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DOCUMENT 1-318/82

REPORT

drawn up on behalf of the Legal Affairs Committee

on the ~~the~~ European judicial areas (Extradition)

Rapporteur : Mr A. TYRRELL

OR.EN.

PE 69.437/fin.

English Edition

At its sitting of 28 September 1979, the European Parliament referred to the Legal Affairs Committee as committee responsible and to the Political Affairs Committee for an opinion a motion for a resolution (Doc. 1-370/79/rev.) tabled by Mr Motchane and others on the European judicial area.

At its meeting of 20 November 1979 the Legal Affairs Committee appointed Mr Tyrrell rapporteur.

At its sitting of 13 December 1979, the European Parliament referred to the Legal Affairs Committee as committee responsible and to the Political Affairs Committee for an opinion a motion for a resolution (Doc. 1-593/79) tabled by Mr Sarre and others on the European judicial area and the European convention on the suppression of terrorism.

At its sitting of 14 December 1979 Parliament referred to the Legal Affairs Committee as committee responsible and to the Political Affairs Committee for an opinion a motion for a resolution (Doc. 1-603/79) tabled by Mr Sieglerschmidt and others on the Dublin agreement on the suppression of terrorism.

At its meeting of 28 and 29 January 1980 the Legal Affairs Committee decided to consider jointly the three motions for resolutions referred to above.

At its meeting of 23 and 24 April 1980 the Legal Affairs Committee heard an introductory statement by its rapporteur on problems connected with the European judicial area and decided not to resume consideration of this matter until it had received the opinion of the Political Affairs Committee.

The Political Affairs Committee delivered its opinion at its meeting of 21 October 1980 and the Legal Affairs Committee resumed its deliberations on 5 December 1980.

At its sitting of 3 November 1981, the European Parliament referred to the Legal Affairs Committee a motion for a resolution (Doc. 1-649/81) tabled by Mr De Clercq and others on the racist attack in Antwerp.

Mr Tyrrell was appointed rapporteur for this motion for a resolution on 25 November 1981.

At its meetings of 2 and 3 December 1981 and 30 and 31 March 1982 the Legal Affairs Committee considered the draft report by Mr Tyrrell and adopted it at the latter meeting.

The motion for a resolution was adopted by 10 votes to 4 with 3 abstentions.

Present: Mrs Veil, chairman; Mr Luster, Mr Turner and Mr Chambeiron, vice-chairmen; Mr Tyrrell, rapporteur; Mrs Baduel Glorioso (deputizing for Mrs Cinciari Rodano), Mrs Boot (deputizing for Mr Fischbach), Mr Dalziel, Mr D'Angelosante, Mr Geurtsen, Mr Hapsburg (deputizing for Mr Goppel), Mr Janssen van Raay, Mrs Macciocchi, Mr Malangre, Mr Megahy, Mr Poniridis, Mr Prout, Mr Sieglerschmidt and Mrs Vayssade.

The opinion of the Political Affairs Committee and the minority opinion are attached to this report.

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The Legal Affairs Committee hereby submits to the European Parliament the following Motion for a Resolution together with Explanatory Statement:

MOTION FOR A RESOLUTION ON THE EUROPEAN JUDICIAL AREA

The European Parliament,

- A. having regard to the Motion for a Resolution by Mr MOTCHANE, Mr SARRE, Mrs CRESSON, Mr GLINNE, Mr ZAGARI, Mr ESTIER, Mr MOREAU, Mr OEHLER, Mr JAQUET, Mrs ROUDY and Mr VAN MINNEN on the European judicial area (Doc. 1-370/79/rev),
- B. having regard to the Motion for a Resolution by Mr SARRE, Mr GLINNE, Mrs LIZIN, Mr VAN MINNEN, Mr ESTIER, Mr MOTCHANE, Mr JAQUET, Mrs CHARZAT, Mrs ROUDY, Mrs CRESSON, Mr SUTRA and Mr OEHLER on the European judicial area and the European Agreement on the Suppression of Terrorism (Doc. 1-593/79),
- C. having regard to the Motion for a Resolution by Mr SIEGLERSCHMIDT, Mr ORLANDI, Mr PELIKAN, Mr KEY, Mrs CASTLE, Mr LEZZI, Mr SEEFELD, Mr WAGNER, Mr B FRIEDRICH, Mr SCHINZEL, Mr ABENS and Mr SEELER on the Dublin Agreement on the Suppression of Terrorism (Doc. 1-603/79),
- D. having regard to the Motion for a Resolution by Mr De Clercq, Mr de Gucht and Mr van Miert on the racist attack in Antwerp (Doc. 1-649/81),
- E. having regard to the European Convention on Extradition, and the first additional protocol thereto, the European Convention on the Suppression of Terrorism and other work carried out by the Council of Europe on the subject of international crime,
- F. having regard to the communications of the European Council referring to the prospect of establishing a European judicial area particularly with respect to criminal matters,
- G. having regard to Articles 48, 52 and 59 of the EEC Treaty providing, in certain circumstances, for the free movement of persons,
- H. having regard to Article 230 of the EEC Treaty ("The Community shall establish all appropriate forms of cooperation with the Council of Europe"),
- I. having regard to the report of the Legal Affairs Committee (Doc. 1-318/82), and the opinion of the Political Affairs Committee;

