person before the requesting State submitted the formal extradition request and supporting documents. In all cases, the provisional arrests must be immediately notified in writing to the procuracies of the same level, enclosed with documents related to the urgent arrests, for consideration and approval.[38] The decision and procedure of provisional arrest are under rules of bilateral treaties, the Vietnamese Criminal Procedure Code and the principle of reciprocity. It is the fact that provisional arrest is different from the emergency arrest in the Criminal Procedure Code on account of the objective and the purpose of the arrest. Therefore, the application of Criminal Procedure Code for provisional arrest in extradition procedure is inappropriate, or in other words, unlawful. However, there was no question of the legitimacy of the procedure of extradition in general, provisional arrest in particular at this time.

With the adoption of Law on mutual legal assistance 2007, the procedure of extradition was formally stipulated in the Vietnamese national law but without the existence of provisions on provisional arrest. Since then, Vietnamese authorities have been carrying out provisional arrest upon request from other States on the basis of the Criminal Procedure Code despite it being against the provisions of Law on mutual legal assistance. The extradition case regarding Poliakov Valeriy and Kosenok Alexey (both Russian citizens) is an example.[39] Valeriy and Alexey committed crimes under Russian Criminal Law: Extortion (Article 163), Wilful Destruction or Damage of Property (Article 167), Organization of an Illegal Armed Formation, or Participation in It (Article 208), Illegal Acquisition, Transfer, Sale, Storage, Transportation, or Bearing of Firearms, Its Basic Parts, Ammunition, Explosives, and Explosive Devices (Article 222, para.3) and were prosecuted by Russian judicial authority. They fled to Vietnam on 7/3/2013 and stayed in Nha Trang. On 9/8/2013, the Vietnamese Ministry of Public Security received the extradition request No.81/3-820-12 and No.81/3-821-12 for the

[38] Regarding to extradition procedure, see more at Nguyen Ngoc Anh et al,. *supra* note 36, at 48-49; Duong Tuyet Mien, "Van de dan do toi pham", Tap chi Toa an nhan dan 5/2006, trang 7. [Duong Tuyet Mien, "Matters of Extradition", Peple's Court Journal, 5/2006, p. 7.]

[39] See TUOITRENEWS, Vietnam agree to extradite 2 Russian Criminal, 10 April 2013, available at http://tuoitrenews.vn/society/14069/vietnam-agrees-to-extradite-2-russian-criminals (accessed 20/4/2014)

two above-mentioned fugitives. However, on 09/7/2013, Vietnamese police had arrested them pursuant to the Interpol Red Notice. In this case, Vietnamese police had apprehended the requested persons a month before receiving the formal extradition request from Russian authorities and it is thus apparently a case of provisional arrest in extradition. Finally, the extradition request was granted by Decision of Hanoi People's Court No.01/2003/DDHS-QD dated October 11, 2013.

The conflict between domestic law and international law on extradition caused problems for the implementation of provisional arrest in practice. In responding to this obstacle, in the Report on the evaluation of mutual legal assistance 2013 to Ministry of Justice,[40] Ministry of Public Security highly recommended supplementing provisional arrest in the Law on mutual legal assistance 2007.

Conclusion

From views on law and practice concerning extradition in the European Union and Vietnam, this chapter has found provisional arrest to be an essential measure in ensuring extradition requests are executed efficiently; contributing effectively to the combat against transnational criminals. As far as the EAW Framework Decision is concerned, the lack of provisional arrest mechanisms may cause difficulties for implementing "urgent cases" between the EU Member States. The legislative action at the national level is not enough in this case. Regardless of whether "a European Arrest Warrant shall be dealt with and executed as a matter of urgency",[41] "Provisional arrest" should be specified in the EAW Framework Decision and only applied in special cases.

The matter surrounding provisional arrest is more complex in Vietnam. Treaties on extradition between Vietnam and foreign countries comprise of articles on the provisional arrest. However, the national law on extradition does not recognize this procedure. Due to the lack of domestic legal basis, Vietnamese authorities will be faced with a plethora of difficulties when applying and implementing bilateral treaties on extradition in practice. In accordance with Vietnamese law, when there are differences between international law and national legislation on the same issue, international law will prevail. Although bilateral treaties provide provisional arrest, to execute it in practice, Vietnamese authorities need to rely on internal procedures. For this reason,

[40] See the Report No. 110/BCA-V19 on 10/01/2013.
[41] Art.17(1), EAW Framework Decision.

the Law on mutual legal assistance should promptly amend and supplement provisions regarding provisional arrest to facilitate the execution of treaties on extradition to which Vietnam is a contracting party. Besides, provisional arrest in extradition has its own procedure, so the provisions of Law on mutual legal assistance should clarify this issue and distinguish between provisional arrest and urgent arrest in the Criminal Procedure Code.

Chapter 7
WRONGFUL ARREST IN EXTRADITION AND COMPENSATION RESPONSIBILITY

Introduction

Miscarriages of justice, due to varying reasons, if carried out by judicial authorities in criminal proceedings, may be seen in any system of law. In these cases, persons who suffer from wrongful or illegal acts, for instance, unlawful arrest, conviction or false sentence, have the right to claim compensation. Countries are usually responsible for the misconduct and damages caused by their competent authorities. This chapter will take issues and complications regarding the arrest in extradition process into consideration. When a country receives a formal request for the extradition of a person, one of the first important steps is locating and arresting the fugitive pending extradition hearing. In urgent cases, upon the request from the requesting State, competent authorities of the requested State could decide to arrest the person sought before receiving the formal request for extradition. This emergency measure is the application of provisional arrest.[1] The cooperation involving apprehension in extradition bases on the treaty of which two states are the member and relationship between them in case reciprocity principle is applied. The arrest, especially provisional arrest, plays a significant role in preventing the fugitive from fleeing to another country or continuing commit crimes. However, mistakes concerning arrests made by competent authorities, for instance, improper acts of police forces or errors on identity, may cause false arrest; especially in the case of provisional arrest. Because the temporary arrest requests have the characteristic of urgency, they seldom include adequate information and reasonable grounds to believe that a particular person has committed a crime. Therefore, in issuing an arrest warrant pursuant to the provisional arrest clause of a treaty, a competent authority must rely on the representations of a foreign government. In other words, the requested state would determine the state of urgency according to the representations of the requesting state. In term of this issue, it

[1] M. Cherif Bassiouni, *International Extradition: United States Law and Practice* (3d ed. 1996), p.677. According to Bassiouni, there are three elements to justify a provisional arrest. First, there must be "a condition of emergency or urgency or some type of exigent circumstances." Second, the provisional arrest warrant must be based "basically on the same substantial ground as would authorize the issuance of a warrant by a United States court for the crime charged." Third, any other elements required by the applicable treaty or extradition law must be satisfied.

appears that the only prerequisite for a provisional arrest warrant is a statement that an order exists in the requesting country.[2] For this reason, when a wrongful arrest occurs in extradition proceedings, the compensation liability involving arrested persons is complicated. Whether the requested state or the requesting country is responsible for the improper act and how to resolve the compensation is not a simple issue. Traditionally, issues surrounding compensation for unlawful acts are provided in the domestic law of a country. However, apprehension in extradition goes beyond the territory of a state and impacts on the relationship between two or more nations. Correspondingly, in this sense, the wrongful arrest should be taken into account under international level. This chapter does not aim to emphasize the shortcomings of the EU and Vietnamese extradition law concerning the arrest of fugitives because illegal arrest may unintentionally occur in certain circumstances. Instead of that, the study focuses on how to deal with compensation for unlawful arrest by establishing an efficient mechanism for Vietnam as well as the EU. This issue has an especially negative impact on Vietnamese extradition law because it is not only a loophole in the Law on mutual legal assistance 2007 but also a reason for the absence of a "provisional arrest" article in extradition law.[3] Keeping that complication in mind, this chapter will examine the compensation liability in association with wrongful arrest occurring in extradition procedure and the practice of these issues in Vietnam in comparison to the European Union's experience. Some recommendations for the Vietnamese extradition system will be addressed in the conclusion.

1. Wrongful arrest

Protection from arbitrary arrest is one of the fundamental rights embodied in global legal instruments concerning human rights. The Universal Declaration of Human Rights pronounces that no one shall be subjected to arbitrary arrest or detention,[4] and that "everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law."[5]

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[2] See Joan Presky, "The Provisional Arrest Clauses of Extradition Treaties: Are They Constitutional", 11 *Loy. L.A. Int'l & Comp. L. Rev*. 657 (1989), p. 670 (Available at: http://digitalcommons.lmu.edu/ilr/vol11/iss3/9)

[3] See explanations in Chapter 6 (Provisional arrest).

[4] See Universal Declaration of Human Rights art. 9, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948).

[5] *Id*. art. 8.

This right is also enshrined in Article 2 of the International Covenant on Civil and Political Rights (ICCPR)[6], inter alia, that:

> "1. Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law."

Wrongful arrest, also known as false arrest or unlawful arrest, occurs when a person is apprehended without proper legal authority. This genre of arrest is usually conducted by the mistake of police officers or judicial authorities concerned when an arrest or detention of a person is carried out without probable cause.[7] There are two possible cases which could lead to a wrongful arrest. First, the arrested person did not commit a crime. Second, judicial authorities may mistakenly recognize the identity of an individual and arrest him/her for detention and prosecution. Victims of unlawful arrest may file for damages in a civil court and on the basis of court's decision, the police agency or other competent authority in charge of such form of arrest have a responsibility to apologize and appropriately compensate for damages which the victim suffered.

The possibility of wrongful arrest is prevalent in across the globe; the case of Anthony Finnegan in the United Kingdom being an example.[8]The Guardian reported that on the 5 June 2012, whilst photographing Shrewsbury town centre, Finnegan, a 45-year-old construction worker, was arrested by a police constable as some of those pictures taken by Finnegan had purportedly included the front lobby of a high street bank. Finnegan received forceful handling during the arrest and was held for nearly seven hours in a cell before his release. Since the incident, West Mercia police force has issued an apology alongside a pay-out of £10,000 under the acceptance of wrongful arrest. Furthermore, West Merica's chief constable was required to write Anthony Finnegan a letter of apology and a full acceptance of liability was issued. Alongside this, the deletion of all records of his arrest were carried out as compensation.

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[6] International Covenant on Civil and Political Rights, art. 21, G.A. Res. 2200A (XXI), annex, U.N. GAOR, 21st Sess. Supp. No. 16 at 55, U.N. Doc. A/6316 (Dec. 19, 1966), 999 U.N.T.S. 171 (hereinafter ICCPR).

[7] Probable cause is based on facts and circumstances that would lead a judicial authority to believe that an actual crime has been or is being committed by the suspect. It simply means that the police officer had a "reasonable belief" that the person committed a crime.

[8] The article is available at http://www.theguardian.com/uk/2012/jun/05/west-mercia-police-compensate-man (accessed 8 December 2014).

The case of *Witold Litwa v. Poland* [9] is another example of an arbitrary arrest which was heard by the European Court of Human Rights (ECtHR) on 7th October 1999. The applicant, born in 1946, is blind in one eye and his sight in the other is severely impaired. Along with his guide dog, Litwa visited Kraków Post Office no. 30 to check his mail on 5 May 1994. After realizing that his post-office boxes had already been opened and were now empty, Litwa made a complaint to the post-office clerks. Following Litwa's complaint, the post-office clerks called the police, claiming he was both drunk and disorderly. After the police officer arrived, Litwa was then transported to a Kraków sobering-up facility and held there for a further six hours and thirty minutes; his stay documented by a form completed by staff there. After assessment, the ECHR gave the final decision that Polish police had violated Article 5 § 1 regarding arbitrary arrest of the European Convention on Human Rights[10] resulting in a compensation payment being made to Litwa.

In most cases false arrest causes serious problems for victims, for instance, pecuniary and non-pecuniary damages, mental and physical health suffering, unemployment, and personal troubles. It is the fact that in some cases, financial reparation cannot compensate an acquitted person for the loss of family life which he or she has experienced while being arbitrarily detained. Generally, their damage always outweighs the amount of compensation they received.

2. Compensation for wrongful arrest

Compensation for victims of unlawful arrest is usually stipulated in the national law. The procedure and the amount of financial compensation depend on many factors, namely damages and losses of victims, national criminal policies, state budget and the standard of living. Different countries would have distinctive practices and policy to deal with false apprehension.

For example, there are a notable amount of people receiving compensation for being unlawfully arrested and imprisoned in the Netherlands.[11] The DutchNews.nl on 9

[9] Application no. 26629/95, is available at http://hudoc.echr.coe.int/eng?i=001-58537 (accessed 9 December 2014).

[10] Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14*, 4 November 1950, ETS 5, available at: http://www.refworld.org/docid/3ae6b3b04.html (accessed 8 December 2014).

[11] See DutchNews.nl, *10,000 people given compensation for being wrongly jailed*, June 9, 2012. It is available at http://www.dutchnews.nl/news/archives/2012/06/10000_people_given_compensatio.php. (last visited 15/12/2014).

June 2012 reported that around 10,000 people were paid a total of €22 million in compensation for wrongful imprisonment in 2011. The number of persons wrongfully arrested and held in custody was up 11% on 2010 and is double the total of five years ago. People are eligible for compensation if they are arrested and later found not guilty or if they are found to have been held in custody for a minor offense. In 2005, 4.5% of people taken to court were found not guilty. By 2010, that had risen to 8.5%. The standard compensation is €105 for a night in a police cell and €80 for a night in a detention centre.

In term of categories of damages caused by wrongful arrest, in the case of Witold Litwa v. Poland mentioned above, the ECtHR holds unanimously:

> "(a) that the respondent State is to pay the applicant, within three months, the following amounts:
>
> (i) by way of compensation for non-pecuniary damage, PLN 8,000 (eight thousand zlotys);
>
> (ii) for costs and expenses, PLN 15,000 (fifteen thousand zlotys), together with any value-added tax that may be chargeable, less FRF 13,174 (thirteen thousand one hundred and seventy-four French francs) to be converted into zlotys at the rate applicable at the date of delivery of this judgment;
>
> (b) that simple interest at an annual rate of 21% shall be payable on these sums from the expiry of the above-mentioned three months until settlement;"

In international law, the right of compensation was specified in a number of legal instruments concerning human rights. Article 9(5) of the ICCPR provides: "Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation."[12] Similarly, Article 85(1) of the Rome Statute of the International Criminal Court states: "anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation."[13] European Convention on Human Rights addresses in Article 5(5) that "everyone who has been the victim of arrest or detention in contravention of the provisions of this Article shall have an enforceable right to compensation."

