



ATTENTION: This version of the commentary is an automatically generated machine translation of the original. The original commentary is in French. The translation was done with www.deepl.com. Only the original version is authoritative. The translated form of the commentary cannot be cited.

COMMENTARY ON

Art. 47 IMAC

A commentary by Olivier Peter

Edited by Maria Ludwiczak Glassey / Lukas Staffler

SUGGESTED CITATION

Olivier Peter, Commentary of art. 47 IMAC, in: Maria Ludwiczak Glassey/Lukas Staffler (eds.), Online Commentary of the Federal Act on International Mutual Assistance in Criminal Matters

Short citation: OK-Peter, art. 47 IMAC N. XXX.

Section 3 Detention awaiting Extradition and Seizure

Art. 47 Arrest warrant and other rulings

¹ The FOJ shall issue an arrest warrant with a view to extradition. It may decline to do so, especially if the defendant:

- a. will probably not elude extradition and will not endanger the criminal investigation; or
- b. can prove without delay that he was not at the place of the offence when it was committed.

² If the defendant is unfit to remain in detention or if there are other valid reasons, the FOJ may order measures other than detention to ensure his presence.

³ At the same time the FOJ shall rule on which objects and assets will remain seized or must be seized.

CONTENT

I. General	3
II. Conditions	3
A. Extradition request not manifestly inadmissible	3
B. Risk of absconding or obstructing the investigation (Art. 47 para. 1 a IMAC)	4
C. Lack of alibi (Art. 47 para. 1 b IMAC)	4
D. Fitness to be imprisoned (Art. 47(2))	5
E. Ineffectiveness of alternative measures (Art. 47 para. 2 in fine IMAC)	6
III. Seizures (Art. 47 para. 3)	7
Bibliography	7

I. GENERAL

- 1 **Detention pending extradition** is a coercive measure under administrative law. Its main purpose is to ensure that the objectives of the extradition procedure are achieved and, indirectly, to support mutual legal assistance in foreign criminal proceedings.
- 2 The **arrest warrant** is issued by the FOJ. It follows the provisional arrest carried out by the police. The decision must be made within three working days of the arrest, failing which the provisional coercive measure must be lifted. The arrest warrant may be issued in advance by fax, email or telephone, but must be confirmed in writing within the aforementioned time limit. The decision must be notified to the person being prosecuted, whereupon the authority informs them of their rights and gives them the opportunity to state their reasons for opposing the arrest warrant and/or extradition.
- 3 According to case law, which has been adopted by legal doctrine, the imposition of a measure involving deprivation of liberty against the person who is the subject of an extradition request is “**the rule**” and this applies in principle throughout the proceedings. The freedom of the person concerned during the proceedings is the exception. The Federal Court justifies this interpretation by Switzerland's international obligations to ensure the surrender of the person to the requesting State. The conditions for ordering detention pending extradition are thus more flexible than those laid down by the legislature for ordering provisional detention in criminal proceedings. In the latter case, the legislature has expressly provided that the principle is that the accused “remains at liberty” and that detention is the exception.
- 4 However, the interpretation of the conditions for issuing an arrest warrant for extradition must respect the **right to personal liberty** guaranteed by the Federal Constitution and international law. Any interference with a person's liberty must be justified by a public interest and be proportionate to the aim pursued, which is also the case for the issuance of an arrest warrant in extradition proceedings. As the European Court of Human Rights has reiterated in a case concerning Switzerland, “pre-trial detention must appear to be the last resort, justified only when all other available options prove insufficient.” We are of the opinion that this principle also applies to extradition detention. The “more flexible” interpretation proposed by the Federal Court does not therefore exempt the authority from conducting a strict review of proportionality.

II. CONDITIONS

- 5 The FOJ may only issue an arrest warrant for extradition if the following **cumulative conditions** are met:
 - The authority has received an extradition request that is not manifestly inadmissible (2.1);
 - There is a risk of flight and/or obstruction of the investigation (2.2);
 - The person cannot provide an alibi without delay (2.3);
 - The person is fit to be detained (2.4) and
 - No alternative measures can significantly reduce the risk of flight and/or collusion (2.5).

A. Extradition request not manifestly inadmissible

- 6 An arrest warrant may be issued when the requesting State has submitted an extradition request including **sufficient information** on the identity of the person sought, as well as the facts and offenses alleged against them.

- 7 Even in the **absence of a formal warrant**, coercive measures may be ordered on a provisional basis if the requested State expressly requests this and indicates that it intends to submit an extradition request. Measures may also be taken ex officio by the FOJ if there is a risk of danger.
- 8 The information provided must show that the request is not **manifestly inadmissible or inappropriate**. In particular, the extradition request must not:
- relate to a Swiss national;
 - originate from a State that clearly does not have jurisdiction to prosecute the acts;
 - lead to prosecution by a special court or to the enforcement of a sentence imposed by such a court;
 - relate to an offense that is manifestly political, military, or fiscal in nature;
 - relate to penalties or acts that are clearly time-barred;
 - relate to acts that are manifestly not punishable under Swiss law;
 - relate to acts that are trivial and/or punishable by a sentence of less than one year.