1. Presumes that the creation of a European judicial area should relate to the establishment and safeguarding of the rights to which citizens are entitled, to the definition of the obligations incumbent upon them and to the manner in which the Member States will cooperate to ensure that those rights may be freely exercised, those obligations maintained and society protected against any attack on public order and security in the form of terrorist or other criminal activity perpetrated by individuals or groups of individuals;
2. Expresses its abhorrence of all terrorist crimes;
3. Considers that priority should be given to establishing effective cooperation in the sector dealing with the fight against crime;
4. Considers that it is repugnant to the concept of the free movement of persons and of the special quality of the relationship between the ten Member States that terrorists should be able to evade detection or capture or trial and punishment by preparing their terrorist activity in one Member State, carrying it out in another, and retreating across an internal Community frontier;
5. Considers therefore that to prevent criminals going unpunished stronger agreements, which do not, however, jeopardize the free movement of persons, should urgently be sought;
6. Considers that the concept of political motive or political offence in the context of laws governing extradition should have no place within the external frontiers of the Community;
7. Calls on the Commission to make proposals for a Directive providing for the suppression of terrorism in the Member States and establishing common principles for extradition between Member States, and to report thereon to the European Parliament;
8. Requests the Commission likewise to make proposals for Directives dealing with mutual assistance in criminal matters, the compellability of witnesses, the taking of witness statements, and the transfer of prisoners, and report thereon to the European Parliament;
9. Considers that all such directives should be supplementary to, but not in conflict with, the European Conventions negotiated within the Council of Europe;

10. Calls once again on the Member States of the European Community to sign and ratify without reservation the European Convention on the Suppression of Terrorism or - at the very least - the Dublin Agreement of 4 December 1979 concerning the application of that convention between the Member States;
11. Calls urgently on the appropriate Ministers meeting in Political Cooperation to do their utmost to adopt in due course agreements to facilitate the capture, arrest, trial and punishment of criminals and to promote closer, legally regulated cooperation between police forces;
12. Instructs its President to forward this resolution to the Commission, the Council and the Conference of Justice Ministers meeting in political cooperation.

EXPLANATORY STATEMENTI. INTRODUCTION

1. This report deals with four Motions for Resolutions:
  - (a) by Mr MOTCHANE and others (Doc. 1-370/79/rev), which expresses concern at the plan to establish a Judicial Area, which it describes as "a set-back for democracy";
  - (b) by Mr SARRE and others (Doc. 1-593/79), which opposes the Dublin Agreement of 4 December 1979 as "putting an end to the right of asylum"; and
  - (c) by Mr SIEGLERSCHMIDT and others (Doc. 1-603/79), which endorses the European Convention on the Suppression of Terrorism and welcomes the Dublin Agreement as a means of overcoming the reservations of some Member States with regard to it.

(d) by Mr DE CLERCQ and others (Doc. 1-649/81) which condemns a bomb attack on Antwerp's Jewish community and calls for more effective protection of the population from such attacks.
2. In recent years there has been a massive increase in terrorist activity within the Community. Such activity takes the form of killing or maiming members of the public, usually at random in public places, often not themselves involved in the purported grievance of the assassin; the bomb explosion in Antwerp on 20 October 1981 which is condemned by the motion for a Resolution tabled by Mr De Clercq and others may be seen as one such attack. It differs from the common criminal activity in its emotive, in that the common criminal usually acts for reasons of personal greed or lust or hate, whereas the terrorist acts to draw attention to a political aim and to frighten others into tolerating the realisation of such aim. The terrorist prefers violence to debate, and seeks to assert, by force, the will of the minority over that of the majority. In short, by the use of criminal means he seeks to overthrow democracy.
3. His activity has been facilitated by the advent of more devastating weapons, their availability to him, improved communications, the example of the successful use of terrorist activity elsewhere in the world, and the sanctuary he is able to find in other countries both to prepare his terrorist activities and to retreat to afterwards.
4. Almost all Member States have been the subject of terrorist activities. They have, with few exceptions relied on their established anti-crime procedures to deal with it. The stages of these procedures are detection, capture, trial, and punishment.
5. Experience has shown that these procedures are barely able to cope with the challenge of current terrorist activity, partly because of its international nature. For this reason, the Council of Europe



has devoted much attention to improving cooperation amongst its members on anti-terrorist measures.

6. By reason of the principles and provisions of the European Community Treaties, and in particular those dealing with the freedom of movement of workers, rights of residence, and the gradual dismantling of internal barriers, the ten Member States have a particular responsibility for and opportunity for cooperation in this area. Members of the public will never be willing to accept that a terrorist who has committed his crime in one Member State may be able to escape detection or capture or trial and punishment by crossing the border to another.

## II. THE WORK OF THE COUNCIL OF EUROPE

7. After six years' work, the Council of Europe opened for signature in December 1957 the multilateral European Convention on Extradition. It provides for extradition for offences punishable by at least one year's imprisonment. It permits reservations in respect of offences which are not extraditable under national law (Article 1(3)), for fiscal offences (Article 5), and for nationals of the requested State (Article 6). There are other exclusions, some optional. The most important of them is (Article 3(1)):

"Extradition shall not be granted if the offence in respect of which it is requested is regarded by the requested party as a political offence or as an offence connected with a political offence."

8. There is no definition of "political offence". This was partly remedied by the first additional Protocol, opened for signature in October 1975, which excludes from the definition crimes against humanity, as specified in the United Nations Convention on Genocide, 1948, and certain crimes contrary to the Geneva Conventions relating to war-time crimes, 1949. A second additional Protocol, open for signature in 1978, has no immediate relevance to terrorist offences.