However, the above conventions, especially Rome Statue, have no interpretation for how to implement compensation procedure in practice. Moreover, it is not clear

[12] International Covenant on Civil and Political Rights, deposited 13 August 1980, 1197 UNTS 411.

[13] See Rome Statute of the International Criminal Court, art. 85, July 17, 1998, 2187 U.N.T.S. 90 available at http://www.unhcr.org/refworld/docid/3ae6b3a84.html.

whether the right to claim compensation would only include financial compensation or could also obtain a sentence reduction if the defendant is convicted. The broader interpretation, which enables this right to include both the possibility of a financial award and reduction in a jail term, ought to be preferred.

3. Wrongful arrest in extradition proceedings and compensation liability

In all the cases of unlawful arrest analyzed in the above paragraphs, the subject has had to pay compensation and the victim is relatively clear for competent authorities to determine and decide who is responsible for the acts of miscarriage. When false arrest occurs in extradition process, the determination of reparation is complicated because the miscarriage regards two or more countries. In accordance with treaties and domestic law on extradition of nations concerned, the competent authority of the requested State would apprehend a person based on the application and supporting documents from the requesting State. Where the authority of the requesting State makes a request based on faulty information, accordingly, if the person sought did not commit a crime, or his/her identity was erroneously identified, then the required state would be unable to access the truth, and, consequently, execute a wrongful arrest. In urgent cases, the application of provisional arrest would increase the risk of unlawful deprivation of liberty. Because the arrest carried out before transferring the formal request for extradition, the competent authorities of both contracting parties fail to have adequate time to examine documents, evidence, related laws and others statements with respect to apprehending the person whose extradition is sought.

As far as reparation obligation is concerned, the related countries should clarify four main issues when wrongful arrest takes place in extradition, as follows:

(1) Will the requesting State or requested State pay compensation for arrested person?

(2) Which competent authority, police office or central authority for extradition will responsible for compensation?

(3) The procedure for victims of false arrest to claim reparation.

(4) Apart from stipulated in municipal law, whether or not wrongful detention and process of claiming compensation should be specified in treaties on extradition.

4. Compensation for wrongful arrest in extradition proceedings in the European Union

According to the 2014 Report on European judicial systems issued by The European Commission for the Efficiency of Justice (CEPEJ)[14], the majority of European countries have a compensation procedure for victims of crime. Typically, European states build up a public fund for compensation.[15] All persons related to the court's decisions should have the right to apply to a national jurisdiction for compensation for the damage he/she has suffered due to a dysfunction of the judicial system. This dysfunction may consist of the excessive length of proceedings, non-enforcement of court decisions, wrongful arrest or wrongful conviction. As a part of the protection of the court users against dysfunctions of the courts, judicial systems may implement compensation procedures. Under the Report of CEPEJ, 34 countries or entities have a compensation mechanism for excessively lengthy proceedings and 24 countries have compensation process for non-enforcement of a court decision exists. Almost all countries in the European region establish provisions for compensating persons who are victims of wrongful arrest.[16] For example, under Austria's law, in the case of unlawful arrest or wrongful criminal conviction, compensation can also be obtained without proving the fault of the authorities. To make sure that authorities pay compensation following the concrete circumstances of each case, there is no such thing as a daily tariff or a fixed compensation sum. The amount of compensation depends solely on the magnitude of damage suffered by the victim and the degree of fault attributable to the Public Authority. In cases in which the detention started after the 31st of December 2010, changes in the law are applicable and the liability for non-material damage for detention is limited to a minimum compensation of €20 and a maximum of €50 per day.[17]

Regarding EU legal framework of compensation for unlawful arrest, Art.111(1), Schengen Agreement[18] provides "Any person may, in the territory of each Contracting

[14] See The European Commission for the Efficiency of Justice (CEPEJ), Report on "European judicial systems – Edition 2014 (2012 data): efficiency and quality of justice" (available at http://www.coe.int/t/dghl/cooperation/cepej/evaluation/2014/Rapport_2014_en.pdf).
[15] *Id,* at 98.
[16] *Id,* at 100.
[17] *Id,* at 101-102.
[18] 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 on the gradual abolition of checks at their common borders, Official Journal L 239 , 22/09/2000 P. 0019 – 0062.

Party, bring before the courts or the authority competent under national law an action to correct, delete or obtain information or to obtain compensation in connection with an alert involving them." From this perspective, compensation would be obtained under an internal mechanism rather than on an international level. In the same manner, provisions regarding wrongful arrest and compensation are absent in treaties or agreements concerning extradition between EU Member States. Currently, the EU does not provide any formal regulation related to false arrest and compensation responsibility as a regional framework.

In certain circumstances, the arrest and detention of the requested person pending extradition could lead to illegal arrest and compensation obligation. Most of the treaties on extradition have provisions concerning time limit for surrender the person sought. For instance, Article 18 of the European Convention on Extradition 1957[19] (ECE) pronounces that if the requested person has not been removed within the specified date, he may be set at liberty after the expiry of 15 days and shall in any case be set free after the expiry of 30 days. The Article 23 of the Framework Decision on European Arrest Warrant and surrender procedures between Member States 2002[20] (EAW Framework Decision) has the provision that upon expiry of the time limits (10 days) referred to in paragraphs 2 to 4, if the person sought is still being detained, he shall be released. In the case that the arrest is false, how the requested State or executing State of the arrest warrant will act will depend on whether the freed person takes the competent authorities to a court for wrongful arrest and requires them to compensate for which he had suffered in the custody duration. A question arises whether the provisions on wrongful arrest and compensation proceedings should be supplemented in an international instrument such as ECE and Framework Decision on EAW.

In practice, unlawful arrest could stem from mistakes in the Schengen Information System (SIS).[21] There are some cases in which failure within the SIS alert

[19] European Convention on Extradition, ETS 24; 1 ECA 173; 359 UNTS 273.

[20] Framework Decision on European Arrest Warrant and surrender procedures between Member States, 2002/584/JHA.

[21] The Schengen Information System (SIS) is a highly efficient large-scale information system that supports external border control and law enforcement cooperation in the Schengen States in which most of them are the EU countries. One of the main purposes of SIS is supporting police and judicial cooperation by allowing competent authorities to create and consult alerts on persons or objects related to criminal offences. Currently, the Schengen States have launched the updated version of the system (SIS II), see http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/borders-and-visas/schengen-information-system/index_en.htm (accessed 19 March 2015)

and European Arrest Warrant procedures result in wrongful arrest.[22] European Arrest Warrants are often transmitted through the SIS and this System allows the issuing Member State to update or remove an alert when appropriate. On the contrary, it is not possible for the executing court to dismiss an alert even where it has decided to refuse surrender. The result is that the requested persons can remain the subject of SIS alerts and are liable to arrest if they travel to the other Member States.[23] The main reason is the shortcoming of a regular review of the Schengen Information System and Interpol alerts as well as the lack of an automatic link between the withdrawal of an EAW and the removal of such alerts. Besides, there is uncertainty as to the effect of a refusal to execute an EAW on the continued validity of an EAW and the linked alerts with the result that persons subject to EAWs are unable to move freely within the area of freedom security and justice without the risk of future arrest and surrender.[24]

In terms of wrongful arrest concerning SIS, Mr. Charles Tannock, a member of European Conservatives and Reformist Group (ECR) sent to the Commission of European Parliament a question on 7 June 2010 as follows:

> A constituent has brought to my attention a serious miscarriage of justice based on mistaken identity and failure of the Schengen Information System (SIS) and European Arrest Warrant system to work correctly. The London constituent, a British citizen, had his passport stolen whilst abroad several years ago which was duly notified to the UK passport authorities and a replacement new passport issued. Apparently the original passport was sold on the black market and used by the buyer to operate a fraudulent criminal business in Germany. After the man fled the country, the German police authorities issued an SIS alert with a European Arrest Warrant under the name of my constituent, which the fraudster had used without his knowledge for some time in Germany. When my constituent went on a recent weekend break to Portugal he was immediately arrested on entering the country at Lisbon airport and detained without legal access over the weekend until finally released following an intervention by a Portuguese judge who accepted the case of wrong identity. My constituent is seeking

[22] For example, see http://www.europarl.europa.eu/sides/getDoc.do?type=WQ&reference=E-2010-4013&language=EN (last visited 19 March 2014).

[23] A Review of United Kingdom's Extradition Arrangements (Following Written Ministerial Statement by the Secretary of State for the Home Department of 8 September 2010), 30/9/2011, p. 120 (This report is also available at http://www.homeoffice.gov.uk/).

[24] European Parliament resolution of 27 February 2014 with recommendations to the Commission on the review of the European Arrest Warrant (2013/2109(INL)), para. F((iii)) (available at http://db.eurocrim.org/db/en/doc/2108.pdf).

damages now for wrongful arrest from the Portuguese authorities and loss of his holiday break.[25]

The above example illustrates the possibility that the EAW may cause wrongful arrest due to mistakes from any Member State on the basis of an SIS alert fault. One issue needs to be taken into consideration is whether Portuguese police or German authorities would be responsible for damages that the UK man suffered in the detention time. In response to the question regarding the aforementioned case on which a redress mechanism is available within the EU legislation, Ms. Malmström on behalf of the Commission of European Parliament, stated: "the Schengen Convention entitles any person, in the territory of each Contracting Party, to bring before the courts or the authority competent under national law an action to correct, delete or to obtain information or to obtain compensation in connection with an alert involving them (Article 111)"[26]. The answer, notwithstanding, is not clear regarding whether the victim could look to Portugal or Germany for claiming compensation.

Furthermore, practice shows that cases of arbitrary detention for the purpose of executing the EAW may be the consequence of different circumstances. Accordingly, wrongful arrest may be subjected to apparent mistakes of the issuing or executing States (or both), or errors on the person in question, for instance, the theft or selling of identity cards.[27] The concerned persons sometimes receive compensation, as illustrated by the example of José Vicente Piera, who received 85,000 euros in compensation for having spent 248 days in prison due to a case of mistaken identity.[28] Most Member States have legislation, which ensures the citizen compensation for depreciation of freedom during criminal proceedings. This legislation has typically been introduced as a response to the powers given to the police when criminal offenses are investigated. However, in the case of extradition, both contracting states should share the responsibility and establish a feasible procedure for the sake of the victim of the wrongful arrest. For instance, a man, who was arrested, claims damages from the Member State that arrested him. This Member State may refuse to pay such damages as it considers the issuing State as the

[25] *Supra*, note 22.

[26] See http://www.europarl.europa.eu/sides/getAllAnswers.do?reference=E-2010-4013&language=EN (access 19 March 2014).

[27] For example, a Spanish citizen, Oscar Sanchez, was sentenced to 14 years as a collaborator of the Camorra as a result of the real criminal having taken over his identity. He had previously handed his ID and a prepaid credit card in change of 1400 euro, believing that the documents would be used by an illegal immigrant.

[28] See http://elpais.com/elpais/2013/08/14/inenglish/1376484100_663219.html.

one to bear the responsibility since the arresting Member State was bound by the EAW despite its later recognition as non-valid. The man must, therefore, "pack his suitcases and travel to the issuing State if he wants to proceed with his claim".[29] The procedural costs, the procedural risks, language barriers and problems of understanding the legal system of another Member State will often exceed the amount of the financial compensation that may be achieved. Consequently, the Member States will therefore, to a certain degree, be able to avoid liability for having wrongfully issued an EAW simply because the citizen gives up before the case is started.

There are not many studies with respect to wrongful arrest and compensation for this false act in the implementation of the EAW Framework Decision. Prof. Anne Weyembergh (Université Libre de Bruxelles) discussed this issue in the Research Paper "Critical Assessment of the Existing European Arrest Warrant Framework Decision" (6/2013). In this paper, she interviewed a number of judicial authorities concerned, evaluated the EU mechanism for compensation and suggested a list of recommendations for contemporary problems. She stated that there were substantial differences among compensation mechanisms at the national level in the EU. These differences have been emphasized in the context of extradition in the framework of the CoE PC-OC.[30] They concern time limits for claiming compensation[31] and amounts awarded.[32] This study also revealed that national compensation mechanisms are not necessarily adapted to transnational cases and that compensation is not always awarded for detention suffered abroad in extradition cases.[33] Moreover, not all states provide for compensation when

[29] Sørensen, H. F., 23.5.2013, "The European Arrest Warrant and Member State Liability – a legal black hole?", is available at http://acelg.blogactiv.eu/2013/05/22/the-european-arrest-warrant-and-member-state-liability-%E2%80%93-a-legal-black-hole/ (accessed 19 March 2014).

[30] CoE, European Committee on Crime Problems (CDPC), Committee of experts on the operation of European Conventions on co-operation in criminal matters (PC-OC), Replies concerning compensation issues related to the European Convention on Extradition, PC-OC (2008) 03 Rev 3, 2 Nov. 2008.

[31] Whereas in Germany the compensation claim should be brought while the criminal proceedings are still pending, in Denmark it can be introduced within two-months of the final judgment being rendered. In Sweden it is possible to bring a claim up to ten years after the final judgment.

[32] These amounts are calculated on the basis of national economic indicators, and change also depending on the country where the claim is brought. Thus for 50 days spent in custody, a person will receive 5748 EUR in Denmark or 5788 EUR in Sweden. Only 1250 EUR would however be awarded as compensation in Germany.

[33] PC-OC, Summary of the replies to the questionnaire on compensation issues related to the European Convention on Extradition, PC-OC (2008) 21, 24 Sept. 2008, p. 3.

they withdraw an extradition request[34], or when they arrest and detain a person at the request of another state without extradition taking place.[35]

The aforementioned discussions in the CoE PC-OC Committee led to the conclusion that "compensation of persons is a very important question, in particular as it affects human rights, which would deserve further consideration by the PC-OC at a later stage"[36], but no recommendation or initiative followed.

