A Challenge for European Law:
The Merging of Internal and External Security

Constitutional Challenges to the European Arrest Warrant

Elspeth Guild (Ed.)

Chapter 8

The Relationship of Extradition Law in International Treaties with the European Arrest Warrant and its Application in France

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Introduction

In France as well as in other EU countries the introduction of the European arrest warrant (hereafter: EAW) has led to important changes in the law and practice of extradition. They cannot be properly analysed without a proper explanation of the situation before the entry into force, in March 2004, of the EU Council Framework Decision (hereafter: FD) of June 13, 2002 creating this new instrument.

This chapter will be divided into three parts: Part I contains an overview of key issues on extradition before the transposition of the FD. Part II analyses the transposition process, including the constitutional issues raised by the FD. Part III comments on the implementation of the EAW in France in 2004 and 2005.

PART I
THE LAW AND PRACTICE OF EXTRADITION IN FRANCE BEFORE THE EAW: KEY ISSUES

French extradition law has undergone deep changes since the mid 1970s, due to the combined influence of a number of elements.[1] Two of them must be mentioned:

- The growing role of international law, i.e. multilateral[2] and bilateral conventions and human rights treaties such as the ECHR, the 1951 Convention on the status of refu-

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1 For an overview of French extradition law and its recent evolution see R. Errera, Reflections on extradition in French law, in: Myres S. McDougal and W. Michael Reisman (Eds), *Power and Policy In Quest of Law. Essays in Honor of Eugene Victor Rostow*, Martinus Nijhoff, Dordrecht 1985, p. 291; idem, Extradition et droits de l'homme, in *Collected Courses of the Academy of European Law/Recueil des cours de l'Académie de droit européen*, 1995. *The Protection of Human Rights in Europe*, Vol. VI, Book 2, Martinus Nijhoff, The Hague-Boston-London 1997, p. 245 ff; idem, Droit national et droit international dans le droit français de l'extradition, in H.C. Cremer, T. Giegerich, D. Richter and A.Zimmermann (Eds.), *Tradition und Weltoffenheit des Rechts. Festschrift für Helmut Steinberger*, Springer, Berlin 2002, p. 733 ff; A. Huet and R. Koering-Joulin, *Droit pénal international*, 3rd ed., Presses universitaires de France, Paris 2005, p. 397 ff.

2 E.g. the 1957 European Extradition Convention, the 1977 European Convention for the repression of terrorism, the 1990 Schengen Agreement.

judicial review of extradition decisions by the Conseil d'Etat. Two points must be emphasized:

a. The affirmation of general principles of law[5] and of considerations of public policy[6] applying to extradition.

b. The constitutional dimension of extradition law. The prohibition of extradition when the aim of the extradition request is a political one, contained in the 1927 statute[7] has been granted constitutional status by the Conseil d'Etat's *Koné* decision.[8] In a 1995 opinion the Conseil d'Etat held that according to a constitutional principle the State must reserve the possibility to refuse extradition for political offences (See infra).As to the constitutional dimension in the requesting State, the case law may be summed up as follows: the Conseil d'Etat shall not pronounce on the constitutionality of the domestic statute under which extradition is sought. It will do so, however, in two cases: if the statute has been declared unconstitutional by a final judicial decision or if its adoption has been affected by defects so grave as to make it non existing,[9] an interesting clause, which might be used in the future.

See *Cimpoesu*, February 15, 1999, p. 830; RFDA 1999, 861, note Ruzié. I have commented this decision in (1999) *Public Law* 362.

Cf. E. Rolin, *Le Conseil d'Etat juge de l'extradition*, preface by M. Roux, Librairie générale de droit et de jurisprudence, Paris 1999.

On the death penalty in the requesting State the case law of the Conseil d'Etat may be summarized as follows: in view of the abolition of the death penalty in France and of its ratification of the 6th Protocol ECHR, the application of the death penalty to an extradited person would be contrary to public policy (*ordre public*). Extradition may take place only if there are guarantees from the requesting State that such a penalty will not be decided by the court or, if decided, will not be executed: *Fidan*, February 27, 1987, p. 81; *D* 1987, 305, concl. Bonichot; *Gacem*, December 14, 1987, p. 733; *JCP* 1988, IV, 86; *Aylor*, October 15, 1993, p. 283, concl. Vigouroux; *RFDA* 1993, 1166 ; *JDI* 1994, 413, note Chappez; *JCP* 1994, II, 22257, note Espuglas; *Stacy*, April 8, 1998; *RFDA* 1998, 879, note Ruzié; *Nivette*, November 6, 2000, p. 485. On the prohibition of extradition of a refugee towards his country of origin, see *Bereciaurta- Echarri*, April 1, 1988, p. 135; *JCP* 1988, II, 21071, concl. Vigouroux; *RFDA* 1988, 413, note Genevois; *D* 1988, 413, note Labayle. On the prohibition of extradition when it would lead to exceptionnally grave consequences for the person sought, see *Kozirev*, October 13, 2000; G., February 2, 2001, p. 31; *Smaali*, July 23, p. 815.

On penalties contrary to public policy see the case law on the death penalty note 5 supra and Art. 696-4-6° CPP. The case law shows a reluctance to review the way prison penalties are implemented in the requesting State: thus public policy is not incompatible with life imprisonment which cannot be shortened (*Einhorn*, July 12, 2001, p. 384) or which is rarely so (*Scott Dohan*, July 27, 2005) or with the extradtion of minors, as long as domestic law contains provisions such as alternative penalties to imprisonment, lowering of penalties for them and takes into account their particular situation (*Nezdulkins*, February 14, 2001, commented in (2001) *Public Law*, 811.

Astudillo Calleja, June 24, 1977, p. 290.

Koné, July 3, 1996, p. 255; *RFDA* 1996, 870, concl. Delarue and 882, notes Favoreu, Gaïa, Labayle and Delvolvé; concl. Delarue, *Revue trimestrielle des droits de l'homme*, 1997, 747; *RGDIP* 1997, 238, note Alland; *RDP* 1996, note Braud; *D* 1996, 509, note Julien-Laferrière; commented in (1996) *Public Law*, 708.

Einhorn, mentioned supra n. 6, confirmed in *Scott Dohan*, mentioned *ibid.*

These related mainly to two points: the length of the extradition procedure and the prohibition of the extradition of nationals.

I. The Length of Extradition Proceedings

The procedure is both a judicial and an administrative one. The different stages, as mentioned in the 1927 statute, are the following ones.