9. The 1957 European Convention on Extradition has been ratified by Denmark, Germany, Greece, Ireland, Italy, Luxembourg and the Netherlands, and signed by Belgium and France. The first additional Protocol thereto has been ratified by Denmark and signed by Greece, Luxembourg and the Netherlands.

10. After 2½ years' work, the Council of Europe opened for signature in November 1976 the European Convention on the Suppression of Terrorism. It provides that, for the purpose of extradition between contracting States, certain offences shall not be regarded as political or connected with a political offence. Broadly, these are aircraft offences (hi-jacking etc), attacks on those with diplomatic immunity, kidnapping, the taking of hostages, bombing, including parcel bombs, and attempts at these offences (Article A1). But exclusions, some optional, persist. So it is also provided that if the requested State does not extradite, it shall itself prosecute (Article 7).

11. The European Convention on the Suppression of Terrorism has been signed by all the Member States except Ireland. It has been ratified by Denmark, Germany, the United Kingdom and Luxembourg.

12. It would not be right to leave this section on the work of the Council of Europe without referring to the detailed work it has done on the Transfer of Proceedings in Criminal Matters (Convention opened for signature in 1972), Mutual Assistance in Criminal Matters (Convention opened for signature in 1959), International Validity of Judgements in Criminal Matters (Convention opened for signature in 1970) and Transfer of Sentenced Persons (Convention opened for signature in 1964).

### III. ACTIVITIES OF THE COUNCIL OF MINISTERS

13. The European Council, at its meetings in December 1975 and July 1976, undertook to prosecute or extradite those who took hostages, and set up a working party of senior officials. At its meeting in December 1977, it noted with interest the proposals of the French President for closer cooperation between Member States which should take the form of a judicial area, particularly with respect to criminal matters. At its meeting in April 1978, it agreed that "high priority must be given to intensifying cooperation among the Nine to defend our societies against terrorist violence".

14. In October 1978, the Council of Justice Ministers reached a number of decisions. It agreed to open for signature an agreement between the Nine on the application of the European Convention on the Suppression of Terrorism and called on Member States to sign and ratify as soon as possible. The agreement would apply only between states, one of whom is not a party to the European Convention. It permits a Member State to refuse extradition if it considers the alleged offence to be a political offence, or inspired by political motives, provided it undertakes to bring the case to its own prosecuting authority.

15. The Council of Justice Ministers also decided that the working party should continue consideration of the judicial area, as a first step to prepare a draft convention on extradition; as a second step, to consider mutual assistance in criminal matters, the transfer of prisoners, the transfer of prosecutions, and the international enforcement of criminal judgments, and to consider other means of improving cooperation in criminal matters.

16. The Agreement on the application of the European Convention on the Suppression of Terrorism was in fact opened for signature at the European Council in December 1979, in Dublin.

17. By the time of the Council meeting at Rome in May 1980, a Convention concerning cooperation in Criminal Matters was ready for opening for signature. By Article 1, the Member States would undertake either to extradite or themselves submit for prosecution all alleged criminal offenders whose offences are punishable with imprisonment for more than 12 months. It differs from the European Convention on Extradition in that it extends to criminal offences other than terrorism. There are more exclusions, some mandatory, and some optional. Procedures would be both simpler and more fully specified.

18. This draft was not in fact opened for signature. One Member State, Holland, declined to participate. The principal reasons appear to be that it was too narrow in its scope; there was no provision allowing a signatory to withdraw; there was no procedure for reconciling disputes; there was no subjection to interpretation by the European Courts; and it would have a negative effect on the Council of Europe Convention. Another Member State, France, has declined to ratify the Dublin Agreement. It appears to take the view that if there is to be no further progress on the Rome draft convention, it would not proceed with the Dublin Agreement either.

19. As a result, it appears that the work on 'the second step' has also come to a standstill, at least for the present.

#### IV. ACTIVITY OF THE EUROPEAN PARLIAMENT

20. The President-in-Office of the Conference of Justice Ministers addressed the Legal Affairs Committee on this subject in November 1978 (Mr Hans-Joachim VOGEL) and 18 March 1980 and 25 June 1980 (Mr MORLINO). On each occasion, members of the Committee encouraged them in their work in this field. On 27 September 1979 the Parliament passed the following resolution on a common system of extradition in the fight against international crime and terrorism:

"Deploring terrorist violence which more and more results in the loss of lives,

1. Calls on all Governments of Member States to intensify cooperation between their security services and police forces to bring to justice those responsible for violence at the earliest possible moment;
2. Urges the Governments of Member States to move towards a common system of extradition in the fight against international crime and terrorism;
3. Requests the Foreign Ministers meeting in political cooperation to report progress on these two matters;
4. Instructs its President to forward this resolution to the Council and the Foreign Ministers meeting in political cooperation".

(Minutes of the European Parliament, OJ No. C 266 of 22.10.1979, page 43).

#### V. CONCLUSIONS

21. The Legal Affairs Committee bears in mind the concern expressed by the Council of Europe in their final Activity Report of 30 January 1980 "about the possibility of two parallel legal areas being created as a result of concurrent activities among the members of the European Communities in fields which are already covered by the network of Conventions elaborated within the Council of Europe." It would like to see more effective communications between all Member States and the Council of Europe. It greatly admires the pioneer work the Council of Europe has done in this area, which it hopes it will continue. It would deplore a Community Judicial Area which conflicts with any of the various European Conventions. However, it recognises that some Member States have not ratified these Conventions. It has regard to the special quality of the relationship between the Ten. It has special regard to the Treaty provisions for free movement of persons. It bears in mind the words of Mr MORLINO that "free movement of goods and persons has led to new kinds of crime and free movement of justice is needed to counter the increase in crime". It is of the view that cooperation in this field should continue between the Ten, in such a way as to implement but not to conflict with, the European Conventions.