There are calls for Member States, whether as an issuing or executing State, to provide legal mechanisms for compensating the damage caused from miscarriages of justice deriving from implementation of mutual recognition instruments. Whilst stressing the fundamental importance of correct procedures, especially of appeal rights, these efforts shall be in accordance with the ECHR developed standards and those found in the well-established case-law of the ECJ.[37]

5. Compensation for wrongful arrest in extradition proceedings in Vietnam

The false arrest caused by police or competent authorities in criminal proceedings could occur in any country. As far as compensation is concerned, persons or agencies in charge of the arrest must take responsibility for their unlawful act by paying for the victims. False arrest is also a problem which the judicial authorities have to deal with in Vietnam. For instance, Vietnam News reported that on 12 March 2012[38], after serving a total of 31 months in jail, six people were finally compensated by the People's Procuracy of Dong Phu District, Binh Phuoc, southern Vietnam, under admission of wrongful arrest back in 2008. The six men arrested including brothers Luong Van Sang, Luong Van Trong and Luong Van Han, as well as Truong Quang Lam, Nguyen Nhu Tung and Le Van Huy were among nine people purportedly involved in a series of robberies in the area which took place in 2008. The individual whose police statement lead to the arrest of the group, Nguyen Van Hung, was only 15 at the time it was issued. The eventual compensation pay-out to the individuals totaled

[34] *Ibid.*
[35] *Ibid.*
[36] PC-OC, List of decisions taken at the 6th meeting of the restricted Group of experts on international co-operation (PC-OC Mod) enlarged to all PC-OC members, 30 Sept. - 2 Oct. 2008, point 1, b), compensation of persons, p. 1.
[37] *Supra* note. 20, para.11.
[38] See http://vietnamnews.vn/print/222018/victims-of-wrongful-arrest-receive-compensation.htm (last visited 16/12/2014).

to over VND500 million (US$23,800). The statement issued by Nguyen Van Hung incriminated the six men, plus three others, but police were unable to identify victims or gather other evidence of the alleged robberies. The People's Procuracy finally prosecuted the case in the local People's Court in December 2010. Upon examination of the evidence, the court concluded that the police had gravely violated the criminal procedure code. Due to a lack of proof, the procuracy withdrew its prosecution. The three others named in and detained due to Hung's statement continue to negotiate a higher settlement.

Recently, Le Quoc Si and Pham Nhat Hung from the southern province of Hau Giang have received a public apology from the police for their wrongful arrest 24 years ago. With a case starting in 1990, after both being charged with the illegal use of public assets, Hung was initially accused of embezzlement with Si being charged as acting as his accomplice. Although released three months after arrest, the case continued right up to late 2013 until it was eventually dropped and a compensation payout of nearly VND 900 million (US$42,300) was paid to the individuals. After 20 years of relentless efforts by Hung and Si filing complaints through a variety of agencies, Hau Giang Police finally announced the innocence of the pair and published a statement of apology amongst various local newspapers.[39]

Although the framework of compensation for wrongful arrest is adequate to national cases, there is an absence of a legal basis for this issue in extradition law. All the treaties on extradition between Vietnam and other countries cover articles related to arrest and provisional arrest, but the provision on wrongful arrest has never been mentioned. In the context of a procedure, there has been a vague relationship between extradition and criminal procedure in Vietnamese law. Although a chapter on extradition was established in the Procedure Criminal Code 2003, it is unclear whether extradition is part of criminal procedure or a separate institution in the Vietnamese law system. This obstacle was still not resolved with the adoption of Law on mutual legal assistance in 2007. Thus, there is no legal basis for Vietnam competent authorities to apply to compensate for wrongful arrest in extradition. The lack of compensation provision led to the exclusion of provisional arrest in extradition law. When the Law on mutual legal assistance was in the process of being drafted in 2007, some legal experts

[39] See http://www.thanhniennews.com/society/vietnamese-cops-apologize-for-wrongful-arrest-24-years-back-27376.html (last visited 26/12/2014).

and members of the Vietnam National Assembly argued that "provisional arrest" is not compatible with the proceedings of the Vietnam Criminal Procedure Code. More importantly, they concerned how to deal with compensation problems in case of wrongful arrest occurring in extradition proceedings. The main question was not answered clearly in the discussion among Parliament members of whether the requested State or the requesting State in extradition process would be in charge of paying compensation if the arrest was false. Consequently, the Law on mutual legal assistance was passed by the Vietnam National Assembly in 2007 with the absence of stipulation on provisional arrest. The only article concerning arrest in extradition proceedings is regulated in Article 41 as follows:

> "Upon an official request from a foreign state for extradition of a person, the competent authority of Vietnam may take preventive measures stipulated by the law of Vietnam and international treaties to which Vietnam is a party to secure the consideration of the request for extradition."

In accordance with this Article, an arrest warrant would only be executed after Vietnamese competent authorities received a formal request for extradition.

In contrast to national law, "provisional arrest" appears in treaties on extradition to which Vietnam is a signatory party. Article 9 (Provisional Arrest) of Extradition Treaty between Vietnam and Republic of Korea[40] specifies: "In case of urgency, a Party may request the provisional arrest of the person sought pending the presentation of the request for extradition. An application for provisional arrest may be transmitted through the diplomatic channel or directly between the People's Supreme Procuracy of the Socialist Republic of Vietnam and the Ministry of Justice of the Republic of Korea". To solve the above problems regarding provisional arrest, it is necessary to supplement both mechanism for provisional arrest and compensation for wrongful arrest in the Law.

Conclusion

This chapter has evaluated and proved that wrongful arrest is a serious violation of human rights. The courts/tribunals should take into consideration that if the defendant is acquitted, financial compensation cannot adequately compensate a person for the loss of job, income and family life which he or she may have experienced during the period of arbitrary detention. For this reason, firstly the court should include a period of

[40] Treaty on extradition between the Socialist Republic of Vietnam and the Republic of Korea, signed 15/9/2003, entered into force 19/4/2005.

domestic detention in its calculation concerning whether the defendant has been detained for an unreasonable length of time and should therefore be provisionally released. Likewise, this period of time should contribute towards the credit time served which is thus deducted from overall sentence duration. Note, however, that such credit should be deemed a right and therefore should not act as a rectification for the violation itself. Alongside this, further remedy, such as financial compensation or further reduction of sentence, should be provided additionally and independently from the sentencing credit itself. [41]

On the EU level, the Council of the EU should issue a legal document to ensure that national compensation mechanisms are applicable to EAW cases and introduce specific rules allocating responsibility between Member States. An EU dispute settlement mechanism should be envisaged for cases of wrongful arrest where no agreement is reached between the concerned States.

To resolve obstacles with regard to wrongful arrest in extradition and safeguard human rights of the person whose extradition is sought, the compensation responsibility should be mentioned in both treaties and internal law on extradition regarding Vietnam. At the national level, the Vietnamese Law on mutual legal assistance 2007 should be supplemented provisions covering wrongful arrest and compensation mechanism for the ingoing as well as outgoing extradition. At the international level, when concluding extradition treaties, Vietnamese competent authority should discuss with the foreign State to establish an assurance concerning wrongful arrest and compensation responsibility when both parties cooperate in executing extradition requests.

[41] See Melinda Taylor and Charles Chernor Jalloh, "Provisional Arrest and Incarceration in the International Criminal Tribunals", *11 Santa Clara J. Int'l L. 303* (2013), p.334. (Available at: http://digitalcommons.law.scu.edu/scujil/vol11/iss2/2)

Chapter 8
EXTRADITION PROCEDURE, POSTPONEMENT OF EXTRADITION, TEMPORARY EXTRADITION AND RE-EXTRADITION

Introduction

Generally, international instruments on extradition do not consist of concrete proceedings for several related issues, such as "extradition procedure", "postponement of extradition", "temporary extradition" and "re-extradition". Extradition treaties simply establish general principles agreed among contracting parties with a view to surrendering the person sought. On the contrary, the national law of the requested State would specify the particular stages of the extradition process as well as competent authorities who involve in giving the decision on whether or not granting extradition. Apart from certain similarities and common features, extradition procedure may vary considerably from one country to another. There are no formal definitions of the terms "extradition procedure", "postponement of extradition", "temporary extradition" and "re-extradition". However, on the basis of analyzing provisions of multilateral[1] or bilateral treaties[2] and domestic law[3] on extradition, the meaning and content of the above terms could be clarified. *Extradition procedure* initiates from the time the formal extradition request has been sent to the competent authority of the requested State. Prior to this stage, a state could request the other to apply provisional arrest on the fugitive for the urgent reason. When the requested person is being prosecuted or serving a sentence in the requested State for an offense other than that for which extradition is requested, the requested State may *postpone the extradition* of the person sought until the conclusion of the proceedings or the service of the whole or any part of the sentence imposed. Postponement of extradition may also be applied when arising difficulties in extradition proceedings which bar the surrender of the requested person, for instance, if the person concerned is suffering from poor health. The execution of surrender decision would continue where all the obstacles are resolved. Sometimes, the extradition postponement could block the criminal proceedings in the requesting State due to the

[1] For example, European Convention on Extradition 1957.

[2] For example, Treaty on extradition between the Socialist Republic of Vietnam and Republic of Korea 2003.

[3] Depending on different countries, extradition is provided in extradition law or other law with respect to criminal matters. In Vietnam, the present legal basis for extradition is Law on mutual legal assistance 2007.

lapse of time or furthermore, it may create a serious difficulty for prosecuting the claimed person in the requesting State. To deal with this dilemma, *temporary extradition* is applied to the person sought on the basis of the request from the requesting State. The person whose temporary extradition is granted shall be returned as soon as the criminal proceedings are completed or the mutually agreed time permitted for the request of temporary extradition is expired. The term *re-extradition* is the combination of "re" and "extradition" so that it itself means extraditing a person claimed one more time. The requested State would extradite the wanted person back to the requesting State or the third State under its law and relevant international instruments. In practice, a country or group of countries or international organizations do not adhere to the same provisions or applications with the above-mentioned issues to which the following comparison between European Union law and Vietnamese law on extradition is an example. This chapter will examine the EU law with respect to extradition procedure, postponement of extradition, temporary extradition and re-extradition in comparison to the same issues in the Vietnamese law. Upon the findings arising from analysis and evaluations on the both systems, recommendations will be suggested in the conclusion section.

1. Extradition procedure

The specific process of extradition is governed by the domestic law of the requested State due to most steps of proceedings being executed in its territory or, more importantly, they belong to its jurisdiction.[4] International law instruments like conventions or agreements on extradition, if applicable, only provide the general procedure. On the one hand, it creates favorable conditions for a Member State to apply and cooperate in the extradition field and, on the contrary, limits obstacles arising from different law systems of contracting countries. According to treaties and domestic law on extradition, the procedure commences at the time the requesting State sends a request for extradition, alongside supporting documents, to the requested State and this process is considered completed when the person sought is eventually handed over to the requesting State.

[4] Article 22 (Procedure) of European Convention on Extradition provides that *except where this Convention otherwise provides, the procedure with regard to extradition and provisional arrest shall be governed solely by the law of the requested Party*.

In most countries, extradition proceedings of the requested State usually consist of both the executive and the judiciary phrases.

At the initial administrative phase, an examination of the extradition request is performed by the receiving authority and a decision, based on the governing criteria of the State, is presented on whether it is permissible to carry out or not. A typical assessment at this stage would largely focus on an assessment of formal requirements, but it is also possible for applicable legislation to contribute towards this initial evaluation on the probability of extradition being granted. In the case of the request failing to satisfy the relevant requirements, or immediate recognition that refusal grounds apply, a competent authority may, at this initial stage, refuse the request.[5]

If the case is decided by the competent authority to move forward in proceedings, the extradition request is put before the judicial authority in charge of determining the case's applicability. The decision of such authority is in relation to relevant national legislation alongside any relevant extradition treaties that may exist. Evidence forwarded by the requesting State is thus reviewed by the judicial authority and from this necessary information, inquiries are pursued to establish their contribution. Legal obstacles to extradition may require assessment by the extradition judge including those possibly posed by both human rights and refugee law. At this stage, an opportunity to appeal against the decision of the judicial authority is often available.[6]

The judicial stage is typically followed by a final executive decision provided by the relevant minister based on whether the extradition request meets requirements for granting. In most countries, a minister must refuse to extradite in cases where it is found that legal requirements for extradition are not met is binding on the executive. In cases where extradition has already been permitted by the courts, it is at the minister's discretion to either grant surrender of the fugitive, likely alongside attached conditions, or to refuse extradition. Appeal or review of the final decision may be provided by the law, but this is specific to the country in which the decision takes place.[7]

[5] See Sibylle Kapferer, "Interface between Extradition and Asylum", UNHCR's Department of International Protection, PPLA/2003/05, para. 157.
[6] Ibid.
[7] Ibid.

1.1. Extradition procedure under the European Union law

To clarify the development of extradition procedure in the European Union (EU) law, both the European Convention on Extradition 1957 and the Framework Decision on the European Arrest Warrant and the surrender procedure between Member States 2002 would be analysed and evaluated.

1.1.1. Pursuant to European Convention on Extradition

In 1957, the European Convention on Extradition was adopted and became the first common legal basis of extradition among European countries.[8] The Article 12 of the Convention provides that the extradition request shall be in writing and shall be communicated through the diplomatic channel. Other means of communication may be arranged by direct agreement between two or more Parties. The request shall be enclosed with:

> the original or an authenticated copy of the conviction and sentence or detention order immediately enforceable or of the warrant of arrest or other order having the same effect and issued in accordance with the procedure laid down in the law of the requesting Party (1); a statement of the offenses for which extradition is requested. The time and place of their commission, their legal descriptions and a reference to the relevant legal provisions shall be set out as accurately as possible (2); and a copy of the relevant enactments or, where this is not possible, a statement of the relevant law and as accurate a description as possible of the person claimed, together with any other information which will help to establish his identity and nationality (3).

The requested State would ask for supplementary information from the requesting State in case the received documents are not sufficient to allow the requested State to make a decision according to the Convention. The following procedure such as arresting the person sought or hearing the case to decide extradition shall be carried out by the competent authorities of the requested State in accordance with its law. After the final decision is released, the surrender of the person would be executed on the basis of Article 18 of the Convention. The requested Party shall inform the requesting Party of its decision concerning the extradition. Consequently, the requesting Party shall be informed of the place and date of surrender and of the length of time for which the person claimed was detained, pending the surrender. If the person claimed has not been

[8] Council of Europe, Convention on Extradition, ETS No.024, is available at http://conventions.coe.int/Treaty /en/Treaties/Html/024.htm

removed on the appointed date, he may be released after the expiry of 15 days and shall in any case be freed from detention after the expiry of 30 days. The requested Party may refuse to extradite him for the same offense.

In the above procedure, the circumstances regarding the age or health condition of the person sought which may have prevented the surrender would not be mentioned.