1. Stage 1 is a judicial one. Shortly after the reception of the extradition request, the person sought is placed under arrest ands is heard by the local State prosecutor. A public hearing then takes place before a special division (*Chambre de l'instruction*) of the court of appeal, the task of which is to check whether the legal conditions of extradition, as stated in the 1927 statute (double criminality; principle of speciality; prohibition of extradition if the offence is a political one or if the aim of the request is a political one; prohibition of the extradition of nationals) and in the relevant conventions, are fulfilled.It may request additional information and is empowered to set the person free at any moment. Its opinion (*avis*) on the request must contain the reasons. If it is a negative one, the extradition may not take place. If it is a positive one, it may.
   Appeal on points of law (*cassation*) lies before the Cour de cassation. It is a recent and a restricted one. It did not exist until the mid 1980s.The Cour de cassation reviews only the regularity of the procedure before the court of appeal, not substantial law.[10]
2. Stage 2 is an administrative one. If the opinion mentioned supra is a positive one, the Prime Minister may sign an extradition decree, which is countersigned by the Minister of Justice. He must do so, if there is an obligation to extradite under a convention (under Art. 55 of the Constitution, treaties take precedence over domestic statutes, irrespective of their dates). The decree may not be taken before the expiration of the time limit relating to the appeal to the Cour de cassation and, if such an appeal exists, before the Cour de cassation's judgment.[11]
3. Stage 3 is again a judicial stage. It takes place before the Conseil d'Etat, before which extradition decrees may be challenged within the two months following their notification to the person sought. The custom is not to execute the extradition decree before the expiration of this time limit and, if an action has been brought against the decree, before the final decision of the Conseil d'Etat.[12] The latter is empowered to stay the execution of the extradition decree. It usually decides such cases within one year. This was the average length of the 18 cases decided by it in 2005 until the end of October.

10 Cass. Crim., September 17, 1984, *Bull.* n° 273; September 21, 1984, 2 decisions, *Bull.* n° 274; *JCP* 1985, II, 20346, note Jeandidier; *RFDA* 1985, 1276, concl. Clerget; *JCP* 1985, II, 20232, note Borricand; Gaz. pal. December 23-25, 1984, 6, rapport Cruvellié; Y. Rodriguez, La Cour de cassation et le contrôle de l'avis des chambres d'accusation, *D* 1984, 233,

11 *Alba Ramirez*, March 8, 1985 p. 71; *RDP* 1985, 1120, concl. Genevois; *Nurock*, February 6, 1986, p. 35.

12 See, for two exceptions, *Croissant*, July 7, 1987, p. 292; JDI 1979, p. 90, note Ruzié; *Saniman*, July 29, 1994, p. 388.

Stage 4 is an administrative one. The decision of the Conseil d'Etat is notified to the person sought. If the application has been rejected, the Prime Minister orders the implementation of the extradition. Delays may also exist at this stage.

he combined effect of the superposition of these four judicial and administrative phases as the, at times, excessive length of extradition proceedings. Any request for additional formation coming from any of the authorities mentioned supra, often made necessary by e fact that key documents or information were sometimes missing in the file sent by the questing State, increased it.

Hence the EU Member States' attempts to make these proceedings simpler and orter. The technique initially used was that of international conventions:

The Agreement of May 26, 1989, between Member States of the European Communities relating to the simplification and modernization of the means of transmission of extradition requests.

The Convention of 19 June 1990 implementing the Schengen Agreement of 14 June 1985 on the gradual abolition of checks at the common borders, now part of the *acquis communautaire*.[14]

The Convention of 10 March 1995 on simplified extradition procedure between the member States of the EU.[15]

The Convention of 27 September 1996 relating to extradition between the member States of the European Union.[16]

Luijambio Galdeano, Garcia Ramirez and *Martinez-Beiztegui*, September 26, 1984, p. 307; *Rev. sc. crim.* 1984, 804, note Lombois; *RFDA* 1985, 183, note Labayle.

OJ L 239, 22 September 2000, p. 19. See its Articles 61 (mitigation of the qualified double criminality for France in relation to the other Schengen countries, 62 (statute of limitations; amnesty), 63 (mandatory extradition of offenders in the field of indirect taxation), 64 (alert in the SIS shall have the same force as a request of provisional arrest). See also Articles 65 and 66. Cf. A.J.S. Swart, "Police and security in the Schengen Agreement and the Schengen Convention", in H. Meijers et al, *Schengen. Internationalization of central chapters of the law on aliens, refugees, privacy, security and the police*, Kluwer 1991, p. 103-105; R. Errera, Combatting fraud, judicial criminal matters and police cooperation, in J.A. Winter, D.M. Curtin, A.E. Kellermann and B. de Witte (Eds), *Reforming the Treaty on European Union: The Legal Debate*, TMC Asser Instituut, Kluwer 1996, p. 407 ff (see p. 411).

OJ C78, 30 March 1995, p. 2. See Mar Jimeno-Bulnes, European Judicial Cooperation in Criminal Matters, *ELJ*, vol. 9, n° 5, December 2003, 614 ff, at 622. On European criminal judicial cooperation see generally G. de Kerchove and A. Weyembergh (Eds), *Vers un espace judiciaire pénal. Towards a European judicial criminal area*, Editions de l'Université de Bruxelles, Brussels 2000; idem, *Quelles réformes pour l'espace pénal européen?*, 2003; idem, *Sécurité et justice: enjeu de la politique extérieure de l'Union*, 2003; P. Rancé and O. de Baynast, *L'Europe judiciaire. Enjeux et perpectives*, Dalloz, Paris 2001; W. de Lobkowicz, *L'Europe et la sécurité intérieure. Une élaboration par étapes*, La Documentation française, Paris 2002.

OJ C 313, 13 October 1996, p. 12. See R. Errera, Combatting fraud..., *loc. cit.*, quoted supra, n. 14; idem, Extradition et droits de l'homme, *loc. cit.*, quoted supra, n. 1, at 298; D. Richard, Tendances du droit extraditionnel, *JCP* 1996, I, 3917; M. Mackarel and S. Nash, Extradition and the EU, (46) *ICLQ* (1997) 948 ff, at 953. See also Y. Gautier, La convention du 27 septembre 1996 relative à l'extradition entre les Etats membres de l'Union européenne, *Europe*, December 1996, p. 1; D. Richard, Une contribution européenne aux tendances actuelles du droit extraditionnel. La convention du 27 septembre 1996, *JCP* 1997, I, 3988; Mackarel and Nash, *loc. cit.*; R. Errera, Extradition et droits de l 'homme, *loc. cit.*, at 301; Mar Jimeno-Bulnes, *loc.cit.*

Under the 1927 statute (Art. 5-1°) the extradition of French nationals is prohibited. However a number of bilateral conventions signed by France give the requested State the possibility to extradite a national.[17] Article 6-1 of the 1957 European extradition convention allows a State to refuse the extradition of nationals. If it does so, and if the requesting State so asks, it must refer the case to its domestic judicial authorities (Art. 6-2). In a 1994 opinion (*avis*) the Conseil d'Etat held that the prohibition to extradite nationals was not a constitutional rule. No French national had been extradited since 1820. Conventions making such an extradition mandatory, the Conseil d'Etat held, should include the principle of reciprocity. Their implementation should respect such constitutional principles as the respect of fundamental individual rights, the right of defense and the right to a fair trial.[18]

Two points were *not* issues: the first one was the prohibition of extradition when the offense is a political one, a rule contained in the 1927 statute and of constitutional standing.[19] It is worth noting that this rule did not hinder the extradition of persons accused of terrorist acts or sentenced for having committed them. Long before the ratification by France of the 1977 Council of Europe convention for the repression of terrorism according to which (Art. 1) acts of terrorism shall not be considered as political offenses, French courts and the French Government allowed extradition in such cases.[20] The second point was the double criminality condition, stated in the 1927 statute (Art. 4, para 2). This clause has very rarely been an obstacle to extradition.