22. In view of the decisions of the Court of Justice in Case 67/74, *Monsignore v Oberstadtdirektor der Stadt Köln* (1975) ECR297, Case 30/77, *R v Bouchereau* (1977) ECR1999 and Case 131/79, *R v Secretary of State for Home Affairs, ex parte Santillo*, (1980) ECR1585 whereby it has recognised that the Treaties limit the right of Member States to deport nationals of other Member States in certain circumstances; and in view of the resolution of the Parliament on Friday, 13 March 1981 (European Parliament Minutes, OJ No. C 77 of 8.4.1981 page 77) whereby it called on the Commission to produce proposals for a directive on compensation for victims of acts of violence, the Legal Affairs Committee is of the opinion that there may be scope under the Treaties for a Directive dealing with extradition, trans-frontier information between police forces relating to suspected criminals in their territory, compellability of witnesses, the taking of witness statements, and the transfer of prisoners. It would prefer that Community activity in this field should take place within the scope of the Treaties, and therefore asks the Commission to examine proposals for relevant directives and report back to the Committee. An analysis of possible legal bases for such activity is set out in the working document annexed (see page 14).

23. Although it is aware of the difficulties they have experienced, the Legal Affairs Committee deeply regrets the failure of the Ten Member States to reach common agreement, either within the Council of Europe Conventions or outside them, and despite their many expressions of intention to do so, on such offences as hi-jacking of aircraft, kidnapping, the taking of hostages, the assassination of elected representatives or of public officials, and the killing and maiming of members of the public innocently caught up in terrorist activities.

24. For the above reasons, and taking note of the Motion for a Resolution of Mr DE CLERCQ and others, the Legal Affairs Committee agrees with the Political Affairs Committee, that the attitudes expressed in the Motion for a Resolution by Mr SIEGLERSCHMIDT and others (above) should be supported, and the attitudes expressed in the other two motions (Docs.1-370/79/Rev. and 1-593/79) should be rejected.

ANNEX I

Working Document by the rapporteur of the Legal Affairs Committee, Mr A. TYRRELL,  
on possible legal bases for Community action in respect of the European judicial  
area (Extradition)

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## I. INTRODUCTION

1. In response to a request, which was made at the committee's meeting on the 3 December 1981, for clarification of the legal basis for possible Community action in respect of the European judicial area, your rapporteur has the honour of presenting to the Legal Affairs Committee this working document; while this is not an exhaustive treatment of the subject, it is hoped that the paper will at least show that action by the Community in this field is possible within the framework of the Treaty of Rome.

2. There are three possible avenues of approach under the EEC Treaty, namely Article 100, Article 235 and Articles 48, 56 and 65.

## II. ARTICLE 100

3. Construction of Article 100 centres on the words: "directly affect the establishment or functioning of the common market". The meaning of "directly affect" and "the common market" is not clear from the article itself and permits of both narrow and wide construction.

4. Construction of Article 100 is assisted by reference to Article 2. In Article 2, the common market is regarded as an instrument for achieving the broader improvements therein specified. The expression and concept of the "common market", however, occurs throughout the Treaty in differing contexts and with differing senses.

5. Under a wide construction, "common market", for the purposes of Article 100 and therefore the field in which approximation of laws can be proposed, includes the freedom of movement of goods and persons, services and capital, and the common policies. The argument for a narrow construction is that harmonisation is tied to economic measures alone, where, further, a direct causal effect can be shown.

6. The editorial comment in the Common Market Law Review, Vol. 15, 1978, pages 389-392 was critical of this narrow view. On page 390 it is stated:

"It is true that the common market pursues an economic object, but it cannot be maintained that the only measures standing in the way of the full achievement of the four freedoms and the establishment of a system of undistorted competition are those whose primary function it is to regulate economic matters. Therefore it would seem wrong to assume that national provisions in the fields such as law of contracts, torts, civil procedure or even penal law are entirely outside the scope of Article 100. It is of course perfectly legitimate to dispute that national measures in a specific field are of such a nature as to directly affect the operation of the common market. It would seem unjustified, however, to deny the Community the power to move in spheres of the law that were originally

of no concern to it but which, because of the dynamic nature of the common market and the evolution of the law itself, now are felt to cause it to function in a less than optimal way."

7. Further support for the contention that criminal law provisions might be a proper field for intervention relating to Article 100 are found in the views of Dr. C.-D. Ehlermann<sup>1</sup>, given in a lecture in Edinburgh on 18 November 1977: see Appendix 3(b), House of Lords Select Committee report on Article 100. In relation to the use of Article 100, he said:

" ... The approximation of laws pursuant to Article 100 covers all national provisions which have a particular effect. There is no other condition. Therefore the nature and content of the legal provision (e.g. commercial law, fiscal law, criminal law) is of no consequence ..."

8. The Court of Justice of the European Communities has also made it clear that the Member States do not have unfettered freedom in relation to their criminal law where it conflicts with their obligations under the Treaty. In various decisions concerning freedom of movement and establishment, the Court of Justice has adopted a strict approach against any possible imposition of criminal sanctions which are unreasonable or disproportionate: see, for example, the cases Royer, case 48/75; Sagulo, case 8/77; Bouchereau, case 30/77; Santillo, case 131/79; and Pieck, case 157/79.