Simplified extradition was also not provided in the European Convention on Extradition 1957 and provisions relating to this issue were supplemented in the third Additional Protocol 2010[9]. Simplified extradition would be applied with the consent of the persons sought and the agreement of the requested State.

In the scope of the European Union (EU), there are two international instruments permitting extradition without the need for a formal procedure in certain circumstances. Under Article 66(1) of the Schengen Convention (1990), the requested State may authorize extradition without formal proceedings if this is not obviously prohibited under its laws. Furthermore, it must be on the condition that the person concerned agrees to their extradition in a statement made before a member of the judiciary after being examined by the latter and informed of their right to formal extradition proceedings. By an Act of 10 March 1995, the Council adopted the Convention relating to the simplified extradition procedure between Member States of the European Union.[10] This Convention aims to facilitate the application between the Member States of the European Convention on Extradition of 13 December 1957, by supplementing its provisions. In the light of this Convention, the simplification of extradition procedure between Member States was established without affecting the application of the most provisions of bilateral or multilateral agreements. The Convention obliges Member States to surrender persons sought for the purpose of extradition on two conditions; namely that the person in question consents to be extradited and that the requested State gives its agreement (Article 2). In particular, it no longer requires the surrender of the person who is the subject of an application for an arrest to be subject to submission of a request for extradition and the other documents required by Article 12 of the European Convention on Extradition. According to the Article 4 of the Convention, the information from the requesting State is regarded as adequate if it includes: the identity

[9] Council of Europe, Additional Protocol, CETS No.209, 10 November 2010, see http://conventions. coe.int /Treaty/en/Treaties/Html/212.htm.

[10] Council Act of 10 March 1995, Official Journal C 78 of 30.3.1995(not yet in force). However, the Convention is applied between member States had ratified it.

of the person sought; the authority requesting the arrest; the existence of an arrest warrant or other document having the same legal effect or of an enforceable judgment; the nature and legal description of the offense; a description of the circumstances in which the offense was committed and the consequences of the offense in so far as this is possible. Notwithstanding this, the requested State retains the right to request further information if the information provided proves to be insufficient[11]. The person may consent to extradition following his or her provisional arrest. However, before an extradition request is made; or after such a request has been presented, regardless of whether this was preceded by a request for provisional arrest, if the requested Member State has made a declaration to that effect when ratifying the Convention then consent must be given before a judicial authority. This is to be done voluntarily with full awareness of the consequences, and with the provision that the person concerned has the right to legal counsel (Article 7 of the 1995 Convention).

On 27 September 1996, the Convention relating to extradition between the Member States of the European Union was adopted on the basis of Article K.3 of the Treaty on the European Union.[12] It supplemented the other international agreements such as the European Convention on Extradition 1957, the European Convention on the Suppression of Terrorism 1977 and the European Union Convention on Simplified Extradition Procedure 1995.[13] Relating to extradition procedure, the Convention supplements provisions of central authority and transmission of a document by facsimile in Article 13.

1.1.2. Pursuant to EAW Framework Decision

In 2002, the extradition procedure of the EU completely changed with the adoption of Council Framework Decision 2002/584/JHA of 13 June 2002 on the European Arrest Warrant and the surrender procedures between the Member States.[14] The EAW Framework Decision replaced the formal extradition system by surrender

[11] See more at http://europa.eu/legislation_summaries/justice_freedom_security/judicial_cooperation_in_criminal_matters/l14015a_en.htm.

[12] Convention of 27 September 1996 drawn up on the basis of Article K.3 of the Treaty on European Union, relating to extradition between the Member States of the European Union (not yet in force), OJ C 313, 23.10.1996

[13] See http://europa.eu/legislation_summaries/justice_freedom_security/judicial_cooperation_in_criminal_matters/l14015b_en.htm

[14] Framework Decision of 13 June 2002 on the European Arrest Warrant and the surrender procedures between member States OJ L 190, 18.7.2002, pp. 1–18.

process requiring each national judicial authority (the executing judicial authority) to recognize, *ipso facto*, and with a minimum of formalities, requests for the surrender of a person were thus be made by the judicial authority of another Member State (the issuing judicial authority). The EAW Framework Decision entered into force on 1 January 2004 and replaced the existing texts concerned in the EU's territory, especially the European Convention on Extradition 1957. The decision simplifies and speeds up the surrender procedures of the requested person, given that a judicial mechanism replaces the whole political and administrative phase.

Article 8 of the Decision defines content and form of the European Arrest Warrant. The European Arrest Warrant shall contain the following information: "(a) the identity and nationality of the requested person; (b) the name, address, telephone and fax numbers and e-mail address of the issuing judicial authority; (c) evidence of an enforceable judgment, an arrest warrant or any other enforceable judicial decision having the same effect, coming within the scope of Articles 1 and 2; (d) the nature and legal classification of the offense, particularly in respect of Article 2; (e) a description of the circumstances in which the offense was committed, including the time, place and degree of participation in the offense by the requested person; (f) the penalty imposed, if there is a final judgment, or the prescribed scale of penalties for the offense under the law of the issuing Member State; (g) if possible, other consequences of the offense."

Appearing in the name of the EAW Framework Decision, "surrender procedures" is provided in Chapter 2 (from Article 9 to Article 25). As a general rule, the issuing authority transmits the European Arrest Warrant directly to the executing judicial authority. Provision is made for cooperation with the Schengen Information System (SIS) and with INTERPOL. If the authority of the executing Member State is unknown, the issuing Member State will receive assistance from the European Judicial Network (Article 10).

All Member States may take necessary and proportionate coercive measures *vis-à-vis* requested persons. When an individual is arrested, he/she must be made aware of the contents of the arrest warrant and is entitled to the services of a lawyer and an interpreter. In all cases, the executing authority may decide to keep the individual in custody or to release him/her subject to certain conditions (Article 12).

Pending a decision, the executing authority (in accordance with national law) hears the person concerned. The executing judicial authority must take a final decision

on execution of the European Arrest Warrant no later than 60 days after the arrest. It then immediately notifies the issuing authority of the decision was taken (Article 17). Any period of detention arising from the execution of the European Arrest Warrant must be deducted from the total period of deprivation of liberty imposed.

The arrested person may consent to his or her surrender. Consent may not be revoked and must be given voluntarily and in full knowledge of the consequences. In this specific case, the executing judicial authority must take a final decision on execution of the warrant within a period of ten days after consent has been given (Article 13).

In standard procedure, when the person whose extradition is requested not consent to his surrender and to be heard by a competent court. Article 23 provides that the person requested shall be surrendered as soon as possible on a date agreed between the authorities concerned. He or she shall be surrendered no later than ten days after the final decision on the execution of the European Arrest Warrant. There may be an exception of the surrender being temporarily postponed for serious humanitarian reasons, for example, if there are substantial grounds for believing that it would manifestly endanger the requested person's life or health. The execution of the European Arrest Warrant shall take place as soon as these grounds have ceased to exist. The executing judicial authority shall immediately inform the issuing judicial authority and agree on a new surrender date. In that event, the surrender shall take place within ten days of the new date thus agreed. Upon expiry of the time limits referred to in paragraphs 2 to 4, if the person is still being held in custody he shall be released.

1.1.3. European Court of Human Rights (ECtHR)

The European Court of Human Rights[15] is an international court founded in 1959. It rules on individual or state applications alleging violations of the civil and political rights set out in the European Convention on Human Rights (ECHR). Since 1998 it has sat as a full-time court and individuals can apply to it directly. Most of the EU Member States are signatories of the ECHR so that a citizen of a European state which is a member of the ECHR has the right to apply for the protection of the ECtHR. The decision of the ECtHR is binding on every European Member State. Consequently, in these cases, it can be considered as the final stage of extradition proceedings within the EU.

[15] See http://www.coe.int/t/democracy/migration/bodies/echr_en.asp (accessed 19 April 2014).

Comparing to the corresponding provision of surrender procedure of the European Convention on Extradition 1957, the provision of the EAW Framework Decision is more concrete and comprehensive, especially supplementing provisions that surrender would be temporarily postponed for serious humanitarian reasons. In accordance with general assessments, it appears that the EAW Framework Decision is the "*success story"* of the EU's field of criminal justice. To many authors, significant shortening of the time limits for the surrender of the person should be mentioned as one of the most important added values of the new instrument. In comparison with the one-year average under the extradition regime, the average is now 48 days when the person does not consent to surrender and from 14 to 17 days in case of consent.[16] Many experts who have known both the traditional extradition system and the "surrender procedures" mechanism consider the EAW Framework Decision as a revolution.[17]

1.2. Extradition procedure under Vietnam law

The development of legislation concerning extradition proceedings in Vietnam can be divided into two phrases and the milestone of which is the Law on mutual legal assistance adopted in 2007.

Before the entry into force of the Law on mutual legal assistance, there was no formal procedure for extradition in Vietnam as provided by any legal document. The Vietnam Supreme People's Procuracy (PSP), an organization similar to the Public Prosecutor's Office or the Attorney General's Office in the EU and other countries in the world, has a role as a central authority for extradition. PSP is responsible for the sending and receiving of extradition requests alongside issuing the final decision, while Ministry of Public Security (MPS) acts as the executing authority.[18]

When receiving a request from a foreign country, PSP would send the request and supporting documents to MPS for examination and arrest of the person sought if necessary. INTERPOL National Central Bureau for Vietnam (Vietnam's Interpol Office), an office of MPS, was in charge for extradition within Vietnam. Provisional arrest is usually transferred via the INTERPOL channel and the Vietnam's Interpol

[16] See Commission, 2011 Evaluation Report, April 2011 (COM (2011) 175 final, p. 3.

[17] See Plachta, "EAW: Revolution in Extradition?" *European Journal of Crime, Criminal Law and Criminal Justice (11:2, 2003*), pp.178 -194.

[18] See N.Anh, Nguyen, V.Hong, Nguyen, V.Cong, Pham, *Extradition – Theoretical and Practical Issues,* (Hanoi, People's Police Publisher, 2006) (in Vietnamese), p.48-49.

Office cooperates with relevant police forces in executing the arrest warrant. While MPS agrees the extradition request, PSP would decide whether or not to extradite the person sought and thus MPS is responsible for the handing over of him/her to the competent authority of the requesting country. The extradited person would not be tried by any court in Vietnam before extradition is decided. In cases where Vietnam is the requesting State for extradition, MPS would send all necessary documents concerning persons claimed to PSP. PSP would send the request for extradition and supporting documents to the requested State where the person claimed is residing. If the requested State grants extradition, MPS will cooperate with the competent authority of this State to surrender the person sought to Vietnam.

In 2007, the Law on mutual legal assistance was passed by the Vietnam National Assembly in which extradition was enshrined in a separate chapter. This was the first time extradition procedure had been established in a formal legal document. Under the provision of Article 36 and 37 of this Law, a dossier of request for extradition shall include a letter of the competent authority requesting for extradition and the accompanying documents including: a statement of facts of the case; a statement of the laws describing the essential elements and the designation of the offense, the punishment for the offense, and the time limit for prosecution or enforcement of the sentence imposed; documents certifying the nationality and residence of the person whose extradition is requested (if any); and documents which describe the identity and the photo of the person whose extradition is requested according to international law and practice. Within 20 days of receipt of the request for extradition, alongside the accompanying documents sent by a foreign competent authority, the MPS[19] shall enter this fact in the extradition register and examine the validity and feasibility of the request. If the dossier is valid and adequate, the MPS shall transmit without delay the dossier to the competent people's court at the provincial level for consideration and decision (Article 38). The extradition case would be tried in two court's levels, the provincial people's court and Supreme People's Court (in the event of appeal). Within 5 working days of the date on which the decision takes legal effect, the Chief Judge of the People's Court at the provincial level, having the right to consider the request, must issue a decision on execution of the decision on extradition. The decision on implementation must be sent to the People's Procuracy at the same level, the MPS, the

[19] In accordance with Article 65 of Law on mutual legal assistance, Ministry of Public Security is the central authority for extradition.

requesting State, and the requested person. The MPS shall arrange the execution of the decision on extradition and inform, in writing, the requesting State thereof (Article 42). The Public Security Agency shall execute the decision on extradition and thus surrender the person sought at the place and time agreed in advance in writing. The time limit for receiving the person sought shall be 15 days of the decision on execution of the decision on extradition. If the requesting State has not received the person sought within the time limit agreed in advance in writing, the MPS shall request the People's Court at the provincial level, which has issued the decision on extradition, to cancel the decision on execution of the decision on extradition and inform the requesting State thereof (Article 43. Surrender of the person sought).

The adoption of the Law on mutual legal assistance 2007 can be considered a major turning point of Vietnamese extradition law. This was the first time extradition procedure had been set forth in a domestic legal document. However, the new framework had a number of loopholes and shortcomings in connection with extradition procedure. Comparing provisions of the Law on mutual legal assistance with treaties on extradition to which Vietnam is a signatory, there are some weaknesses that should be considered to aid attempts for their resolution. The procedure for outgoing extradition was not provided in this Law although it is an indispensable procedure in extradition practice of every State. Besides, procedures regarding extradition agreed by the person sought and simplified extradition are other issues which are excluded in this Law.

Apart from the basic issues mentioned above, compared to the EU extradition law, the Vietnamese Law on mutual legal assistance also lacks a number of provisions which may improve the effectiveness of the extradition system. Firstly, the diplomatic or INTERPOL channel for sending extradition requests is not stipulated in the Law. Secondly, the Law does not take into account is the request could be transmitted by mail or fax in order to help the cooperation in extradition matters between states faster and more efficiently. Thirdly, the surrender procedure at Article 43 of the Law does not mention whether to release the person extradited in case the requested party does not pick that person up in the time limit. In addition, the postponement of extradition when the person sought is in a serious condition of health is also not provided in the Law on mutual legal assistance 2007.

2. Postponement of extradition and temporary extradition

Postponement of extradition is applied when the person sought being proceeded against or is serving a sentence in the Requested State for an offense other than that for which extradition is requested. The Requested State shall postpone the extradition of the person sought until the conclusion of the criminal proceedings. There is a close and mutual relation between postponement of extradition and temporary extradition. When the postponement of extradition bars the prosecution due to the lapse of time or creates a serious difficulty for the prosecution process, the Requested State may, at the request of the Requesting State and pursuant to its laws, grant temporary extradition of the person whose extradition is sought. The person whose temporary extradition is granted must be returned as soon as the criminal proceedings are completed or the mutually agreed time permitted for the request for temporary extradition has ended.