As to the 1995 and 1996 conventions mentioned supra, they have been ratified by France at the end of 2004.[21]

PART II
THE TRANSPOSITION OF THE FRAMEWORK DECISION INTO FRENCH LAW

Such a transposition raised a number of constitutional issues, which will be examined first. The legislative stage will be then analysed.

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17 See A. Huet and R. Koering-Joulin, *op. cit.*, at 399.

18 See Conseil d'Etat, *Rapport public 1994*, Etudes et documents, n° 46, La Documentation française, Paris 1995, p. 164 and 343; *Les Petites affiches*, 1996, n° 3, p. 21, note Peyrical.

19 See the Conseil d'Etat's opinion of November 9, 1995 in Conseil d'Etat, *Rapport public 1995*, Etudes et documents, N° 47, La Documentation française, Paris 1996, p. 205 and 395; see also Y. Gaudemet, B. Stirn, T. Dal Farra and F. Rolin (Eds), *Les grands avis du Conseil d'Etat*, 2nd ed., Dalloz, Paris 2002, n° 34, note BG.

20 Cf. R. Errera, Extradition et terrorisme, *Etudes*, November 1978, p. 455. On the French practice see H. Labayle and R. Koering-Joulin, Dix ans après... De la signature (1977) à la ratification (1987) de la convention européenne pour la répression du terrorisme, *JCP* 1988, I, 3349; M.E. Cartier, L'application de la convention européenne d'extradition par la Cour de cassation, *Mélanges Levasseur*, Litec, Paris 1992, p. 299.

21 See the two statutes of December 9, 2004.

They were discussed and settled not in the course of litigation before a constitutional court as in Belgium (where the Cour d'arbitrage referred the case to the ECJ), Germany (where the Constitutional Court found the statute invalid when applied to German, nationals),[22] Poland and Cyprus (where the Constitutional Court did the same) and the Czech Republic, but through a different procedure: the consultation of the Conseil d'Etat by the Government. The Prime Minister, or indeed any Minister is empowered to ask it for its opinion on a given legal issue, except of course if the issue is pending before the courts.[23] This is done rather frequently when a new legal problem requires an authorized opinion or when there are acute divergences within the Administration.The opinion carries great weight ands is almost always followed by the Government. It is not made public at the time it is issued (unless the Government decides otherwise). It is published in the next annual Report of the Conseil d'Etat.

In 2002, after the adoption of the FD creating the EAW, the Prime Minister asked the Conseil d'Etat's opinion on whether its transposition into French law through a statute raised constitutional issues, particularly in relation with the fact that under the FD the political nature of the offense may not be a ground of non execution of an EAW. This consultation related to international law, and more precisely, to the conformity of a new legal instrument, the FD, to the Constitution. The reason the Government consulted the Conseil d'Etat and not the Conseil constitutionnel is the following one: under the Constitution, the latter may be consulted by the President of the Republic, the Prime Minister, the President of the National Assembly or that of the Senate or by 60 deputies or senators on whether an international commitment (*un engagement international*) contains a clause contrary to the Constitution.[24] If the Conseil constitutionnel finds this is the case, a revision of the Constitution is necessary before the convention may be ratified. This applies only to treaties and conventions, and not to such EU instruments as directives, regulations or framework decisions.There are precedents of such a consultation.Some have taken place at an earlier stage, that is, during the EU negociations[25] Here the Conseil d'Etat used both previous opinions and its own case law.

I shall comment in order the opinion of the Conseil d'Etat and the revision of the Constitution that followed.

22 On the Court's decision see S.Mölders, Case Note, The European Arrest Warrant in the German Federal Constitutional Court, *German Law Journal*, vol. 7, n° 1, January 2006;J. Leblois-Happe, L'arrêt de la Cour constitutionnelle allemande du 18 juillet 2005, *Actualité juridique-pénal*,2006, n° 1, p. 33.

23 Code de justice administrative, Art. L.112-1. For a collection of commented opinions of the Conseil d'Etat see *Les grands avis*, *op. cit.*, mentioned supra n. 18.

24 Constitution, Art. 54.

25 See the Conseil d'Etat's opinions of November 24, 1994 and November 9, 1995, mentioned supra n. 19; cf. V. Ogier-Bernard, "Les avis du Conseil d'Etat relatifs aux conventions internationales en cours d'élaboration: un contrôle de constitutionnalité préventif méconnu", *Les Petites affiches*, 2002, n° 145, p. 4.

What follows is a summary of its contents. A Framework Decision of the European Council taken on the basis of Article 34 TEU and the aim of which is to replace "traditional cooperation relations which have prevailed up till now between Member States by a system of free movement of judicial decisions in criminal matters",[26] may be transposed into domestic law through a statute. This is consistent with several constitutional provisions: Article 3 of the 1789 Declaration of the Rights of Man and the Citizen,[27] the Preamble of the 1946 Constitution, paras. 14[28] and 15,[29] and Articles 3,[30] 53,[31] and 88-1[32] of the Constitution. However, if the Framework Decision contains clauses contrary to the Constitution or to constitutional principles, or affecting constitutionally guaranteed rights and freedoms or interfering with the essential conditions of the exercise of national sovereignty, it may be transposed into domestic law only after a revision of the Constitution.

The Conseil d'Etat's opinion then examines in detail the FD. It mentions six areas where no constitutional issue arises, and one in which such an issue arises. The six areas are the following ones: the nationality of the person sought; the double criminality rule; amnesty; the statute of limitations; the right of asylum and the political aim of the extradition request.

a. Nationality of the Person Sought

The FD does not mention the nationality of the executing Member State of the person sought as one of the grounds for mandatory non-execution of the EAW listed in Article 3. As held in its November 1994[33] and July 4, 1996[34] opinions, the French practice of not extraditing nationals is not a constitutional principle. Neither the 1789 Declaration of the

26 Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, recital 5, last phrase.

27 "All sovereignty inheres in the Nation. No body or individual may exercise any powers other than those expressly emanating from the Nation."

28 "The French Republic, faithful to its traditions, shall observe the rules of public international law. France will not engage in any war of acquisition and will never use its forces against the liberty of other peoples."

29 "Subject to reciprocity, France will consent to such limitations of sovereignty as are necessary to the realization or the defense of peace."

30 Para 1: "National sovereignty belongs to the people, who shall exercise it through their representatives and by means of referendum".

31 Para 1: "Peace treaties, commercial treaties, treaties or agreements relating to international organizations, those that commit the finances of the State, those that modify provisions which are matters for statute, those relating to the status of persons and those that involve the cession, exchange or addition of territory may be ratified or approved only by virtue of an Act of Parliament."

32 "The Republic shall participate in the European Communities and in the European Union, constituted by States that have freely chosen, by virtue of the treaties establishing them, to exercise in common some of their powers."

33 See supra n. 24.

34 Opinion on the Council of Europe Agreement relating to the unlawful maritime trafficking, implementing Art. 17 of the UN Convention against unlawful trafficking of narcotics, in Conseil d'Etat, *Rapport public 1996*, Etudes et documents, n° 48, La Documentation française, Paris, 1997, p. 288, see p. 289.

b. Double Criminality

Offenses leading to the use of the EAW are enumerated in the form of 32 categories in Article 2-2 of the FD. Some of them are very generally worded.[35] If usual extradition criteria were applied, the FD would not meet the condition relating to double crimilinality. However, the latter is not a constitutional principle. But, the opinion adds, the necessity for the issuing State to establish that the offence for which an arrest warrant has been issued is punished under its domestic law, is a constitutional principle. The ground here is Article 66 of the Constitution.[36] The rationale is to prevent that the restriction of individual freedom entailed by the execution of an EAW does not have an arbitrary character.