9. Further legislation ancillary to Treaty provisions already restricts the Member States concerning their penal laws. Council directives nos. 64/221 and 68/360 both prevent expulsion in certain circumstances.<sup>2</sup>

10. It is clearly arguable on a wider and generous construction that Article 100 could provide a legal basis for approximation of penal provisions. It would still, however, be necessary to provide the relevant evidence of direct effect on the functioning of the common market. The Legal Affairs Committee has considered, for example, that differences in the national laws of the Member States would operate as a deterrent to the exercise of rights of establishment and free movement of persons. The existence of terrorism, aggravated by the lack of satisfactory means of control and punishment, must operate as an even more obvious deterrent. Investment of capital may clearly be regarded in the same light. This argument could be pursued with further illustrations, but the general nature of it must be clear. "The direct effects" in these circumstances may well be more readily apparent than those relied upon by the Commission in many of its other proposed directives.

<sup>1</sup> Director-General of the Legal Service of the Commission of the European Communities

<sup>2</sup> Further, a Member State can not rely upon its own failure to implement a directive after the deadline for implementation in order to impose criminal sanctions on an individual who has complied with the relevant provisions of that directive: Ratti 148/78, 1979 ECR 1629.



### III. ARTICLES 220, 224-5 and 235

11. It must be noted at the outset that the obligations imposed on the Member States by Articles 220 and 224 are of a lower order than the vast majority of obligations which derive from the Treaty's provisions. Article 220 only obliges Member States "so far as is necessary" to "enter into negotiations with each other" to ensure, inter alia, a minimum standard of protection for the person.

12. By Article 224, Member States are under a duty to consult other Member States regarding steps to minimise the adverse effects of national measures taken to deal with, for example, "serious internal disturbances affecting the maintenance of law and order". The interest which this provision is designed to protect is very clearly different from that guaranteed by Article 220; in this latter article, Article 224, the functioning of the common market is paramount.

13. This goes some way to explaining the unusual provisions of Article 225. Article 225(1) lays down a concertation-type procedure between the Commission and the Member State concerned to "examine how these measures can be adjusted to the rules laid down in this Treaty". Any improper use of the powers granted by Article 224 may be taken by a Member State or the Commission directly to the Court of Justice without waiting for the sometimes lengthy procedure provided by Articles 169 and 170, emphasising once again the exceptional nature of the measures allowed by the preceding Article.

14. The Court of Justice has been called upon to pronounce on Article 224 on one occasion. Along with Articles 36 and 226 of the Treaty, the Court opined that

"... although these provisions attach particular importance to the interests of Member States, it must be observed that they deal with exceptional cases which are clearly defined and which do not lend themselves to any wide interpretation".

(Salgoil v Italy, 1968 ECH 463)

Article 224 thus allows a minimum derogation from the rules regarding the functioning of the common market only in strictly limited conditions.

15. One may therefore argue that in conditions other than those mentioned in Article 224, Member States may not take "any measure which could jeopardise the attainment of the objectives of this Treaty" (Article 5 EEC), including measures against terrorism which have an actual or potentially deleterious effect on the free movement of persons, specifically mentioned as one of the objectives of the Community. Earlier in Article 5, Member States agree to take "appropriate measures ... to ensure the fulfilment of the obligations arising out of this Treaty"; it may be argued that Community directives

providing for mutual assistance in criminal matters and laying down common principles for extradition are the only measures which are appropriate for dealing with the numerous acts of terrorism within the Community and the provisions taken to counteract them.

16. A number of conditions precedent must be satisfied before Article 235 may be called into play:

- a) prior necessity for Community action;
- b) action must relate to one of the Community objectives. The objectives of the Community are those set out in the general Articles 2 and 3 as well as in the more specific Articles, for example Articles 39, 104, 110, etc. The free movement of persons is mentioned in Article 3c and in Articles 48, 52 and 59;
- c) action must be necessary in the context of the operation of the common market. The effects of terrorist acts and national measures taken to prevent them have already been dealt with in the report;
- d) "necessary powers" not already provided in the Treaty. Caution must of course be exercised in choosing between Article 100 and Article 235 as a legal basis for a Community measure: the latter should be chosen in the interests of legal certainty where the former does not provide "a really adequate solution".<sup>1</sup>

There is thus clearly a case for arguing that the preconditions for use of Article 235 may be met for measures in relation to terrorism and the European legal area.

#### IV. ARTICLES 48, 56 and 66

##### a) Community competence in relation to extradition law

17. The crucial question of competence which arises is: are national rules dealing with the extradition of terrorists within the exceptions of the free movement provisions of the Treaty? If so, are they already covered by existing Community legislation? If they are not covered the final question is how existing Community legislation may be amended or new legislation be adopted to fill the gap. These questions can all be answered in the affirmative in relation to the rules of entry and deportation of aliens

18. Extradition differs from deportation in that it is not a matter exclusively for the domestic law of a Member State, but one of bilateral agreement. Only to this extent is the argument that the Member States are sovereign in the

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<sup>1</sup>See Massey-Ferguson, 1973 ECR 908.

matter tenable in the context of a political policy such as the prevention of terrorism. The EEC Treaty is primarily an economic treaty. However, not only does the impact of extradition laws impinge on the entry and expulsion of nationals exercising their rights of free movement, it also falls within the exceptions to these provisions on free movement in so far as extradition comes within the definition of "public security".