2.1. Under the EU law

As far as extradition postponement and temporary surrender are concerned, Article 19 of European Convention on Extradition 1957 provides that the requested Party may, after making its decision on the request for extradition, postpone the surrender of the person claimed in order that he may be proceeded against by that Party or, if he has already been convicted, in order that he may serve his sentence in the territory of that Party for an offense other than that for which extradition is requested. The requested Party may, instead of postponing surrender, temporarily surrender the person claimed to the requesting Party in accordance with conditions to be determined by mutual agreement between the Parties.

Keeping the same title with the corresponding article of European Convention on Extradition (Postpone and conditional surrender), the Framework Decision on the European Arrest Warrant and the surrender procedures between Member States 2002 regulate matters concerned at Article 24 as follows:

> 1. The executing judicial authority may, after deciding to execute the European Arrest Warrant, postpone the surrender of the requested person so that he or she may be prosecuted in the executing Member State or, if he or she has already been sentenced, referred to in the European Arrest Warrant.
>
> 2. Instead of postponing the surrender, the executing judicial authority may temporarily surrender the requested person to the issuing Member State under conditions to be determined by mutual agreement between the executing and the issuing judicial

authorities. The agreement shall be made in writing and the conditions shall be binding on all the authorities in the issuing Member State.

The practice of transposing this article is varied amongst the Member States of EAW Framework Decision. In accordance with the *Report from the Commission on the implementation since 2005 of the Council Framework Decision of 13 June 2002 on the European Arrest Warrant and the surrender procedures between Member States*[20], by the year 2007, 18 out of 28 Member States have fully transposed Article 24.[21] The others have different proceedings regarding these issues. In Spain, the Spanish executing judicial authority is required to surrender the person at the request of the issuing judicial authority whilst in Malta, temporarily, the competent national authorities must postpone surrender where the requested person is to be prosecuted or sentenced in these countries. Denmark stated that the Ministry of Justice will have the final decision on a case by case basis and has no binding transposition for Art. 24. At the same time, Germany, Latvia and Slovakia have transposed correctly only Art. 24(1), and do not provide for temporary surrender pursuant to Art. 24(2). Moreover, Slovakia has informed the Commission that the provisions contained within Art. 24 of the Framework Decision may be implemented by a new amending legislation that should be adopted in June 2007. Against the provision of Art. 24, Netherlands and Poland specify the Ministry of Justice rather than the executing judicial authority is responsible for postponed or temporary surrender. In Estonia, it is the central authority which is the competent authority to decide on the merits of postponed or temporary surrender and not the judicial authorities, contrary to Article 24 of the Framework Decision.[22] It is clear that a number of EU countries have implemented provisions on extradition postponement and temporary extradition in different ways, even in contrast to Article 24 of the EAW Framework Decision.

2.2. Under Vietnamese law

Generally, postponement of extradition and temporary extradition are fundamental stages in extradition proceedings which are provided in almost all international law and domestic law on extradition. Vietnamese law and treaties on

[20] See Com. Doc. SEC(2007) 979, 32, available at http://ec.europa.eu/justice/criminal/files/annex_eaw_implementation_report_2007_en.pdf (accessed 01 July 2015).

[21] Belgium, Bulgaria, Czech Republic, Greece, Spain, France, Ireland, Italy, Cyprus, Lithuania, Luxembourg, Hungary, Austria, Portugal, Romania, Slovenia, Finland, Sweden).

[22] According to Com. Doc. SEC(2007) 979, 32-33.

extradition of which Vietnam is a Member State contain similar provisions as with the EU law on extradition. The Law on mutual legal assistance 2007 stipulates postponement of extradition and temporary extradition in Article 44.[23] In accordance with this Article, Vietnamese authorities shall postpone the surrender of that person until the completion of the proceedings or whole or part of the sentenced is served, when the person sought is being proceeded against or is currently serving a sentence in Vietnam for an offense other than that for which extradition is requested. In case of the postponement seriously prejudicing the legal proceedings in the requesting State due to the lapse of the statute of limitation, the competent authority may, at the request of the Public Security Agency or the People's Procuracy and the requesting State, issue a decision on temporary extradition of the person sought to the requesting State. The decision of which must also be based on the Vietnamese law and include a specific agreement with the requesting State. Treaties on extradition which Vietnam has signed with Korea, India, Algeria and Australia have the similar provisions. For instance, Article 5 (postponement of extradition and temporary extradition) of the Extradition Treaty with Korea regulates that when the person sought is being proceeded against or is serving a sentence in the requested Party for an offense other than that for which extradition is requested, the requested Party may postpone the extradition of the person sought until the conclusion of the proceedings or the service of the whole, or any part of the sentence, is imposed. The requested Party shall inform the requesting Party of any postponement. When the conditions of the postponement no longer exist, the requested

[23] Article 44. Postponement of surrender and temporary extradition
1. When the person sought is being proceeded against or is serving a sentence in Vietnam for an offense other than that for which extradition is requested, the People's Court at the provincial level which has issued the decision on extradition may, on its own motion or at the request of the People's Procuracy or the Public Security Agency at the same level, postpone the surrender of that person until the completion of the proceeding or the service of the whole or any part of the sentence imposed. The Ministry of Public Security shall inform in writing the requesting state of the postponement not later than 10 days prior to the expiration of the time limit for the postponement. The Chief Judge of the People's Court at the provincial level which has postponed the surrender must issue a decision on execution of the decision on extradition and send without delay the decision and relevant documents to the Public Security Agency executing the decision on extradition for informing the requesting State and surrendering the person sought under a specific agreement with the requesting State.
2. If the postponement stated in Paragraph 1 of this Article would seriously prejudice the legal proceeding in the requesting State due to the lapse of the statute of limitation, the competent People's Court may, at the request of the Public Security Agency or the People's Procuracy and the requesting State, based on the Vietnamese law and a specific agreement with the requesting State, issue a decision on temporary extradition of the person sought to the requesting State according to this Law.
3. The person temporarily extradited must be returned to Vietnam immediately upon the completion of the legal proceeding or lapse of the time limit for request for temporary extradition agreed by Vietnam and the requesting State. Upon a new request from the requesting state, a Vietnamese Court may consider, under this Law, agreeing on the new extradition if there exist good reasons to do so.

Party shall promptly inform the requesting Party and resume the process for extradition unless otherwise notified by the requesting Party. When the postponement of extradition bars the criminal proceedings due to the lapse of time or creates a serious difficulty for the prosecution, the requested Party may, at the request of the requesting Party and pursuant to its laws, grant temporary extradition of the person whose extradition is sought.

Concerning postponement of extradition and temporary extradition, although the provisions of Vietnamese law and EU law have different expressions or use divergent phrasing, the meaning and purpose of the articles are fundamentally similar. The noticeable common point is that the Vietnam and EU states empower judicial authorities to issue decisions on the postponement of extradition and temporary extradition.

3. Re-extradition

3.1. Under the EU law

Re-extradition may be understood as extradition executed to the extraditee one more time. According to the treaties or national law of certain countries, persons sought could be re-extradited to the requested State or a third State. EU law applies re-extradition for the latter. Re-extraditing to the third State, in principle, is a violation of the rule of specialty and is thus only executed in some exceptional cases.

Article 15 (Re-extradition to a third state) of the European Convention on Extradition 1957 stipulates that except as provided for in Article 14 (rule of specialty), paragraph 1(b)[24], the requesting Party shall not, without the consent of the requested Party, further surrender a person already surrendered to the requesting Party, who is simultaneously sought by another Party or to a third State, in respect to offenses committed prior to his surrender to the original Party. In doing so, the requested Party may request the production of the documents mentioned in Article 12, paragraph 2 (the request and supporting document).

The Framework Decision on EAW 2002 regulates re-extradition issues with a different title and more specific provisions. Article 28 (Surrender or subsequent

[24] When that person, having had an opportunity to leave the territory of the Party to which he has been surrendered, has not done so within 45 days of his final discharge, or has returned to that territory after leaving it.

extradition) stipulates three cases in which the person sought could be surrendered to a Member State other than the executing Member State pursuant to a European Arrest Warrant issued for any offense committed prior to his or her surrender. Namely, (1) the requested person, having had an opportunity to leave the territory of the Member State to which he or she has been surrendered, has not done so within 45 days of his final discharge, or has returned to that territory after leaving it; (2) the requested person consents to being surrendered to a Member State other than the executing Member State pursuant to a European Arrest Warrant; (3) the requested person is not subject to the specialty rule, in accordance with Article 27(3)(a), (e), (f) and (g). [25]

Paragraph 4 of Article 28 directly mentions re-extradition in the provision that a person who has been surrendered under a European Arrest Warrant shall not be extradited to a third State without the consent of the competent authority of the Member State which surrendered the person. Such consent shall be given in accordance with the Conventions by which that Member State is bound, as well as with its domestic law.

3.2. In Vietnamese law

The Vietnamese law on extradition provides re-extradition to be applied in cases which differ from the EU provisions on the same issue. Accordingly, re-extradition is not carried out with a view to extraditing to the third State. Request for this process is only executed by the Vietnamese competent authority when the surrendered person has avoided the prosecution or service of the sentence in the requesting State and returned to Vietnam. In this case, the requesting State may present a request for re-extradition of that person. Under Article 45 (Re-extradition) of the Law on mutual legal assistance, the Chief Judge of the People's Court at the provincial level, which has issued the decision on extradition, shall issue a decision on re-extradition of the person sought. *Extradition to the third State* is separately mentioned in Article 34 (non-prosecution and non-extradition to the third country)[26] of the Law.

[25] Article 27 of the Framework Decision on EAW named "Possible prosecution for other offenses".

[26] Article 34. Non-prosecution and non-extradition to a third country

The person who has been surrendered to Vietnam shall neither be prosecuted nor extradited to a third country for a conduct committed by that person before he or she has been surrendered to Vietnam if that conduct does not constitute a criminal offense under the law of Vietnam and is not mentioned in the request of Vietnam or of the third country.

If Vietnam is the requested State, extradition shall be granted only if the requesting State assures that it shall not prosecute the person sought or extradite that person to any third country for a conduct committed by that person before he or she has been surrendered to the requesting State, except with a written consent by Vietnam.

Similarly, treaties on extradition between Vietnam and other countries enshrine these issues in the separate article named “rule of specialty” and “re-extradition”. For example, Article 15 (rule of specialty) of the Treaty on extradition between Vietnam and Korea provides that a person surrendered under this Treaty may not be extradited to a third State for an offense committed prior to his extradition unless the Requested Party consents. However, paragraph 3 of Article 15 also provides two exceptional cases, namely, if: (a) that person leaves the territory of the requesting Party after extradition and voluntarily returns to it; or (b) that person does not leave the territory of the Requesting Party within forty-five (45) days of the day on which that person is free to leave. Re-extradition is addressed in Article 13 as follows:

> Where the person extradited has absconded the criminal proceeding against him and returned to the territory of the requested Party, the requesting Party may submit a request for re-extradition of that person, which shall be accompanied by the documents referred to in Article 7.
>
> (Article 7 mentioned in the above paragraph details Extradition Procedures and Required Documents)

With reference to EU law on extradition and the European Arrest Warrant relating to re-extradition or surrender to the third State alongside treaties on extradition of which Vietnam is a member, the Law on mutual legal assistance 2007 should supplement provisions for exceptional cases as in Article 34 (non-prosecution and non-extradition to the third country).

Conclusion

The Law on mutual legal assistance issued in 2007 is a turning point in the development of extradition law in Vietnam. This is the first time extradition procedure and other issues concerned have been provided in a Vietnamese legal document. However, through the analysis of provisions concerning the issues in this chapter and the comparative study of the EU extradition law, the Vietnamese law still lacks several important matters such as procedure for outgoing extradition request; procedure where the person sought agrees with the extradition and, procedure for simplified extradition. These loopholes should be resolved as soon as possible as they form the standard and principal basis for cooperation in extradition between Vietnam and foreign countries. Besides, regarding some issues regarding extradition procedure, details of re-extradition should be reconsidered to be provided in the Law, such as channels of sending request

for extradition (diplomatic as well as INTERPOL channel), types of transmission (fax, mail), and exceptional cases of extradition to the third State. In addition, Article 43 of the Law should determine whether to release the person extradited in cases where the requested party does not collect that person within the proposed time limit. Finally, the postponement of extradition needs to be supplemented in cases where the person sought is suffering a serious condition of health to ensure human rights are implemented in extradition procedure.

Chapter 9
SURRENDER OF PROPERTY, CONCURRENT REQUESTS, TRANSIT, LANGUAGE AND EXPENSES IN EXTRADITION

Introduction

Extradition has its own specific procedure and various unique related matters which a country has to take into account when issuing or executing extradition request. Normally, issues such as extraditable offenses, grounds for extradition refusal and principles of extradition play key roles in extradition proceedings. It is under these grounds, where a country will decide whether to grant or refuse extradition of a person. Apart from the aforementioned issues, there are several related factors which also may significantly impact the extradition request. Particularly in certain cases, conflicts arise from these matters that may prolong or delay extradition process or even negatively affect the relationship between the requesting State and the requested State. This chapter will discuss issues including "surrender of property", "concurrent request", "transit", "language" and "expense" specified in the Vietnamese extradition law in comparison to corresponding matters in the European Union (EU) surrender framework. Experiences, achievements and difficulties found by the EU can make contributions as useful references for Vietnam to conduct appropriate adjustments on extradition law. Specifically, the first section of this chapter will examine the surrender of property in extradition in the EU and Vietnam. Property may relate directly to not only the extraditee but may also have further influence on the benefits of individuals, organizations or States. Hence, in some circumstances, it is a complex matter handing it over to another State, especially in the case the claimed property regards a third Party. Besides, there is no a global standard for binding a country on how to surrender properties located in its territory to another country. In this sense, the jurisdiction solely belongs to the discretion of the country which is considered in charge of the requested properties. The second section focuses on multi-requests to the same fugitive. Two or more nations may make a claim to another nation for the extradition of a person for the same or different offenses. In accordance with relevant national law, where there are possibilities that the person could be extradited to more than one of the requesting States, the requested State must decide which application takes priority. The next section aims at analyzing and comparing principles of transit in extradition in the EU as

well as Vietnam. Language and expense in connection with extradition are respectively addressed in the last two sections. The conclusion will proffer several recommendations for the aforementioned issues.