The FD complies with this principle. It allows the executing State to check that the offence mentioned by the issuing State is punished, by the law of that State, by a custodial sentence or a detention order in accordance with the thresholds mentioned in the FD.

In addition, under Article 2-3 of the FD the limitative list of offenses contained in Article 2-2, for which the double criminality principle is excluded, may be extended only by a decision of the Council acting unanimously. Consequently there is no interference with the essential conditions of the exercice of national sovereignty.

c. Amnesty

Under Article 3 of the FD, non-execution of the EAW is mandatory "if the offense on which the arrest warrant is based is covered by amnesty in the executing Member State, where that State had jurisdiction to prosecute the offense under its own criminal law". This is consistent, the Conseil d'Etat held, with Parliament's will when it passes an amnesty statute and does not interfere with the essential conditions of exercise of the national sovereignty.

d. Statute of Limitations

Under Art. 4-4 of the FD "the executing judicial authority may refuse to execute the EAW... when 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". The same remark relating to the essential conditions of exercise of national sovereignty applies.

35 Ex: "racism and xenophobia", or "sabotage" (my remark).

36 "No one shall be arbitrarily detained. The judicial authority, guardian of individual liberty, shall ensure the observance of this principle as provided by statute."

This right, constitutionally guaranteed, forbids that a person entitled to it be surrendered to a State where he could fear with reason to be persecuted on the ground, inter alia, of his political opinions. Supposing that this could be the case in relations between Member States, the FD is compatible with the constitutional provisions on asylum, in view of its Article 1-3: "This Framework Decision shall not have the effect of modifying the obligation to respect fundamental rights and fundamental legal principles as enshrined in Article 6 of the Treaty on European Union". This is very strange language: why on earth is it suddenly necessary to affirm, in a Framework Decision, that it does not modify the obligation for all Member States and EU institutions, to respect the TEU and especially the fundamental rights and legal principles mentioned in its Article 6? Besides, according to recital 12 of the the FD: "Nothing in this FD may be interpreted in prohibiting refusal to surrender a person for whom an EAW has been issued when there are reasons to believe, on the basis of objective elements, that the said warrant has 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 opinion... or that that person's position may be prejudiced for any of these reasons."

f. Political Aim of a Surrender Request

The principle according to which the State must refuse extradition when it is requested with a political aim is a constitutional principle. The consequence of Article 1-3 of the FD, which repeats the substance of Article 3-2 of the 1957 European extradition convention, is that the executing State may refuse to surrender a person if it has reasons to believe that the request has been issued for a political aim. Conclusion: the Conseil d'Etat held that the statute transposing the FD should contain a provision according to which the French judicial authorities must refuse to surrender a person when the warrant has beern issued for a political aim.

A constitutional issue arises in relation with the constitutional principle, affirmed in the 1995 opinion mentioned supra, under which the State must reserve the possibility to refuse extradition for offences it considers political. Articles 3 and 4 of the FD on grounds for mandatory and optional non-execution of the EAW do not mention the political nature of the offence. It is true that, as a consequence of Articles 1-3 of the FD combined with Article 6 TEU, that the FD cannot be regarded as interfering with the fundamental rights "as guaranteed by the ECHR... as they result from the constitutional traditions common to the Member States, as general principles of Community law". The opinion notes that the Italian and Spanish Constitutions prohibit extradition when the offence is a political one, and that other States (Germany, Portugal, Greece, Finland) recognize the right of asylum or prohibit extradition when there is no guarantee of an impartial tribunal in the requesting State. Besides, the 1957 European convention on extradition forbids extradition when the offence is a political one. All these elements do not allow to affirm that Community law includes such a general principle, which would bind the Member States as a rule of inter-

pretation of the FD in a way guaranteeing the respect of the constitutional principle mentioned supra.

Conclusion: the transposition of the FD into French law may not take place without a prior revision of the Constitution.[37]

Eight months later, the Prime Minister again asked the Conseil d'Etat's opinion on another matter, also related to EU law and extradition, i.e. legal issues raised by two draft agreements between the EU and the USA, one on extradition, the other one on judicial cooperation (the two agreements were signed on June 25, 2003). It is therefore pertinent to analyse the Conseil d'Etat's opinion, which is another apt illlustration of the scope of such examinations. It can be summed up as follows:

- Under Article 24 TEU the Council may be empowered to negociate and conclude agreements which shall bind the Union's institutions and the Member States.
- The aim of Article 24-5 TEU[38] is to allow a State to respect its substantial constitutional rules.
- When such agreements are concluded on the basis of Article 24 TEU and not on that of a Recommendation aopted on the basis of Article 34-2, its ratification does not have to be authorized by Parliament according to Article 53 of the Constitution.
- Such draft agreements must be communicated to Parliament under the procedure mentioned in Article 88-4 of the Constitution.
- If there is an incompatibility between such a draft agreement and rights or liberties constitutionally protected, the Governement must invoke Article 24-5 TEU.
- The combination of the draft agreements with other international conventions must take place according to their respective contents and to the rules of customary international law as codified by the 1969 Vienna convention on the law of treaties.
- The opinion then analyses in detail the contents of the two draft agreements and especially that of their Articles 3, 17 and 14 determining how they combine with bilateral conventions with the same object concluded previously by Member States.
- On constitutional principles the opinion mentions two rules contained in two ratified treaties: the 1996 Franco-American extradition convention and the 1998 judicial cooperation treaty between the two States. The first rule is the possibility for the Government to refuse extradition if the offense is a political one. The second one is the obligation to refuse it when the aim of the request is a political one. The opinion also mentions the rights of defence which, according to the Conseil constitutionnel's case law, include a fair procedure and the equality between parties, as well as an impartial tribunal. They also imply that a person tried and sentenced *in absentia* must be able to obtain a new hearing in his presence upon return, unless it is unequivocally established that he has given up his right to be present and present his defence.

37 Opinion of September 26, 2002, in Conseil d'Etat, *Rapport public 2003*, Etudes et documents, n° 54, La Documentation française, Paris, 2003, p. 192; see A. Ondoua, "L'ordre constitutionnel français à l'épreuve de la décision-cadre du 13 juin 2002 sur le mandat d'arrêt européen", *AJDA*, July 28, 2003, p. 1368.

38 "No agreement shall be binding on a Member State whose representative in the Council states that it has to comply with the requirements of its own constitutional procedures. The other members of the Council may agree that the agreement may nevertheless apply provisionnally."

- Article 16-2 of the draft agreement on extradition mentioned the situation in which the "constitutional principles of the requested State could be an obstacle to its obligation to extradite". This, the Conseil d'Etat held, can be construed as authorizing the State to refuse an extradition in situations in which the guarantee of the person sought to present his defense before an impartial tribunal would not be assured. To suppress any ambiguity on this point the Conseil d'Etat suggested to add to the draft an explicit reference to the "fundamental principles " mentioned in Article 6- 2 TEU.
- Besides, the opinion added, the fact that the draft agreements may be interpreted as not containing clauses contrary to rules of constitutional value and to other international commitments of France cannot prevent the Government from invoking them during the *in concreto* examination of an American request of extradition or of judicial cooperation, a transparent allusion to what was currently taking place on the other side of the Atlantic.[39]

B. *The Revision of the Constitution*

Here again the Conseil d'Etat was consulted, as is compulsory for all Government's bills under Article 39 of the Constitution, before the bill is adopted by the Government and sent to Parliament. The draft bill and the way the revision took place will be examined in turn.