19. Community nationals have the right to equal treatment with nationals of the host Member State in respect of the substantive law and procedures for extradition. From the viewpoint of the sovereignty of the Member States, the primary obligation towards their own nationals under the Treaty rules on the free movement of persons - to allow them to enter and leave their territory<sup>1</sup> - also encompasses, or at least does not interfere with, the right to require the expulsion of one of their nationals from another Member State without having to overcome different obstacles of substance or procedure in the host Member State.

20. As an aspect of public security, the necessary coordination of extradition rules would clearly come within the exceptions to free movement authorised by the Treaty.

21. While the rules on extradition do come within the exceptions to the Treaty's provisions on free movement of persons, it appears that they are not covered by existing Community legislation. There is therefore a justifiable legal basis either for amending the existing legislation on entry and expulsion where it impinges on the free movement of persons and services, or, if necessary, for adopting new legislation.

b) The position under Community law of the Member States' competence to derogate from the rules of free movement

22. The coordination of special national measures concerning the movement and residence of foreign nationals justified on grounds of public policy, public security or public health is complementary to the abolition of national restrictions on travel and residence by Community nationals exercising the right of free movement of persons or services.

23. The principle of free movement of workers, under which the Treaty requires the abolition of discrimination on the grounds of nationality (Article 48) has been implemented by Regulation 1612/68 and Directive 68/360. Article 1 requires the removal of restrictions on travel and residence for Community workers and members of their families.

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<sup>1</sup>See Article 2 of Council Directive 73/148 on the "Abolition of Restrictions on Movement and Residence within the Community for Nationals of Member States with regard to Establishment and the Provision of Services" and Article 2 of Commission directive 68/360.

24. Similarly, in respect of the free movement of the self-employed (Articles 52, 59 and 60), Articles 54(2) and 63(2) of the EEC Treaty require the abolition of legislation generally regulating the movement and residence of aliens, to the extent that it hinders the exercise of their rights by nationals of a Member State.

25. The scope of both measures has been extended to cover the right to remain in the territory of a Member State after exercising the right of free movement: in the case of workers, Commission Regulation 1251/70, and in the case of self-employed, Council Directive 75/34 applies.

26. As already mentioned, the Treaty rules and the provisions set out above are subject to derogations justified on grounds of public policy, public security or public health.<sup>1</sup> Coordination of the special measures adopted by Member States under this exception was required by Article 56(2) before the end of the transitional period.

27. Council Directive 64/221 of 25 February 1964, "On the Coordination of Special Measures concerning the movement and residence of foreign nationals which are justified on grounds of Public Policy, Public Security and Public Health" (OJ 1963-1964, 117; OJ 1964, 850) implements Article 56(2) and seeks to define the scope of justified derogations.

28. The Directive applies to all the special measures affecting the movement and residence of Community nationals whether for the purposes of employment, establishment or for the provision or receipt of services. All the derogations justified on these policy grounds, which are permitted by the Directives on the abolition of restrictions on movement and residence, are limited to their definition and application in Directive 64/221<sup>2</sup>.

c) Possible additional articles to Directive 64/221 to achieve a common system of extradition  
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29. Where a Member State ('requesting state') requests the expulsion of one of its nationals by the host Member State on the grounds of public security, in particular the prevention or control of terrorist crimes, the host state shall comply with that request within a stated period, provided the following conditions are satisfied:

- i) The host Member State is satisfied that there is sufficient evidence which also complies with Article 3(1) and (2), on which a court in the requesting state could convict the requested person of the alleged offence or offences and that for this purpose the host state may request information in accordance with Article 5(2); and

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<sup>1</sup>Article 48(3) workers, Article 56(1) as extended by Article 66 in relation to provision of goods.

<sup>2</sup>See Article 10, Directive 68/360; Article 8, Directive 73/148; Article 6, Directive 75/34.

ii) the host Member State informs the requested person of the allegations made against him, affords him the opportunity of taking legal advice and of making representations to the administrative authority in accordance with the laws, regulations and administrative actions that apply to its own nationals in respect of acts of the administration (of Article 8), before any decision on expulsion is taken by that administrative authority; and

iii) so far as they are relevant, Articles 6, 7, 8 and 9 shall apply to the decisions taken by the administrative authority.

#### V. CONCLUSIONS

30. It is clear therefore from examination of the Treaties that there are a number of alternative arguable legal bases for Community action in the field of "espace". It is not possible simply to dismiss the matter as one which falls within the competence solely of the Member States. In these circumstances the proper approach which the Commission might take is to produce a working document setting out their arguments and reasoning on "espace". The current attitude of simple denial by the Commission that it has any competence is, in view of the arguments set out above, untenable.

tabled by Mr Motchaine, Mr Sarre, Mrs Cresson, Mr Glinne, Mr Zagari, Mr Estier, Mr Moreau, Mr Oehler, Mr Jaquet Mrs Roudy and Mr Van Minnen

with request for urgent debate pursuant to Rule 14 of the Rules of Procedure

on the European judicial area

The European Parliament,

- aware of the serious concern aroused in the Community countries, and in particular among the judiciary, by the plan to establish a European judicial area by means of a common system of extradition,
- 1. Asks the Council whether it does not believe that this system, which without doubt would substantially reduce the degree of discretion left to judges, far from effectively protecting democracy against terrorism in itself constitutes a setback for democracy and hence a victory for terrorism;
- 2. Instructs its President to forward this resolution to the Council.