1. Surrender of property

In accordance with provisions of conventions and laws relating to extradition, property is typically understood as any tangible or intangible possession that is owned by the requested person (for instance, money, houses, cars, shares) acquired as a result of criminal or articles considered as the evidence of offenses. The Council Framework Decision on the execution in the European Union of orders freezing property or evidence[1] defines "property" at Article 2(d) as:

> property of any description, whether corporeal or incorporeal, movable or immovable, and legal documents and instruments evidencing title to or interest in such property, which the competent judicial authority in the issuing State considers:
>
> - is the proceeds of an offense referred to in Article 3, or equivalent to either the full value or part of the value of such proceeds, or
>
> - constitutes the instrumentalities or the objects of such an offense;

Generally, the requested State shall surrender the person sought and property regarding his offense to the requesting State. The case will be more complicated when the illegal property is a large amount of money, a real estate, immovable property or is a part or an alternating part of the huge legal property in the territory of the requested State. Similarly, it is also a difficult situation when the property concerning the rights of rightful owners or the third State. For this reason, and adding the lack of concrete provisions, although signing bilateral or multilateral treaties on extradition including articles on surrender of property, it is difficult for the requested State and requesting State to reach an agreement on how to deal with related problems.

The European Convention on Extradition 1957[2] (ECE) provides at Article 20 (Handing over of property) that the requested Party shall, in so far as its law permits and at the request of the requesting Party, seize and hand over property which may be required as evidence, or has been acquired as a result of the offense and which, at the time of the arrest, is found in the possession of the person claimed or is discovered

[1] Council Framework Decision 2003/577/JHA of 22 July 2003 on the execution in the European Union of orders freezing property or evidence, OJ L 196, 2.8.2003, p. 45–55.
[2] European Convention on Extradition, ETS 24; 1 ECA 173; 359 UNTS 273.

subsequently. The property shall be surrendered even if extradition, having already been agreed to, cannot be carried out on account of the death or escape of the person claimed. To protect interests of the requested State or the third Parties, paragraph 4 of Article 20 stipulates that any rights which the requested Party or third Parties may have acquired in the said property shall be preserved. Where these rights exist, the property shall be returned without charge to the requested Party as soon as possible after the trial.

The Framework Decision of 13 June 2002 on the European Arrest Warrant and the surrender procedures between member States[3] (EAW Framework Decision) keeps the same provision with Article 20 (Handing over of property) of the ECE except the terms "requested Party" and "requesting Party" in ECE was replaced by "executing member State" and "issuing member State". According to the Explanatory Report of the Commission, the provision on the "handing over of property" provided in Article 29 of the EAW Framework Decision had been taken over directly from the ECE with the aim of preserving the existing legal order in this matter. Moreover, the new rule must be interpreted in the light of the specific provisions of the EU Convention on Mutual Assistance in Criminal Matters, particularly its Article 8. In terms of the surrender of property, there are critical views on the content of Article 29 of the EAW Framework Decision. For example, according to Sabine Gless and Daniel Schaffner,[4] this article only states that property which may be required as evidence or has been acquired by the requested person as a result of the offense has to be handed over. However, in practice different questions may arise:

(1) Does the requesting State bear any responsibility to show that it actually needs the property for evidential reason?

(2) What qualifies as an acquisition of property by the requested person? E.g: is money in a bank account acquired as a result of an offense?

(3) Even if "property" is typically defined in a fairly broad way as "something owned; any tangible or intangible possession that is own by someone", it appears unclear what exactly should be handed over with a person. On the other hand, who defines what should be handed over? Are legal criteria relevant or even common sense

[3] Framework Decision of 13 June 2002 on the European Arrest Warrant and the surrender procedures between member States OJ L 190, 18.7.2002, pp. 1–18.

[4] See Sabine Gless and Daniel Schaffner, *The handing over of property according to Article 29 of the European Arrest Warrant Framework Decision: Legal scope, implementation and alternative regimes for handing over property in the EU member States*, in Nico Keijzer and Elies Van Sliedregt, *The European Arrest Warrant in Practice*, T.M.C Asser Press, the Hague, 2009, p. 301.

> with regard to the interests of the particular State? For instance, what if a person carries a savings bank book for a joint account or drives a car which would be his or her own except for an outstanding installment?

Sabine Gless and Daniel Schaffner evaluate that the provision of Article 29 is "fairly vague, broad in its wording and not descriptive".[5] They suggest some recommendations to resolve problems caused by fairly vague provisions. Firstly, implementation laws must be ameliorated in order to establish a functioning, cogent system for the extradition of property; through the seizing and confiscation of objects which may constitute as evidence towards the case. Secondly, a clarification and co-ordination of existing European instruments and reforms in sight of better protection of individuals' rights and thirdly, a comparison and application of global development instruments for surrender of property which may impact on the implementation of Article 29 of the EAW Framework Decision.[6]

In Vietnamese law, "surrender of property" is specified in both the Law on mutual legal assistance 2007 and extradition treaties of which Vietnam is a contracting Party. In terms of domestic law, Article 46 (Surrender of articles and exhibits) of the above mentioned Law provides a general provision as follows:

> To the extent and under conditions provided for by international treaties to which both Vietnam and the requesting State are parties and subject to rights of third parties, which shall duly respect, all articles and exhibits that are proceeds of crime or which may be required as evidence found in the territory of Vietnam may be surrendered, if the requesting state so requests.

In comparison with internal law, provisions concerning the surrender of property in extradition treaties between Vietnam and foreign countries are more concrete and comprehensive. Article 14 (Seizure and Surrender of Property) of Extradition Treaty between Vietnam and India is an illustration as follows:

> (1) The Requested State may seize and surrender to the Requesting State, all articles, documents, and evidence connected with the offense in respect of which extradition is granted;

[5] Ibid., at 312.
[6] See more at *Supra note 3,* p. 314.

(2) The Requested State, if so requested, may surrender the articles to the Requesting State even if the extradition cannot be carried out owing to the death, disappearance or escape of the person sought;

(3) Where the law of the Requested State to the protection of rights of third parties so requires, any property so surrendered shall be returned to Requested State as soon as practicable and free of charge.

A similar provision also appears in extradition treaties between Vietnam and the Republic of Korea as well as Australia.

Basically, there is no significant difference between rules on surrendering property in the extradition treaties signed by Vietnam and the provision of the ECE or the EAW Framework Decision. Nevertheless, at a national level, to facilitate the execution of extradition requests in Vietnam, the Law on mutual legal assistance needs to be supplemented by more detailed regulations on surrender of property in order to conform to extradition treaties of which Vietnam is a signatory. As far as the domestic law is concerned, the current provisions related to the surrender of properties are not clear nor specific enough for the application in practice. Furthermore, there is no specific information about who shall make the decision to surrender articles or exhibits to the requesting Party and how to those decisions should be executed. Vietnamese law should establish a formal procedure for the handing over of property to the requesting State in extradition cases. If not, with provisions in the present law, Vietnamese competent authorities will meet difficulties in order to fulfill the commitments with other countries prescribed in treaties on extradition of which Vietnam is a contracting party.

2. Concurrent requests

In practice, a person may commit crimes in one or more countries and then proceed to flee to another country of which he/she is not a national. In some instances, several nations could claim their jurisdiction over the fugitive at the same time. As a consequence, once this person is arrested, the country where they are found may face the existence of multiple requests for extradition. That is why detail regarding "concurrent requests" is provided in all extradition treaties. Concurrent requests in extradition means there are two or more countries sending request of extradition to a country for the same person. The requested State will use their discretion to extradite the fugitive to one of the requesting States owning to treaty obligations, domestic law

and other relevant factors. The refusal decision in this case is a typical example which could undermine the relationship between the requested country and the countries failed to receive the grant for extradition from the former. The following paragraphs will discuss how concurrent requests specified in the EU and Vietnamese extradition law.

Referring to the direct meaning and impact of this issue, ECE names Article 17 *Conflicting requests* with the content as follows:

> If extradition is requested concurrently by more than one state, either for the same offense or for different offenses, the requested Party shall make its decision having regard to all the circumstances and especially the relative seriousness and place of commission of the offenses, the respective dates of the requests, the nationality of the person claimed and the possibility of subsequent extradition to another state.

According to this Article, where more than one State may have extradition requests for the same offense or for different offenses, the requested Party shall consider all relevant bases to make its final decision, especially the relative seriousness and place of commission of the offenses, the respective dates of the requests, the nationality of the person claimed and the possibility of subsequent extradition to another State.

On the EU level, Article 16 (Decision in the event of multiple requests) of the EAW Framework Decision, on the one hand, stipulates the similar provision with ECE, supplementing paragraphs with the aim of formulating Advice Authority for conflicts – Eurojust (paragraph 2); conflict between a European Arrest Warrant and a request for extradition presented by a third country (paragraph 3) and Member States' obligations under the Statute of the International Criminal Court (paragraph 4).

The Vietnamese Law on mutual legal assistance provides this issue at Article 39 (concurrent requests) which is divided into two paragraphs. The first paragraph regulates the procedure of considering concurrent requests. Where the Ministry of Public Security (the central authority for extradition) receives requests from two or more States for extradition of the same person for either the same or different offenses, it shall, in coordination with the Ministry of Foreign Affairs, the Ministry of Justice, the Supreme People's Procuracy, and the Supreme People's Court, consider and decide to which State the person would be extradited. The second paragraph mentions relevant circumstances that shall be taken into account including, but not limit to, the current nationality and the last place of residence of the person sought, the legitimacy and

suitability of the requests, the time and place of commission of each offense, and respective interests of the requesting states.

In extradition treaties of which Vietnam is a Party, the provision with respect to concurrent requests has a similar content with that of the Article 17 (conflicting of requests) of the ECE. At the same time, these provisions in extradition treaties also list all relevant factors of which the Requested State shall consider before deciding to extradite the person sought to one of the requesting States.[7]

3. Transit

Transit provision shall be applied when the third State surrenders the extradited person to the requesting State through the territory of the requested State. Due to the popularity of transit requests in practice, articles concerning this issue are widely provided in international and national law on extradition.

Article 21 (transit) of ECE stipulates that transit through the territory of one of the Contracting Parties shall be granted on submission of a request by the means mentioned in Article 12, paragraph 1 (request in writing and communicating through diplomatic channel), provided that the offense concerned is not considered by the Party requested to grant transit as an offense of a political or purely military character having regards to Articles 3 and 4 of this Convention (grounds for extradition refusal). Besides, if the person transited is the national of the requested country, the transit may be refused. When air transport is used for transit, the requesting State has to prepare and submit supporting documents used for the extradition request. When it is not intended to land, the requesting Party shall notify the Party over whose territory the flight is to be made and shall certify that one of the documents mentioned above exists. In the case of

[7] For example, Article 11 (concurrent requests) of extradition treaty between Vietnam and India provides as following:
1. Where requests are received from two or more States for the extradition of the same person either for the same offense or for different offenses, the Requested Party shall determine to which of those States the person is to be extradited and shall notify those States of its decision.
2. In determining to which State a person is to be extradited, the Requested Party shall consider all relevant factors, including but not limited to:-
(a) the nationality and the ordinary place of residence of the person sought;
(b) whether the requests were made pursuant to treaty;
(c) the time and place where each offense was committed;
(d) the respective interests of the Requesting States;
(e) the gravity of the offenses;
(f) the nationality of the victim;
(g) the possibility of further extradition between the Requesting States; and
(h) the respective dates of the requests.

an unscheduled landing, such notification shall have the effect of a request for provisional arrest as provided for in Article 16 of ECE, and the requesting Party shall submit a formal request for transit. When it is intended to land, the requesting Party shall submit a formal request for transit.

The transit of the extradited person shall not be carried out through any territory where there is a reason to believe that his life or his freedom may be threatened because of his race, religion, nationality or political opinion. In this case, the rule of non-discrimination is applied.

In the EAW Framework Decision, transit procedure is simplified and facilitated to the mutual trust among EU Member States. Pursuant to Article 25 of this Scheme, the ground for refusal of transit, except the case of transit of national or resident of a Member States for the purpose of the execution of a custodial sentence or detention order, was no longer mentioned. However, the surrender of national or resident of the executing Member State may be permitted in particular cases under Article 5 (2) of the EAW Framework Decision. Therefore, paragraph 1 of Article 25 provides that where a person who is the subject of a European Arrest Warrant for the purposes of prosecution is a national or resident of the Member State of transit, transit may be subject to the condition that the person, after being heard, is returned to the transit Member State to serve the custodial sentence or detention order passed against him in the issuing Member State.

Article 25 (1) also provides concretely necessary information for the request of transit including (a) the identity and nationality of the person subject to the European Arrest Warrant; (b) the existence of a European Arrest Warrant; (c) the nature and legal classification of the offense; (d) the description of the circumstances of the offense, including the date and place. A new modification is the provision of an authority responsible for receiving transit requests and the necessary documents.

However, the arrest or detention of the person sought in case of unscheduled landing was not mentioned in this Article.

Concerning “transit” in extradition proceedings, the Vietnamese Law on mutual legal assistance provides at Article 47 (Transit) that subject to international treaties to which Vietnam is a party and the Vietnamese law, transportation of a person surrendered by a third State to the requesting state through the territory of Vietnam shall

be permitted only after a written request for transit permission sent by the foreign country has been accepted. Permission for transit shall not be required when air transport is used and no landing is scheduled in the territory of Vietnam. If an unscheduled landing occurs in the territory of Vietnam, the state transporting the surrendered person shall send a request to the competent authority of Vietnam for transit permission according to paragraph 1 of this Article.

Generally, the provision regarding transit in extradition treaties between Vietnam and foreign countries is nearly the same as the corresponding provision in the domestic law. However, some treaties have the stipulation of detaining the person sought in the process of transit. For example, paragraph 2, Article 17 (transit) of Extradition Treaty between Vietnam and India provides that if an unscheduled landing occurs in the territory of that Party, it may require the other Party to furnish a request for transit as provided in paragraph 1 of this Article. That Contracting State shall detain the person to be transported until the request for transit is received and the transit is effected, so long as the request is received within four days (96 hours) of the unscheduled landing.

On grounds of the analysis and comparison between the EU law and Vietnamese provisions on transit in extradition, there are some issues Vietnam should be take into consideration to adjust the domestic law. Accordingly, the Law on mutual legal assistance 2007 should supplement more specific provisions on necessary information or required documents; designation of an authority responsible for transit; the arrest and detention of person transported in case of unscheduled landing in transit procedure. The provision concerning the transit of a national or resident of the requested State can only be feasible in the condition of the mutual trust between Member States of the EU. This issue may be considered to enshrine in the extradition treaty of the ASEAN of which Vietnam is a Member State.