1. The Draft Bill

The draft bill sent by the Government to the Conseil d'Etat had an extremely wide scope. It added the following Article 88-5 to the Constitution: "Under the conditions stated by acts and conventions taken on the basis of the TEU of February 7, 1998, the recognition and the implementation of civil and criminal decisions taken by the judicial authorities of the Member States or under their control are authorized." The rationale of such a wording was to go beyond what was needed to transpose the FD, in order to avoid the necessity of another revision of the Constituition if future instruments of judicial cooperation contained clauses inconsistent with it. In its statement the Government tried to minimize the scope of the bill. It applied, it said, only to judicial decisions. The text mentioned decisions taken by the "judicial authorities" of the Member States, which include those in charge of prosecution. It added that in view of the contents of Article 6 TEU the acts and conventions taken on the basis of the treaty would not raise issues relating to fundamental rights.

The Conseil d'Etat was not persuaded and rejected such an unprecedented innovation, which could be regarded as a kind of blank cheque. It held that if in the future new instruments of judicial cooperation inside the EU raised constitutional issues, especially in relation with rights and freedoms constitutionally guaranteed, domestic authorities and, in the last resort, those responsible for the revision of the Constitution, would conserve their

39 Text of the opinion in Conseil d'Etat, *Rapport public 2004*, Etudes et documents, n° 55, La Documentation française, Paris, 2004, p. 180.

jurisdiction, that is, the possibility to evaluate future innovations. This applied especially to criminal matters.[40]

2. The Revision of the Constitution

Under the French Constitution the bill revising the Constitution must be adopted in the same terms by the National Assembly and the Senate and then by both bodies sitting together (*le Congrès*), where a 3/5 majority of the votes is needed, unless the President of the Republic decides that there will be a referendum.[41] Several observations are in order.

- The Government followed the Conseil d'Etat's opinion. The text adopted reads: "The statute determines the rules relating to the EAW in implementation of the acts taken on the basis of TEU". The National Assembly Committee Report found such a wording "prudent" and to be preferred to the constitutionalisation of the principle of mutual recognition of judicial decisions.
- During the Committee's deliberations some members found it strange that the Conseil d'Etat, the supreme court for administrative law, had affirmed constitutional principles not recognized by the Conseil constitutionnel,[42] which showed a misunderstanding of the consultative functions of that body, mentioned supra. The Conseil d'Etat's opinion was added as an annex to both the National Assembly's and the Senate's Committee Reports.[43]
- Both Reports regretted that the Conseil d'Etat had not been consulted by the Government during the negotiations leading to the adoption of the FD and suggested that in the future such a consultation should take place.[44]
- The Senate Committee's Report went further: for the first time, it said, Parliament, responsible for the revision of the Constitution, is doing so without having ever been previously informed, during the negociations, of the existence of a "risk of unconstitutionality".[45]
- This revision of the Constitution, Parliament remarked, was the first one caused not by the ratification of a treaty but by secondary EU legislation.

40 See Conseil d'Etat, *Rapport public 2003*, *loc. cit.*, p. 61.

41 *Ibid.*

42 See Assemblée nationale, Commission des lois, compte-rendu n°14, December 11, 2002; AN, n° 463, Rapport fait au nom de la commission des lois par M. X. de Roux, December 11, 2002.

43 See Sénat, n°126, Rapport fait au nom de la commission des lois par M. Fauchon,January 15, 2003.

44 Either by a Government request or under the procedure prescribed by Art. 88-4 of the Constitution. On the latter see the Prime Minister's circular of December 13, 1999, *Journal officiel*, December 17, 1999, p. 18800. The National Assembly Committee Report noted that the Conseil d'Etat had in fact, when it was shown the draft proposal, drawn the attention of the Government to its importance and its particularly delicate character in relation with the traditional principles of extradition law.

45 Senate Committee Report, p. 33. The same remark is expressed in AN, N° 469, December 11, 2002, Rapport d'information de la Délégation de l'Assemblée nationale pour l'Union européenne, par M. P. Lequiller, p. 13.

II. The Transposition of the FD into Legislation

The Government did not introduce in Parliament a special bill to this effect. During the discussion of a bill on criminal law and criminal procedure in the Senate, it accepted, in fact suggested, in March 2003, a parliamentary amendment transposing the FD into statutory law. The final result was the statute of March 9, 2004.[46] The contents of the FD are to be found now in Art. 695-11 to 695-51 of the CPP.[47]

Seven points will be commented: transitional provisions; the scope of the EAW; time limits for the decision to execute it; the case of nationals; the transposition of recital 12; the humanitarian clause; grounds for mandatory non execution of the EAW.

a. Transitional Provisions

In accordance with Article 32 of the FD, France made a declaration according to which, as an executing Member State, it will continue to deal with requests relating to acts committed before November 1, 1993 (date of the entry into force of the Maastricht Treaty) in accordance with the extradition system applicable before January 1, 2004, i.e. with ordinary extradition law.

b. Scope of the EAW

The list of offences contained in Article 2-2 of the FD is reproduced in Art. 695-23 CPP. The only difference is that "*racket et extorsion de fonds*" have become "extorsion". Replying to the Commission's Report[48] the French Government said that the term "*racket*" had been deleted from the text during the parliamentary debate for the following reasons. The first is a linguistic one: the word does not exist in French (which invites a query: who has authority to say that a word exists or does not exist in French? Is there one? I do not think so). Besides, any reader of the *Petit Larousse* will find "racket" in it). What is true is that it does not exist in French penal law. The only term which comes close to it is "extorsion". To transpose a meaningless word into French law would have been pointless. Hence the second reason, a legal one: in French law the crime of "extorsion" covers, in addition to the acquisition of money by violence, threat of violence or coercion, the acquisition by means of signature, undertaking, relinquishment, disclosure of a secret or the handing over of shares or assets of any kind (see Art. 312-1 of the Penal Code, hereafter: CP). Consequently the

46 Statute n° 2004-204, *Journal officiel*, March 10, 2004.

4747 See J. Pradel, "Le mandat d'arrêt européen, un premier pas vers une révolution copernicienne dans le droit français de l'extradition", D. 2004, 1392 and 1462; L. de Gentili-Picard, "La mise en œuvre du mandat d'arrêt européen en France", *JCP* 2004, I.168; V. Malabat, "Observations sur la nature du mandat d'arrêt européen", *Droit pénal*, December 2004, p. 6; L. Rinuy, "Mandat d'arrêt européen", in *Répertoire pénal Dalloz*, 2004; M.Masse, "L'entraide judiciaire internationale, version française", *Revue de science criminelle*, 2004,pp. 470 and 978; A. Huet and R. Koering-Joulin, *op.cit.*; I. Jégouzo, "Le mandat d'arrêt européen, premier pas vers un espace judiciaire européen en matière pénale", *Revue des affaires européennes*, March 2005; S.Lainé, Le mandat d'arrêt européen. Présentation et aspects pratiques, *Actualité juridique-pénal*, 2006, n° 1 p. 9.