JUSTIFICATION

The plan to establish a European judicial area on the basis of a Community system of extradition raises such important and urgent questions that the Assembly should consider without delay the implication of the priority which would thus be given in the development of the Community to a political Europe.

tabled by Mr Sarre, Mr Glinne, Mrs Lizin, Mr van Minnen, Mr Estier, Mr Motchane, Mr Jaquet, Mrs Charzat, Mrs Roudy, Mrs Cresson, Mr Sutra and Mr Oehler

pursuant to Rule 25 of the Rules of Procedure

on a European judicial area and the European agreement on the suppression of terrorism

The European Parliament,

1. Observes that the agreement signed in Dublin on 4 December 1979 by the Ministers of Justice of the nine Member States of the Community by providing for the automatic extradition of political offenders puts an end to the right of asylum;
2. Opposes vigorously the disappearance of this fundamental freedom;
3. Considers it unacceptable that under the guise of a European judicial area a repressive Europe should be built up where all persons wanted for political reasons are placed at the mercy of the executive branch of each Member State or of their police forces;
4. Condemns this serious attack on the very foundations of civil liberties and this retrograde step in respect of human rights in Europe;
5. Affirms emphatically its resolve to build instead a Europe whose freedoms are founded on the systems of law most concerned to safeguard human rights, civil liberties and the concept of asylum;
6. Invites the governments of the Member States to make use of the declaration referred to in Article 3 of the Agreement activating the reservation mentioned in Article 13 of the European Convention which provides for protection at law to be restored in political cases;
7. Instructs its President to forward this resolution to the President-in-Office of the Council of the European Communities and to the Heads of State and Heads of Government of the Member States.

tabled by Mr Sieglerschmidt, Mr Orlandi, Mr Pelikan, Mr Key, Mrs Castle, Mr Lezzi, Mr Seefeld, Mr Wagner, Mr Bruno Friedrich, Mr Schinzel, Mr Abens and Mr Seeler

pursuant to Rule 25 of the Rules of Procedure

on the Dublin agreement on the suppression of terrorism

The European Parliament,

1. Notes that the European Convention on the suppression of terrorism has so far been ratified by three Member States of the European Community i.e. Denmark, the Federal Republic of Germany and the United Kingdom and by a further four Member States of the Council of Europe i.e. Austria, Cyprus, Lichtenstein and Sweden;
2. Is of the opinion that the Convention improves the conditions for the suppression of terrorism in the Member States and on the other hand offers sufficient scope for considered decisions in each individual case of a request for extradition;
3. Notes that reservations exist in some Member States of the European Community as regards the ratification of the Convention because of its geographically wide-ranging field of application comprising the territories of all the Member States of the Council of Europe;
4. Welcomes with regard to these reservations, the Agreement signed on 4 December 1979 by the Ministers of Justice of the Nine in Dublin, on the implementation within the European Community, of the European Convention on the suppression of terrorism;
5. Asks the parliaments and governments of the Nine at least to ratify as soon as possible the Agreement signed on 4 December 1979 on the implementation of the European Convention;
6. Instructs its President to forward this resolution to the parliaments and governments of the Member States of the European Community.



tabled by Mr De Clercq, Mr De Gucht and Mr van Miert

pursuant to Rule 47 of the Rules of Procedure

on the racist attack in Antwerp

The European Parliament,

- having learned of the murderous attack on the Jewish community in ANTWERP as a result of which two persons were killed and tens of innocent people seriously injured,
  - whereas combating terrorism must become the main concern of European governments as advocated in the European Parliament's resolution No. 1-368/81 of 3 July 1981,
1. Expresses its outrage at this recent act of indiscriminate violence; conveys its condolences to the bereaved families and to the Jewish community of ANTWERP and wishes the injured a speedy and complete recovery;
  2. Condemns this fresh attack perpetrated by terrorist organizations and calls for all terrorist organizations to be rejected by civilized society;
  3. Stresses the need for more effective protection of the population especially those individuals and communities more particularly exposed to such acts of terrorism; this protection must be provided through appropriate measures by the national authorities and an international approach to terrorism;
  4. Instructs its President to forward this resolution to the Council and the Commission of the European Communities.

OPINION

of the Political Affairs Committee

Draftsman: Mr Otto von HABSBERG

On the 8 July 1980 the Political Affairs Committee appointed Mr Otto von HABSBERG draftsman.

It considered the draft opinion at its meeting of 21 October 1980 and adopted it by 19 votes for and 2 against.

Present: Mr Estier, acting chairman; Lord Bethell, Mr Haagerup, vice-chairmen; Mr Habsburg, draftsman of the opinion; Mrs Baduel Glorioso (deputising for Mr Berlinguer), Mr Berkhouver, Mr Blumenfeld, Mrs Cassanmagnago Cerretti, Lady Elles, Mr Fergusson, Mrs Hammerich, Mrs van den Heuvel, Mr Israel (deputising for Mr de la Malène), Mr C. Jackson, Mr Klepsch, Mr Penders, Mr Romualdi, Mr Schieler, Sir James Scott-Hopkins, Mr Seefeld (deputising for Mr Brandt), Mr Segre, Sir John Stewart-Clark and Mr Zagari.

The three motions for resolutions before the committee are of major political importance and highlight the basic dilemma of the present time. It was therefore appropriate that they should be referred not only to the committee responsible, the Legal Affairs Committee, but also to the Political Affairs Committee since the decision which must be reached will have wide-ranging political implications.