4. Language

Traditionally, language used in extradition requests shall be translated into the official language of the requested State or the language chosen by this State. The similar provision is stipulated in the EU law and Vietnamese law on extradition.

There are some widely-recognized rules concerning language and language translation in extradition proceedings. When the request is transmitted to the requested

State, the requesting State should always ensure that the formal request in the language of the requesting State is always accompanied by a translation. States should attempt to keep the requests for extradition short, clear and brief to avoid difficulties in the translation of the request into the language of the requested State. In any translation, States should translate the whole request. Partial translations could result in conflicting interpretations or misunderstandings. Where different official languages are spoken in different regions of the requested State, the requesting State should consult the requested State on the issue and translate the request into the most appropriate for the requested State's purposes. Where multilateral or regional treaties or arrangements indicate the languages in which the request needs to be translated, States should use the official language of the requested State - or if more than one, the most appropriate one. The requesting States are encouraged to translate in advance into a collection of foreign languages those parts of national legislation that are most often used, referred to or reproduced in requests.

Article 23 (language to be used) of ECE provides that the documents to be produced shall be in the language of the requesting or requested Party. The requested Party may require a translation into one of the official languages of the Council of Europe to be chosen by it. This article provides that the documents to be produced in support of a request for extradition shall be in the language of the requesting Party or that of the requested Party. The requested Party may, however, demand a translation in one of the official languages of the Council of Europe. It was understood that the actual request for extradition should be drafted in one of the languages generally used in the diplomatic correspondence between the two Parties.

Paragraph 2 of Article 8 (Content and form of the European Arrest Warrant) of EAW Framework Decision regulates that the European Arrest Warrant must be translated into the official language or one of the official languages of the executing Member State. Any Member State may, when this Framework Decision is adopted or at a later date, state in a declaration deposited with the General Secretariat of the Council that it will accept a translation in one or more other official languages of the Institutions of the European Communities.

The Vietnamese Law on mutual legal assistance provides at Article 5 (Languages) that where an international treaty on mutual legal assistance exists between Vietnam and a foreign State, the language used for mutual legal assistance shall be the

language stipulated in the international agreement. Where no international treaty on mutual legal assistance exists between Vietnam and a foreign State, the request for mutual legal assistance and supporting documents shall be accompanied by a translation of the request and the supporting documents into the language of accepted to the requested state.

Similarly, Article 7 of the Extradition Treaty between Vietnam and Korea provides that all the documents to be presented by the requesting Party pursuant to the provisions of this Treaty shall be certified and accompanied by a translation in the language of the Requested Party or the English language.

5. Expenses

The extradition procedure requests different costs which are paid for the apprehension, detention, trial and transfer of the person claimed as well as other fees incurred in the execution of the extradition application. For instance, the surrender of property, translation of related documents, transportation and witnesses also need expenses from the requested State or requesting State. When an extradition request is granted, the question arises whether the requesting or the requested State should bear the expenses concerned. Furthermore, each country would establish its own standard in accordance with domestic law and treaties of which that state is a contracting party. There is a remarkable difference between provisions of the EU and Vietnam on extradition costs.

Article 24 (Expenses) of ECE stipulates that expenses incurred in the territory of the requested Party by reason of extradition shall be borne by that Party. Expenses incurred by reason of transit through the territory of a Party requested to grant transit shall be borne by the requesting Party. According to Article 24:

> 1. Expenses incurred in the territory of the requested Party by reason of extradition shall be borne by that Party.
>
> 2. Expenses incurred by reason of transit through the territory of a Party requested to grant transit shall be borne by the requesting Party.
>
> 3. In the event of extradition from a non-metropolitan territory of the requested Party, the expenses occasioned by travel between that territory and the metropolitan territory of the requesting Party shall be borne by the latter. The same rule shall apply to

> expenses occasioned by travel between the non-metropolitan territory of the requested Party and its metropolitan territory.

Paragraph 1 provides that reimbursement of the expenses incurred by the requested Party on its own territory cannot be claimed from the requesting Party. Under paragraphs 2 and 3 the transit and transport expenses of a person claimed from non-metropolitan territory between that territory and the metropolitan territory of the requested Party or of the requesting Party shall be borne by the latter.

In term of expenses, Article 30 of EAW Framework Decision provides that expenses incurred in the territory of the executing Member State for the execution of a European Arrest Warrant shall be borne by that Member State. All other expenses shall be borne by the issuing Member State.

There is no consistent rule between national law and international law in the application of extradition costs in Vietnam. Law on mutual legal assistance 2007 provides extradition costs at Article 48 as follows:

> The requesting State shall bear all costs relating to extradition, except otherwise agreed. If Vietnam is to bear such costs, they shall be paid by the state budget.

On the contrary, at the international level, extradition treaties between Vietnam and other countries have different provisions on expenses issues. Accordingly, contracting parties will share the costs concerning extradition. For instance, Article 18 (Costs) of Extradition Treaty between Vietnam and India stipulate that the requested Party shall meet the cost of any proceedings in its jurisdiction arising out of a request for extradition. The requested Party shall bear the cost incurred in its territory in connection with the arrest and detention of the person whose extradition is sought, or the seizure and surrender of property. The requesting Party shall bear the cost incurred in conveying the person whose extradition is granted from the territory of the Requested Party and the cost of transit.

By comparing provisions on extradition expenses in Vietnamese law and the EU law concerning this issue, it is clear that Vietnamese provisions do not comply with its extradition treaties as well as the tradition of international law. The first sentence of Article 48 of Law on mutual legal assistance 2007 that "*The requesting State shall bear all costs relating to extradition, except otherwise agreed*" should be amended as follows:

"Expenses incurred in the territory of the requested State for the execution of an extradition request shall be borne by that State. All other expenses shall be borne by the requesting State."

Conclusion

This chapter has examined issues including the surrender of property, transit, concurrent request, language and expenses for extradition prescribed in Vietnamese law in comparison with the similar matters in the EU law. Under the outcome of comparative work and on the basis of evaluating provisions concerned, the study has found a gap between related provisions of Vietnamese and traditional international standards as well as extradition treaties. Several amendments and supplementations need to be done with the aim to improve effectiveness of the Vietnamese extradition system. Firstly, the Law on mutual legal assistance should complement specific procedures for the surrender of property in extradition. The provision needs to specify the competent authority, surrender order and which properties may be surrendered to the foreign party. Besides, time limits and place of surrendered property needs to be imposed in the Law. Secondly, the Law should supplement more specific provisions on transit procedure, for instance, necessary information or required documents; authorities responsible for transit and the arrest and detention of persons transported in case of unscheduled landing in transit procedure. The present provisions should be added to matters such as competent authorities and procedures to receive and maintain extradited person in detention during the transit. Thirdly, amending provision on expenses in extradition in order to comply with bilateral treaties on extradition of which Vietnam is a contracting party.

CONCLUSION

Extradition plays a vital role in fighting transnational crime, terrorism and international crimes in general. This measure has created one of the most efficient mechanisms for bringing fugitives to justice. Therefore, there have been numerous types of the legal framework for this category of rendition signed, issued or adopted in international as well as national level, namely multilateral treaties, regional treaties, bilateral treaties and domestic law. The thesis has examined issues regarding extradition law in Vietnam and explored impediments that have a negative impact on international cooperation in arresting and surrendering fugitives. Through comparative research with the European Union extradition law, all shortcomings and obstacles of the Vietnamese extradition system have been discussed and evaluated in the nine chapters with a view to answering the research questions formulated in the introduction of this thesis as follows:

1. What are the appraisal outcomes of Vietnamese extradition law in comparison to European Union extradition law?

2. What are the contemporary problems of Vietnamese extradition law?

3. What are recommendations to improve the effectiveness of extradition system in Vietnam?

The differences and similarities in nine respectively major issues between Vietnamese law and EU law on extradition have been examined and thoroughly evaluated. Despite bearing some minor similarities, the differences between Vietnamese law and EU law on extradition are remarkable. In accordance with the outcome of evaluations, admittedly, Vietnamese law should be amended and supplemented to meet requirements of practice as well as treaties on extradition of which Vietnam is a contracting party. The adoption of the EAW Framework Decision between the EU Member States, a “new fast-track extradition mechanism”, is considered as a “successful story” when traditional “extradition procedure” was replaced by “surrender procedure”. Nevertheless, there are a couple of controversial changes that have raised concerns or negatively influenced human rights, for instance, the abolition of political

offence, double criminality principle (to 32 offences), non-extradition of nationals and restrictions to non-discrimination rules. From the EU's experience in implementing the EAW Framework Decision, it is hard to balance between enhancing extradition procedure and ensuring human rights. Regardless of some controversial issues, the practice of implementation proved that the EAW Framework Decision is an efficient mechanism for bringing fugitives to justice and combating international crime. The principle of mutual recognition, the cornerstone of the EAW Framework Decision, plays a crucial role in enhancing cooperation between judicial authorities of the EU Member States. Under evaluations noted above, the comparative study has affirmed that the EU extradition law system has strong points and positive experiences from which Vietnam could study and subsequently adopt suitable provisions into extradition law and relevant statutes. As far as the research findings are concerned, the thesis has clarified obstacles and loopholes of present Vietnamese extradition law. The general appraisal found problems in national law and also international law in Vietnam. The Law on mutual legal assistance 2007 still lacks some important matters such as provisions on procedure for extradition to Vietnam; extradition agreement of the person sought and simplified extradition. Besides, other issues should be reconsidered to provide in the Law such as re-extradition, channels of sending a request for extradition (fax, email) and exceptional cases of extradition to the third state. These loopholes should be amended and supplemented as soon as possible. Other issues have not specified in the Law on mutual legal assistance are the relationship between extradition and asylum, political offence exception, provisional arrest and wrongful arrest in extradition. Some problems mentioned above have resulted in contradictions between national law and bilateral treaties on extradition to which Vietnam is a contracting state. Due to this dilemma, it is difficult for Vietnamese authorities to cooperate in extradition with the foreign counterpart. Besides, the reservations and declarations to conventions containing extradition provisions have prevented Vietnam from collaborating on extradition with other states in the international mechanism.

Based on the findings found in this thesis, in response to the third research question, some constructive recommendations to improve the contemporary problems of the Vietnamese extradition system will be addressed in the following sections:

1. Enhancing the conclusion and implementation of treaties or agreements in relation to extradition

First, as assessed in Chapter 1, some bilateral extradition treaties between Vietnam and other states are obsolete, especially the treaties signed with the former communist countries of the socialist bloc, mostly in Eastern Europe. These treaties should be revised or replaced by negotiating and concluding new treaties or agreements.

Second, enhancing bilateral and multilateral treaties concerning extradition of which Vietnam is a contracting party. Vietnam needs to access, ratify and conclude more multilateral or bilateral extradition treaties with a view to improving the legal framework for cooperation in the surrender of fugitives between Vietnam and foreign countries, establishing a more efficient mechanism for combating international criminals in Vietnam.

Third, reviewing all reservations and declarations in connection with extradition in multilateral treaties to which Vietnam is a signatory state. Vietnamese competent authorities should consider withdrawing all inappropriate reservations and declarations in order to set forth a full-scale multilateral legal basis for extradition and, consequently, facilitate the fight against cross-border crime in practice.

Fourth, establishing regional or sub-regional agreements on extradition based on the mutual trust among contracting states. Multilateral instruments such as the EAW Framework Decision and the Benelux Extradition Treaty provide effective systems which other areas may look at, particularly the Southeast Asia region where Vietnam is located. In a speech titled: "Forty Years of ASEAN Can the European Union be a Model for Asia?" at the Konrad Adenauer Foundation in Berlin in 2007, the Secretary General of ASEAN stated:

> It is by no accident that ASEAN has been looking at the European Union's rich experience as we map out our own plans for becoming a Community by 2015… The very nature of ASEAN as an intergovernmental organization differs from that of the EU. However, we are looking for good ideas and best practices, and the European Union certainly has plenty of these. There are three specific challenges that we in ASEAN are seized with as we lay the foundations of our ASEAN Community, and for which we are looking towards European experience for some ideas.[1]

[1] See http://www.asean.org/resources/2012-02-10-08-47-56/speeches-statements-of-the-former-secretaries-general-of-asean/item/forty-years-of-asean-can-the-european-union-be-a-model-for-asia (accessed 16 August 2014).

It is the fact that Vietnam and nine states in the Association of Southeast Asian Nations (ASEAN) are in the process of negotiating a Model Treaty on Extradition for the region. Bearing the above view in mind, a Treaty on Extradition among ASEAN countries appears to be more suitable and adequate for extradition cooperation in the region in which mutual trust should be the cornerstone of the extradition mechanism.

2. Improving Vietnam law on extradition

In the case of Vietnam, extradition institution has been officially established since the adoption of Law on mutual legal assistance in 2007. However, the process of building and executing extradition laws face many difficulties. The most prominent finding is that the provisions of Law on mutual legal assistance 2007 concerning extradition is lacking some primary issues and remains inconsistent with treaties of which Vietnam is a signatory. These shortcomings make extradition law ineffective and therefore the provisions concerned need to be improved as soon as possible.

Vietnamese competent authorities should firstly amend and supplement provisions to comply with extradition treaties to which Vietnam is a contracting party. Particularly, changes should concentrate on refusal grounds of extradition, namely the death penalty, political offence exception, military offence and at the same time maintain provisions regarding non-discrimination rule to ensure human rights.

Besides, the lack of legal basis for provisional arrest in Vietnam extradition law is a remarkable loophole. All treaties on extradition between Vietnam and foreign countries include an article on provisional arrest. Nevertheless, the national law on extradition does not recognize this procedure. Due to the lack of domestic legal basis, Vietnamese authorities will be faced with various difficulties when they apply and implement bilateral treaties on extradition in practice. Under Vietnamese law, when there are differences between international law and national law on the similar issues, international law will prevail. Although bilateral treaties to which Vietnam is a contracting party provide permission for provisional arrest, Vietnamese authorities need to base on internal procedures to execute this category of apprehension in practice. Without the domestic process, it is unlawful where Vietnamese police forces arrest a person before receiving a formal request for extradition from the issuing state. Apparently, the international cooperation on provisional arrest within Vietnam will be barred on account of the conflict between treaties and Vietnamese law and fugitives may thus make use of this shortcoming to flee from Vietnam. For this reason, Law on

mutual legal assistance should promptly supplement provisions regarding provisional arrest to facilitate treaties on extradition to which Vietnam is a contracting party. Besides, provisional arrest in extradition has its own procedure, so the provisions of Law on mutual legal assistance should clarify this issue and distinguish between provisional arrest and cases of "urgent arrest" in the Vietnam Criminal Procedure Code.