48 COM (2005) 63 final. See Annex 1, pp. 6-7.

French word "extorsion" encompasses both extortion of money and racketeering.[49] The French delegation rightly considered that the reproach of creating "the risk of reintroducing... a check on double criminality"[50] was unfounded.[51]

c. Time Limits for the Decision to Execute an EAW

They are stated in Article 17 of the FD:

- within 10 days after consent has been given by the person sought, if this be the case (Art. 17-2);
- in other cases the final decision must be taken within a period of 60 days after the arrest of the requested person (Art. 17-3);
- when this is not possible the time limit may be extended for a further 30 days.The executing judicial authority shall immediately inform the issuing judicial authority and give the reasons for the delay (Art. 17-4);
- when, in "exceptional circumstances", a Member State cannot observe these time limits, it shall inform Eurojust and give the reasons (Art. 17-7);
- under Article 695-43, para. 2 CPP: "When, in exceptional circumstances, including a decision of the Cour de cassation quashing the judgment of the court of appeal and remanding the case (to another court of appeal), the final decision has not been taken within the 90 days following the arrest of the requested person, the general prosecutor (there is one in each court of appeal) informs the Minister of Justice, who informs Eurojust, giving the reasons. The court of appeal to which the case is remanded must decide it within 30 days following the decision of the Cour de cassation".

The Commission was somewhat unhappy with such a provision. It declared in its Report that France considered an appeal in "cassation" as an exceptional case. Not so. There seems to have been a misunderstanding here. In French law, as the French Delegation rightly remarked in its reply, a domestic appeal, including that to the Cour de cassation, is not in itself an exceptional circumstance. What Article 695-43 CPP mentions was the situation in which the Cour de cassatiion, after quashing the judgment of the court of appeal, remands the case to another court of appeal, instead of deciding it itself, which it is empowered to do. This necessarily involves a supplementary delay. The Delegation also pointed out that in almost all cases EAW procedures led to decisions within the 60 days following the arrest of the person sought.

d. The Case of Nationals

The FD decision allows the surrender of nationals or, more precisely, does not include the fact that the requested person is a national pf the executing State in the grounds for mandatory non execution of the EAW stated in Article 3. France has fully transposed two clauses of the FD relating to nationals: Articles 4-6 and 5-3.

Under Article 4-6 the executing judicial authority may refuse to execute the EAW if it "has been issued for the purposes of execution of a custodial sentence or detention order when the requested person is... a national... of the executing Member State and that State undertakes to execute the sentence or detention order in accordance with its domestic law". Article 695-24-2° CPP transposes this provision.

Article 5 relates to the guarantees to be given by the issuing Member State in particular cases. Under Article 5-3: "Where a person who is the subject of a European arrest warrant for the purposes of prosecution is a national or resident of the executing Member State, surrender may be subject to the condition that the person, after being heard, is returned to the executing Member State in order to serve there the custodial sentence or detention order passed against him in the issuing Member State". This clause has been transposed by Article 695-32-2° CPP with one difference: the word "resident" has been omitted.

e. Recital 12 of the FD

The Government followed the opinion of the Conseil d'Etat mentioned supra and transposed the recital. Hence Article 696-22-5° CPP, which transforms the faculty contained in the recital into an obligation.

f. Humanitarian Clause

Under Article 695-38 CPP the court of appeal may, after deciding on the execution of the EAW, stay the surrender of the requested person on humanitarian grounds, in particular if it may have for him grave consequences, especially for reasons of age or health. In such a case the general prosecutor informs the issuing authority and they agree on another date of surrender. The person must be surrendered within the 10 days following that date.

g. Grounds for Mandatory Non-Execution of the EAW

Article 3-1 FD has been transposed by Article 695-22-1° CPP; Article 3-2 by Article 695-22-2° CPP. In addition this Article states that a final judgment in a third State shall also be a bar to the execution of a EAW. Article 3-3 has been transposed by Article 695-22-3° CPP: the EAW may not be executed if the person was under 13 at the time of the facts.[52] The ground for optional non-execution of an EAW stated in Article 4-4 ("where the criminal prosecution or punishment of the requested person is statute-barred according to the law of the executing Member State and the facts fall within the jurisdiction of that Member State under its own criminal law"), has been transformed into a compulsory one by Article 695-22-4° CPP.

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49 *Comments by the French Delegation*, in Council of the EU, 11528/05, September 2, 2005 (Comments of the Member States), pp. 39-40.

50 COPEN 42, p. 3; annex doc., Art. 2, pp. 6-7.

51 *Comments...*, *loc.cit.*, p. 40.

52 Minors under 13 may not be sentenced to imprisonment. For minors over 10 a juvenile court may order a number of educational measures enumerated in Article 15-10 of the statute of February 2, 1945. Those over 13 may be subjected to another set of measures (see Art. 16).

was referred to the Conseil constitutionnel. The decision of the latter does not mention the provisions relating to the EAW or to extradition in general, which means that the applicants did not raise any constitutional issues about them and that the Conseil constitutionnel did not find them inconsistent with the Constitution.[53]

PART III
IMPLEMENTING THE EAW: 2004–2005

The EAW has brought immediate and profound changes: extradition proceedings are simpler and quicker when the EAW applies. Surrender is decided by the court of appeal, and not by the Prime Minister.The decision to ask a foreign country to surrender a person is taken by the State prosecutor, and not by the Government. The court of appeal's decision is reviewed by the Cour de cassation. Since there is no more an administrative decision, the Conseil d'Etat has no jurisdiction.

Statistics

33% of the EAW issued by French judicial authorities or executed by them related to persons sought for the implementation of penalties, and 67% to persons sought for the implementation of criminal penalties. As of December 31, 2005, French judicial authorities have surrendered 573 persons and obtained the surrender of 515 ones. Between March 2004 and December 31, 2005 the Cour de cassation (Criminal Chamber) decided 82 cases relating to the EAW. 75 were appeals by the individuals sought, 5 were appeals from the General prosecutor of the court of appeal. More than half of the applications (48) were rejected as inadmissible; 28 were rejected on substance. In 6 cases the Cour de cassation quashed, totally or partially, the decision of the court of appeal. According to a recent study half of the persons whose surrender is sought accept it. In these cases there is no appeal. The percentage of the surrender decisions challenged before the Cour de cassation is 2,5%.[54]

The following points will now be commented: application of the FD in time; territorial application; EAW and the Schengen Information System; scope of the Cour de cassation's review of courts of appeal's decisions; contents of the EAW; EAW and the European Convention on Human Rights; time limits.

I. Application of the FD in Time

Three issues will be considered.

53 Decision n° 2004-492 DC of March 2, 2004.
54 P. Lemoine, *loc. cit.*, p 14.

ately to offences committed before their entry into force:

- Statutes relating to jurisdiction and judicial organisation, until a first instance court has decided on substance.
- Statutes relating to the procedure and forms of prosecution.
- Statutes relating to the rules concerning the execution and application of penalties. However, when these statutes lead to a greater severity of the penalties inflicted, they apply only to sentences relating to facts committed after their entry into force (Art. 112-2-3° CP).
- As long as the statute of limitations does not apply, statutes relating to it.