The motions for resolutions reveal different attitudes towards the future direction of Europe. Characteristic of our times is the opposition between the compelling need for political unification and the reactionary forces of old-style nationalism. One of the central problems in this area is that of national sovereignty. Whereas the European-minded forces have recognized that, in a shrinking world, the older concept of sovereignty is no longer applicable in many areas and must therefore yield to the new dimensions of international life, the representatives of the old concept of sovereignty defend it with greater tenacity the more tenuous this sovereignty becomes. This is also true where the question of a European judicial area is concerned. In the long term a politically unified Europe is impossible without a unified judicial area, so that any progress in this area is progress on a European scale. This point has forcibly been made by the eminent Swiss authority on international law, Professor Hans Schultz, in his work 'La Convention Européenne d'extradition and le délit politique'.

The motions for resolutions also demonstrate the differences in attitude to the concepts of political crime, the right of asylum and to terrorism as it exists today. Recent events have clearly been responsible for the change. As the crimes committed in Bologna and the terrorist campaigns in Spain and Northern Ireland have recently demonstrated, it is becoming increasingly more difficult to apply the concepts of the more tranquil 19th century to the present period in which the possibilities and dimensions of terrorism have increased to the point where it is no longer simply a 'professional risk' for leading personalities but threatens the lives and curtails the rights of the population at large.

The rise of anarchist terror in the second half of the 19th century already brought a change in the interpretation of what constitutes a political crime. Since then the prevailing view has been that anarchists guilty of crimes of violence should be extradited in the same way as common criminals. One of the principal arguments put forward in support of this view was that, since anarchism is the opposite of a political movement, the negation of politics, it could not lay claim to any political rights. The same argument was used *mutatis mutandis* in this century with regard to the modern form of totalitarianism, once National Socialism came to be regarded as a criminal conspiracy and not a legitimate political movement.

The decades since the end of World War II have witnessed an expansion of terrorism for so-called political motives made possible by modern technological developments and the fact that the structure of modern industrial states makes them increasingly vulnerable to attack. Even before World War II the Italian writer, Malaparte, in his book 'Coup d'Etat, the Technique of Revolution' argued that Leon Trotsky's strategy would lead to this development. In addition, terrorism has been internationalized, not only through ideological and technical cooperation between terrorist organizations but also because a number of powerful states are providing terrorists with technical, financial and diplomatic aid.

Another aspect should not be overlooked: the principle of complete freedom of movement for citizens of the Member States of the Community, which is the aim of all Europeans, would be seriously jeopardized unless, by the creation of a European judicial area, action was taken against those who abuse it in pursuit of their terrorist objectives.

The amended Brussels Treaty therefore quite logically recognized the Council's role in combating terrorism, thereby affirming that effective protection of the population against terrorism can only be provided on a transfrontier basis, especially as there can be no justification for the use of force against a democratic society. Such a society provides the legal instruments for peacefully changing the existing situation by popular political persuasion.

These issues should be borne in mind when considering the three motions for resolutions. From this point of view the Dublin Agreement of 4 December 1979 is undoubtedly a step towards a European judicial area, even though it must be recognized that it is only a single step in the right direction. Moreover, in a highly critical period, the Agreement at least provides some means of more effectively combating terrorism which, as the events of last summer have shown, threatens virtually all the democratic peoples of Europe.

For this reason, motion for a resolution Doc. 1-603/79 should be approved since it gives governments the support of the freely elected representatives of the people of Europe in the task of combating terrorism. For the same reason, the closely related motions for resolutions Doc. 1-370/79 and Doc. 1-593/79 should be rejected. The bases concepts in each case are mutually exclusive. As already pointed out, the adoption of motion for a

resolution Doc. 1-603/79 would be a clear endorsement of the trend towards European integration and the efforts to create a European judicial area. To reject it would be to subscribe to the old nationalistic concepts, even where this is not explicitly stated.

In order to ensure that motion for a resolution Doc. 1-603/79 expresses more clearly Parliament's determination to combat terrorism effectively and to safeguard the freedom of the people of Europe, it is proposed that a new paragraph 6 be added to the motion for a resolution so that the original paragraph 6 becomes paragraph 7. The new paragraph 6 should read as follows:

'Hopes, on the other hand, that the Council will continue to do everything in its power to ensure that all member states of the Council of Europe eventually accede to the European Agreement on the Suppression of Terrorism'.

The justification for this proposal is that, although the Dublin Agreement is a step in the right direction, it does not go far enough since the territory of the Nine is too small an area to enable terrorism to be combated effectively. For this reason an extension of the Agreement to all member states of the Council of Europe is highly desirable. This is particularly important since the states of the Council of Europe which do not yet belong to the Community have terrorist problems which sooner or later will inevitably affect their neighbours.

### The minority opinion

The minority opposed the motion for a resolution. The principal reasons put forward were as follows:

1. While joining the condemnation of terrorism, no precise definition of this term had been given, a deficiency which was all the more serious given the opinion of the Political Affairs Committee that terrorist activities could also include legitimate national liberation movements and democratic struggles against dictatorships.
2. It is unacceptable to extend the exemption from the ban on extradition applicable to crimes of terrorism to cover all political offences.

Omission of the concept of political motivation within the frontiers of the Community seriously jeopardises the tradition of political asylum, which is an integral part of democratic rights.

3. The recommendation that the Commission should introduce a directive on the creation of a European criminal law area is based on a false interpretation of the Treaties which neither refer to nor contain any obligations in this field.

The two conventions mentioned in the text in question would seem to be adequate although they have not been signed and ratified by all the Member States.

Certain members felt that while a common action against terrorism was necessary, the proposals put forward were neither addressed to the correct bodies nor founded on a valid legal basis.