Moreover, in terms of extradition proceedings, Law on mutual legal assistance still lacks several significant matters of traditional extradition process such as provisions on procedure for extradition to Vietnam, extradition agreed by the person sought and simplified extradition. Without these norms, an extradition request is unable to be executed in cases regarding the above circumstances. These loopholes should be resolved by setting forth the corresponding provisions of the Law on mutual legal assistance. Besides, some other issues regarding channels of sending a request for extradition, types of transmission (fax, email) and exceptional cases of extradition to the third state should be taken the establishment in extradition law into account.

Finally, Law on mutual legal assistance complements general procedure for surrender of property in extradition. The provisions need to clarify the competent authority, surrender order, kinds of property, time limits, and place of surrendering property. Besides, amending provision on expenses in extradition in order to comply with bilateral treaties on extradition of which Vietnam is a contracting party.

3. Enhancing other legal issues with respect to extradition

3.1. Extradition law and asylum law

The relationship between extradition law and asylum law is widely recognized in international law. Nevertheless, it has never been a concern in Vietnam. There was no internal law on asylum in Vietnam and Vietnam has not accessed Refugee Convention or 1967 Protocol yet. In the present era of integration and globalization, Vietnam is not an exception of being a haven for refugees from other states in the future. The lack of legal framework for asylum issues not only cause difficulties for immigration control but also negatively influences human rights in general. In accordance with UNHCR's statistics, counting up to April 2011, a total number of State Parties to Refugee Convention is 144 and, 145 is the number of Member States of 1967 Protocol.[2] It is time for Vietnam to consider the possibility of accessing the Refugee Convention to

[2] See http://www.unhcr.org/3b73b0d63.html (accessed 15/11/2013).

cooperate efficiently with other countries in the scope of asylum cooperation and ensuring human rights. Furthermore, due to the mutual relationship between extradition and asylum, the Law on mutual legal assistance should impose provisions related to asylum. Besides, asylum matters may be supplemented in the Vietnamese law regarding immigration control and it may not be necessary to establish a separate law on this issue.

3.2. Wrongful arrest and compensation responsibility

Chapter 7 of the thesis has evaluated and found that wrongful arrest is a serious violation of human rights. Currently, both the EU countries and Vietnam lack an international mechanism of compensation on account of wrongful arrest in extradition. Moreover, Vietnam does not even have a legal framework for compensation in connection with the unlawful arrest in extradition proceedings in national law. Therefore, on Vietnam's national level, Law on mutual assistance 2007 should be supplementing provisions on wrongful arrest and compensation mechanism for victims concerning extradition arrest upon requests from other countries. On an international level, when concluding extradition treaties, Vietnamese competent authorities may discuss and sign a separate agreement regarding wrongful arrest and compensation mechanisms when both Parties are executing extradition requests. In brief, to resolve obstacles with respect to the wrongful arrest in extradition and in order protect human rights of the person whose extradition is sought, the compensation responsibility should be mentioned in both treaties and internal law on extradition of Vietnam.

Appendix 1

Bilateral Treaty on Extradition of which Vietnam is a Contracting Party

	Name of Treaty	Signature	Entry into force	Notes
1	Treaty on Extradition between the Socialist Republic of Vietnam and the Republic of Korea	15/9/2003	19/4/2005	
2	Convention Relative a L'Extradition Entre La Republique Socialiste Du Vietnam et La Republique Algerienne Democratique et Populaire	14/4/2010	31/12/2010	
3	Treaty on Extradition between the Socialist Republic of Vietnam and the Republic of India	12/10/2011	12/8/2013	
4	Treaty between the Socialist Republic of Vietnam and Australia on Extradition	10/4/2012	07/4/2014	
5	Treaty on Extradition between the Socialist Republic of Vietnam and the Republic of South Africa			Initialed 24/10/2012
6	Treaty on Extradition between the Socialist Republic of Vietnam and the Republic of Indonesia	27/6/2013	11/11/2013	
7	Treaty on Extradition between the Socialist Republic of Vietnam and the Republic of Hungary	17/9/2013		
8	Treaty on Extradition between the Socialist Republic of Vietnam and the Kingdom of Cambodia	26/12/2013	09/10/2014	
9	Treaty on Extradition between the Socialist Republic of Vietnam and the People's Republic of China			Negotiating
10	Treaty on Extradition between the Socialist Republic of Vietnam and the French Republic			Negotiating
11	Treaty on Extradition between the Socialist Republic of Vietnam and the Spanish Republic			Negotiating

Appendix 2

Bilateral Treaty containing Extradition Provisions of which Vietnam is a Contracting Party

	Name of Treaty	Signature	Entry into force	Notes
1	Treaty on legal mutual assistance in civil, family and criminal matters between the Socialist Republic of Vietnam and the Socialist Republic of Soviet Union	10/12/1981	22/12/1981	Russian Federation succeeded
2	Treaty on legal mutual assistance in civil and criminal matters between the Socialist Republic of Vietnam and the Socialist Republic of Czechoslovakia	12/10/1982	30/3/1983	Czech and Slovakia succeeded 16/4/1994
3	Treaty on legal mutual assistance in civil, family, labour and criminal matters between the Socialist Republic of Vietnam and the Republic of Cuba	30/11/1982	26/3/1985	In force
4	Treaty on legal mutual assistance in civil, family and criminal matters between the Socialist Republic of Vietnam and the People's Republic of Hungary	18/1/1985	26/3/1985	In force
5	Treaty on legal mutual assistance in civil, family and criminal matters between the Socialist Republic of Vietnam and the People's Republic of Bulgaria	03/10/1986	16/02/1987	In force
6	Treaty on mutual legal assistance in civil, family and criminal matters between the Socialist Republic of Vietnam and the Republic of Poland	22/3/1993	08/3/1994	In force
7	Treaty on mutual legal assistance in civil and criminal matters between the Socialist Republic of Vietnam and the Russian Federation	25/8/1998	03/6/1999	In force
8	Treaty on legal mutual assistance in civil and criminal matters between the Socialist Republic of Vietnam and the People's Democratic Republic of Laos	06/7/1998	06/7/1999	In force
9	Treaty on mutual legal and law assistance in civil and criminal matters between the	06/4/2000		In force

	Socialist Republic of Viet Nam and Ukraine			
10	Treaty on mutual legal assistance in civil, family and criminal matters between the Socialist Republic of Viet Nam and the Mongolian People's Republic	17/4/2000	05/6/2000	In force
11	Treaty on mutual legal assistance in civil, family and criminal matters between the Socialist Republic of Viet Nam and the Republic of Belarus	14/9/2000		In force
12	Treaty on mutual legal assistance in civil and criminal matters between the Socialist Republic of Viet Nam and the People's Republic of Korea or North Korea	03/5/2002	24/02/2004	In force

Appendix 3

Multilateral Treaty containing Extradition Provisions of which Vietnam is a member State

	Name of Treaty	Signature	Ratification(r)/ Accession(a)	Notes
1	Single Convention on Narcotic Drugs, 1961		14/9/1970 a	
2	Convention on psychotropic substances, 1971		4/11/1997 a	Reservation Art.22(2)(b), Art.31(2)
3	UN Convention against illicit traffic in narcotic drugs and psychotropic substances, 1988		4/11/1997 a	Reservation Art.6, Art. 32(2,3)
4	Convention on rights of the Child, 1989	26/01/1990	28/02/1990 r	
5	Optional Protocol to the Convention on rights of the Child on the sale of children, child prostitution and child pornography	08/9/2000	20/12/2001 r	Reservation Art.5(1),(2),(3) and (4) Withdrawal 26/3/2009
6	Optional Protocol to the Convention on rights of the Child on the involvement of children in armed conflict	08/9/2000	20/12/2001 r	Declaration[1]
7	UN Convention against transnational organized crime	13/12/2000	08/01/2012	Reservation Art.35(2)

[1] "To defend the Homeland is the sacred duty and right of all citizens. Citizens have the obligation to fulfil military service and participate in building the all-people national defense.

Under the law of the Socialist Republic of Vietnam, only male citizens at the age of 18 and over shall be recruited in the military service. Those who are under the age of 18 shall not be directly involved in military battles unless there is an urgent need for safeguarding national independence, sovereignty, unity and territorial integrity.

Male citizens up to the age of 17 who wish to make a long-term service in the army may be admitted to military schools. Voluntary recruitment to military schools shall be ensured by measures which, inter alia, include:

- The Law on Military Duty and other regulations on the recruitment to military schools are widely disseminated through mass media;

- Those who wish to study at a military school shall, on the voluntary basis, file their application, participate in and pass competitive examinations; they shall submit their birth certificates provided by the local authority, their education records, secondary education diploma; they shall also undergo health check in order to ensure that they are physically qualified to study and serve the military."

				Declaration[2]
8	UN Convention against Corruption, 2003	10/12/2003	19/8/2009	Reservation Art.66(2) Declaration[3]
9	Convention on Offences and Certain Other Acts Committed on Board Aircraft, signed at Tokyo on 14 September 1963		10/10/1979 a, in force 08/01/1980	Reservation Art.24(1)
10	Convention for the Suppression of Unlawful Seizure of Aircraft, signed at the Hague on 16 December 1970		17/9/1979 a	Reservation Art.12(1)
11	Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, signed at Montreal on 23 September 1971		17/9/1979 a	
12	Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, adopted on 14 December 1973		02/5/2002 a	Reservation Art.13(1)
13	Protocol on the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, supplementary to the Convention for the Suppression of Unlawful Acts against		25/8/1999 a In force 24/9/1999	

[2] "1. The Socialist Republic of Viet Nam declares that the provisions of the United Nations Convention against Transnational Organized Crime are non-self-executing. The implementation of provisions of this Convention shall be in accordance with Constitutional principles and substantive law of the Socialist Republic of Viet Nam, on the basis of bilateral or multilateral cooperative agreements with other States and the principle of reciprocity.

2. Pursuant to principles of the Vietnamese law, the Socialist Republic of Viet Nam declares that it does not consider itself bound by the provisions with regard to the criminal liability of legal persons set forth in Article 10 of this Convention.

3. The Socialist Republic of Viet Nam, pursuant to Article 16 of this Convention, declares that it shall not take this Convention as the direct legal basis for extradition. The Socialist Republic of Viet Nam shall carry out extradition in accordance with the provisions of the Vietnamese law, on the basis of treaties on extradition and the principle of reciprocity."

[3] "1. Pursuant to principles of the Vietnamese law, the Socialist Republic of Vietnam declares that it does not consider itself bound by the provisions with regard to the criminalization of illicit enrichment set forth in Article 20 and the criminal liability of legal persons set forth in Article 26 of the United Nations Convention Against Corruption.

2. The Socialist Republic of Vietnam declares that the provisions of the United Nations Convention Against Corruption are non-self-executing; the implementation of provisions set forth in the Convention shall be in accordance with Constitutional principles and substantive law of the Socialist Republic of Vietnam, on the basis of bilateral or multilateral cooperative agreements with other States Parties and the principle of reciprocity."

	the Safety of Civil Aviation, signed at Montreal on 24 February 1988			
14	Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, done at Rome on 10 March 1988		12/7/2002 a In force 10/10/2002	
15	Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf, done at Rome on 10 March 1988		12/7/2002 a In force 10/10/2002	
16	International Convention for the Suppression of the Financing of Terrorism, adopted by the General Assembly of the United Nations on 9 December 1999		25/12/202 a	Reservation Art.24(1) Declaration[4]
17	International Convention against the Taking of Hostages, adopted by the General Assembly of the United Nations on 17 December 1979		09/01/2014 a In force 08/02/2014	Reservation Art.16(1) Declaration[5]
18	International Convention for the Suppression of Terrorist Bombings, adopted by the General Assembly of the United Nations on 15 December 1997		09/01/2014 a In force 08/02/2014	Reservation Art.20(1) Declaration[6]

[4] The Socialist Republic of Vietnam also declares that the provisions of the Convention shall not be applied with regard to the offences set forth in the following treaties to which the Socialist Republic of Vietnam is not a party:

- Convention on the Physical Protection of Nuclear Material, adopted at Vienna on 3 March 1980;"

[5] "1. The Socialist Republic of Viet Nam declares that the provisions of the International Convention against the Taking of Hostages are non-self-executing in Viet Nam. The Socialist Republic of Viet Nam shall duly implement the provisions of the Convention through multilateral and bilateral mechanisms, specific provisions in its domestic laws and regulations and on the basis of the principle of reciprocity.

2. The Socialist Republic of Viet Nam, pursuant to Article 10 of this Convention, declares that it shall not take this Convention as the direct legal basis for extradition. The Socialist Republic of Viet Nam shall carry out extradition in accordance with the provisions of its domestic laws and regulations, on the basis of treaties on extradition and the principle of reciprocity."

[6] "1. The Socialist Republic of Viet Nam declares that the provisions of the International Convention for the Suppression of Terrorist Bombings are non-self-executing in Viet Nam. The Socialist Republic of Viet Nam shall duly implement the provisions of the Convention through multilateral and bilateral mechanisms, specific provisions in its domestic laws and regulations and on the basis of the principle of reciprocity.

2. The Socialist Republic of Viet Nam, pursuant to Article 9 of this Convention, declares that it shaII not take this Convention as the direct legal basis for extradition. The Socialist Republic of Viet Nam shaII carry out extradition in accordance with the provisions of its domestic laws and regulations, on the basis of treaties on extradition and the principle of reciprocity."

19	ASEAN Convention on Counter Terrorism	13/01/2007	30/01/2011 r In force 27/5/2011	Declaration[7]
20	Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted by the General Assembly of the United Nations on 10 December 1984	07/11/2013		

[7] The Socialist Republic of Viet Nam declares that, pursuant to paragraph 2 of Article 2 of the Convention, declare that the Socialist Republic of Vietnam does not apply 9 international treaties from those listed paragraph 1 of Article 2 of the Convention to which the Socialist Republic of Vietnam is not a Party.

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