The Cour de cassation held that the 2004 statute implementing the FD did not relate to the rules concerning the execution and application of penalties. It therefore applies to all facts committed from November 1, 1993 on.[55]

2. Since the rules relating to the EAW apply immediately, the Cour de cassation also held that the surrender, under it, of a person wanted for an offence for which extradition proceedings started by the issuing State before March 12, 2004 (date at which the statute entered into force) and not terminated was lawful.[56]
3. Another issue arose. S., a French national, had been sentenced by a Belgian criminal court in 1996 for a number of offences committed both before and after November 1, 1993. The court of appeal held that since a) the sentence was "indivisible", b) some of the offences had been committed before 1993, and c) it was impossible to apply cumulatively ordinary extradition rules to offences committed before 1993 and EAW's ones to those committed after that date (S. was French), the only answer was to refuse to execute the EAW. The Cour de cassation disagreed: as long as one of the offences had been committed after the date mentioned supra, the execution of the EAW should not have been refused.[57]

II. Territorial Application of the EAW

Under Article 695-24-3° CPP the execution of the EAW may be refused if it relates to facts committed, in whole or in part,on French territory (see Art. 4-7a) FD. The facts of the three cases decided by the Cour de cassation on July 8, 2004, were as follows: On April 12, 2004, Judge Garzon Real, investigating magistrate of the Audiencia Nacional in Madrid,

55 Cass. crim, August 5, 2004, n° 04-84-529, *Bull.*, n°186, p. 679; *idem*, November 23, 2004, n° 04-86-131, Bull. n° 293, p. 1099; *Bulletin d'actualité-Lamy Droit pénal des affaires*, n° 35, January 2005, n° 4078, p. 9. See also Cour de cassation, *Rapport annuel 2004*, La vérité, La Documentation française, Paris, 2005, p. 409. I wish to express my thanks to Mme Lazerges, auditeur at the Cour de cassation and member of the Service de documentation et d'études, for kindly making available to me the relevant case law.
56 Cass. crim., November 23, 2004, mentioned supra n. 54; *idem*, March 15, 2005, n° 05-81.107; *Bull.* n° 88, p. 315; D. 2005, I.R. 917, note Girault.
57 Cass.crim., September 21, 2004; *Bull.* n° 217, p. 774; *Bulletin d'actualité-Lamy Droit pénal des affaires*, n° 32, October 2004, p. 7. See two similar decisions of the Conseil d'Etat relating to extradition law: June 7, 1985, *Reemakers*, p. 177; *JCP* 1986, II.20528, concl. Latournerie, note Jeandidier; D. 1986, S. 13, note Waquet and Julien-Laferrière; February 27, 1987, Trincanato, p. 83; *RFDA* 1987, 601, concl. Bonichot.

issued an EAW relating to a warrant for arrest signed by him on March 11, 2004. The offence was "integration in a terrorist organization", a crime under Spanish law. According to the warrant the three persons participated in a criminal terrorist organization as "spokesmen" of a named organization since 2001. This body called to acts and mobilizations the aim of which was to trouble gravely public order, accompanied by agressions against the police and damages to private property. It was a part of the ETA, the Basque terrorist organization. The three named persons had organized action in Spain and in France in favour of this body. The Paris court of appeal based its judgment refusing the execution of the warrant on three grounds:

- The "nature of the facts", suggesting that they might not be offences under French law. This was wrong, since the offence was among those listed in Article 2-2 FD, for which the double criminality condition does not exist.
- The individuals were French nationals. This alone could not be the basis of a refusal.
- The facts had been partly committed on French territory, which was a ground for optional refusal to execute the EAW under Article 4-7 a) FD and Article 695-24-3° CPP.

The fact that the FD mentions "offences" and the French statute "facts" is irrelevant. Under Article 696-24-3° CPP the one condition to be fulfilled to justify a refusal to execute the warrant is the existence of territorial jurisdiction of the executing State, and not the fact that the acts are an offence under domestic law, or the obligation of the executing State to prosecute.[58] In other words, the Cour de cassation held that the court of appeal was entitled, on the sole ground that the acts had been committed in part in France, to refuse the execution of the warrant.[59]

III. EAW and the Schengen Information System

Under Article 9-2 FD the issuing judicial authority may decide to issue an alert for the requested person in the Schengen Information System (hereafter: SIS). Such an alert must be effcted in accordance with the provisions of Article 95 of the 1990 Convention. Under the second sentenceof Article 9-3, para. 1 "An alert in the SIS shall be the equivalent to an EAW accompanied by the information set out in Article 8(1)". This was transposed by Article 695-15, para. 3 CPP. The case decided by the Cour de cassation in October 2004 was the following one: on June 22, 2004, an investigating magistrate from Luxembourg issued an international arrest warrant against L., a Yugoslav national. The information contained in it was circulated through the SIS on July 1. On August 20, he was arrested in France. On August 24-25 the State prosecutor received the copy of an EAW dated August 24, containing the information that was in the international arrest warrant of of June 22. Before the court of appeal L. declared that he consented to his surrender. The court held that it had, even in such a case, to check the existence of the legal conditions of execution

58 See, a contrario, Art. 695-24, 1°, 2° and 4° CPP.

59 Cass.crim., July 8, 2004, n° 04-83-662, 663 and 664; Gaz.Pal., August 6-7, 2004, p. 25; *Bull.* n° 181, p. 662; *Bulletin d'actualité-Lamy Droit pénal des affaires*, n° 31, September 2004.

of the EAW stated in Article 695-26 CPP. This was not the case, it added, since there had been no EAW before the mention of it in the SIS and before L.'s arrest. The court of appeal refused the execution of the EAW.The Cour de cassation held this was wrong since, under under Article 695-13, para. 3 CPP, an alert issued in the SIS is the equivalent of an EAW and since the international arrest warrrant contained all the pertinent information.[60]

IV. Scope of Review by the *Cour de cassation*, of the Decisions of Courts of Appeal

The court of appeal must check that the issuing authority has based the EAW on one of the 32 categories of offences enumerated in Article 695-23 CPP, which transposes Article 2-2 FD, that the offences are punished, under domestic law of the issuing State, by a penalty higher than the threshold mentioned in Article 2-2 FD and that none of the mandatory or optional grounds not to execute the warrant exists. When the person has been sentenced *in absentia*, he must, under Article 6 ECHR, be tried again upon his return.[61] Under Article 695-32-1° CPP the execution of the EAW may be subordinated to the checking that the requested person may appeal the judgment given *in absentia* and be tried in his presence, when he has not been personally called nor informed of the date and place of the trial.

In 2005 the Cour de cassation quashed a judgment of a court of appeal which merely mentioned that the requested person, tried and sentenced *in absentia*, could appeal the judgment. This, the Court held, does not allow (us) to check whether the domestic judgment was a final one.[62] The Cour de cassation also quashed a judgment of a court of appeal which did not contain sufficient information on all the offences mentioned in the EAW, in order to check that Article 2-2 of the FD applied (absence of the condition of double criminality). Having quashed the judgment, the Cour de cassation decided, as it is empowered to do,[63] to decide on substance. It held that some of the offences of which S., a British subject, was accused, were not listed in Article 695-23, paras 2 to 34 CPP (Art. 2-2 FD) and were not offences in French law. The surrender was granted only for fraud.[64]

The court of appeal is not empowered to check the validity, on substance ("*le bien-fondé*") of the prosecution directed by the issuing State against the requested person.[65]

One case relates to the nature of the 60 supra penalty. Under Article 1-1 of the FD one of the purposes of the EAW is the execution of two kinds of penalties: a custodial sentence or a detention order. The French translation of the former is "*peine privative de liberté*". That of the latter is "*mesure de sûreté privative de liberté*". The problem is that such a thing does not exist in French criminal law. In 2005 the courts had to decide on a case re-

60 Cass. Crim., October 5, 2004, n° 04-85-385; *Bull.* N°232, p. 833; *Bulletin d'actualité Lamy-Droit pénal des affaires*, n° 33, November 2004, n° 3820; Cour de Cassation, *Rapport annuel 2004, op.cit.*, p. 409; see also Cass.crim., February 1, 2005, n° 04-87-787; *Bull.* n° 36, p. 106; idem, April 19, 2005, n° 05-81-677.

61 Cass. crim., May 26, 2004, n° 04-82-795; *Bull.*, n° 119, p. 528. This was the first decision of the Cour de cassation relating to the EAW.

62 Cass. crim., October 26, 2005, n° 05-85-847.

63 Code de l'organisation judiciaire, Art. L.131-5.

64 Cass. crim., September 14, 2005, n° 05-84-999.

65 Cass. crim., April 19, 2005, mentioned at n. 60 *supra*.

lating to a Swedish national declared irresponsible by a Swedish criminal court and ordered to it to be sent into a psychiatric hospital. The decision was to be reviewed every 6 months. The court of appeal authorized his surrender. Its decision was upheld by the Cour de cassation. This means that both courts did not consider such a detention to be contrary to "*ordre public*", as long as it was decided by a court.[66]

V. Contents of the EAW

Under Article 8-1-) to g) FD, transposed by Article 695-13 CPP, the EAW must contain specified information.[67] The Cour de cassation held that these provisions do not mean that the original or a certified copy of the judgment sentencing the requested person must be sent. An indication of the existence of an enforceable judgment is enough.[68]

The contents of the EAW on the facts may be supplemented by information requested by the court of appeal, under Article 695-33 CPP. Several decisions of the Cour de cassation relate to the information requested under Article 8-1: description of the circumstances in which the offence was committed, including the time, place and degree of participation by the requested person.[69]

VI. EAW and ECHR

Under recital 12 of the FD, first sentence, the latter "respects fundamental rights and observes the principles recognized by Article 6 of the Treaty on European Union and reflected in the Charter of fundamental rights of the EU". Notwithstanding such an affirmation, two questions may be asked: Do some provisions of the FD or of the French statute transposing it, raise issues in relation with the ECHR? If so, what can be the attitude of the courts?

1. Several Decisions of the Cour de Cassation mention Issues relating to the ECHR

a. Article 6

The Belgian authorities had issued an EAW against F. for the execution of a prison sentence decided *in absentia*. In France F. was indicted for another offence. After being jailed pending trial, he had been freed but forbidden to leave French territory. The court of appeal authorized the execution of the arrest warrant for one year but postponed it in view of the proceedings against him in France. The Cour de cassation held that the prohibition to leave France, ordered by the investigating magistrate, could not be an obstacle to the execution of the EAW. It also held that the temporary surrender of F. to the Belgian authorities would not infringe his rights of defence before the French courts. Only his lawyer was allowed to see the file. The investigation was over. In addition the Belgian authorities had undertaken to send him back to the investigating magistrate in case of need. In these circumstances, the Cour de cassation held, the court of appeal has not infringed Article 6 ECHR.[70]

b. Article 7

In one case the requested person affirmed that the execution of the EAW would be contrary to that Article. The Cour de cassation held that since provisions relating to the EAW were not statutes concerning the rules of execution or of implementation of penalties within the meaning of Article 112-3° CPP, the argument was groundless.[71]

If and when a serious issue relating to a right guaranteed by the ECHR arise, it seems that the best course for the court (the court of appeal or the Cour de cassation) would be to refer the case to the ECJ.

VII. Time Limits

Article 17 FD and Article 695-43 CPP set up time limits for the decision to execute an EAW. They are silent on the possible legal consequences of the failure to comply with them, which means, *prima facie*, that there are none. A court of appeal had decided otherwise. The limit of 60 days following the arrest of the requested person had not been respected. The court decided that there was no case any more and lifted the limitations of the freedom of movement of the requested person. The Cour de cassation quashed the judgment for the reason mentioned supra.[72]

The same rules applies to the time limit of 6 days set up by Article 695-26 CPP for the reception of the certified copy of the EAW.[73]

Such a review of extradition proceedings is a rather new exercise for the Cour de cassation, in view of the division of jurisdiction with the Conseil d'Etat since the mid-1980s, mentioned supra. It has now exclusive jurisdiction on EAW cases, since the decision to execute or not to execute an EAW is taken by the court of appeal. Its review of the latter's decisions has been a full and very attentive one, both on procedure and on substance. The

66 P. Lemoine, *op.cit.*

67 Art. 695-13 CPP does not reproduce Art. 8-1 g) FD: "... if possible other consequences of the offence". Rightly so. What can be the meaning of such a query? What can be known about it at the time of the issuing of the EAW? And, finally, does everything have to be written in an FD, or other EU legislation? I do not think so.

68 Cass. crim., November 24, 2004, n° 04-86-314; *Bull.*, n° 299, p. 1119; *Bulletin d'actualité-Lamy Droit pénal des affaires*, n° 36, February 2005, n° 4082; Cour de cassation, *Rapport annuel 2004, op.cit.*, p. 409.

69 Cass. crim., March 30, 2005, n° 05681-221; *Bull.*, n° 108, p. 373; idem, March 31, 2005, n° 05-81-260; *Bull.* n° 115, p. 401.

70 Cass crim., December 14, 2004, n° 04-86-955; *Bull.* N°317, p. 1198.

71 Cass. crim., November 23, 2004, n° 04-86-131; *Bull.* n° 293, p. 1099; *Bulletin d'actualité-Lamy Droit pénal des affaires*, n° 35, January 2005, p. 9, n° 4078, 4080.

72 Cass. Crim., September 9, 2005, n° 05-84-551.

73 Cass.crim., September 1, 2004, n° 04-84-987; *Bull.* n° 192; see Cour de cassation, *Rapport annuel 2000, op.cit.*, p. 409.

main guiding ideas seem to give its full effect to the FD while, at the same time, protecting the rights of the individual and the juridisction of domestic judicial authorities whenever it exists under the FD.[74] No case has been, to this day, referred to the ECJ. The 27 cases decided as of November 1, 2005, by the Cour de cassation relate to EAW issued by Belgium (11), Spain (8), Germany (2) and Hungary, Luxembourg, Poland, Sweden, Britain and Portugal (one each).

74 For a study of the cases decided in 2004 by the Cour de cassation, see D. Commaret's comments in "Procédure pénale. Le mandat d'arrêt européen", *Rev. sc. crim.* 2005, at 326; for an analysis of the case law of 2004–2005 see P. Lemoine, *loc. Cit.*