B. Risk of absconding or obstructing the investigation (Art. 47 para. 1 a IMAC)

- 9 An arrest warrant may only be issued if there is a **risk** that the person will “abscond” or “obstruct (...) the investigation.” These terms correspond to the “risk of flight” and “risk of collusion” that may justify deprivation of liberty in criminal proceedings, although case law requires that these risks be accepted more broadly in order to issue an extradition detention order. The legislature has rightly not provided for the possibility of issuing an arrest warrant on the grounds of a risk of repetition.
- 10 In practice, it is the **risk of absconding** that is invoked to justify the issuance of an arrest warrant. The concept of “obstruction of the investigation” has not been developed in particular in doctrine and case law. In particular, it is unclear whether the legislature intended to justify the measure on the basis of the risk of obstruction of the administrative extradition proceedings or on the basis of the risk of collusion in any criminal proceedings that may be brought in the requesting State. In the latter case, the risk of obstruction could not be taken into account in relation to an extradition request for the enforcement of a sentence.
- 11 The risk of absconding must be **admitted restrictively** where the person has developed close and long-standing family and professional ties with Switzerland, in particular the length of residence and any close family ties with persons residing in the country. The FOJ must also take into account the type of offense alleged, the penalty threatened and the existence of a final conviction. Health problems that would prevent flight abroad must also be taken into account. Advanced age may be a factor reducing the likelihood of flight.
- 12 The legal text states that, in the **absence of a risk of flight or collusion**, the authority *may* refrain from issuing an arrest warrant. We are of the opinion that deprivation of liberty imposed on a person who does not intend to evade or obstruct proceedings would be a disproportionate measure and would therefore violate the right to personal freedom. In the absence of such risks, deprivation of liberty should be ruled out.

C. Lack of alibi (Art. 47 para. 1 b IMAC)

- 13 Extradition detention cannot be ordered if the person concerned can provide an **alibi**, which constitutes a ground for refusal of extradition. This is an exception to the principle that it is for the foreign courts of first instance to rule on the facts of the case and the guilt of the person prosecuted.

This rule is a general principle of extradition law. The aim is to spare a manifestly innocent person the rigors of criminal proceedings.

- 14 According to federal case law, the term “alibi” must be understood in its traditional **restrictive sense**, i.e., in its literal meaning. The person must prove that they were not at the place where the offense was committed at the time of the events, contrary to what is stated in the extradition request, even if their presence is a condition for the commission of the alleged offense and/or for the jurisdiction of the requesting State to prosecute.
- 15 However, an overly restrictive interpretation of the evidence of the unfounded nature of the alleged acts would be **incompatible** with the case law of the ECtHR, which considers that “the persistence of plausible reasons for suspecting the arrested person of having committed an offense is a *sine qua non* condition for the lawfulness of detention.”
- 16 Case law provides that, in order to prevent the issuance of a (future) arrest warrant, the alibi evidence must exclude participation in all of the offenses alleged in the (future) extradition request. This position should be qualified. A **partial alibi** may still have an impact on the seriousness of the alleged offenses and the possibility of ordering alternative measures.
- 17 It is up to the person concerned to **provide the evidence**, which is not, in principle, administered by the FOJ. The administration of essential evidence by the criminal authority is not excluded by the legislature and should be allowed in special circumstances. This is the case if the person subject to the arrest warrant claims that there is a risk of mistaken identity: the FOJ should then be able to request additional information from the requesting authority. The same applies if information proving that the charge in the extradition request is unfounded is already in the possession of a federal or cantonal authority.
- 18 The evidence must be **immediate and unequivocal**, for example by demonstrating that there has been a case of mistaken identity. Case law requires a high standard of proof for an alibi to be accepted, particularly with regard to the credibility of witnesses acting on behalf of the person sought.
- 19 The law and case law provide that evidence must be provided **without delay**, i.e. “on the spot” or immediately. An allegation accompanied by an announcement of future evidence is not sufficient to prevent the issuance of an arrest warrant. We consider that this position, based on long-standing case law (1983) and on the short time available to confirm provisional arrest, is ill-suited to the reality of proceedings in which the person subject to the measure needs time to organize their defense and gather relevant evidence, which often has to be obtained from abroad and may relate to past events. Alibi evidence may in any event be submitted subsequently, in the context of an application for release that may be made later in the proceedings.

D. Fitness to be imprisoned (Art. 47(2))

- 20 Deprivation of liberty in the context of extradition may only be ordered if the person is **capable of serving a prison sentence**. This means taking into account both the person's state of health and the impact of detention on them. According to federal case law, advanced age alone is not sufficient to rule out detention. A person is considered incapable of serving a prison sentence if it is highly probable that detention would endanger their life or health. If the person claims that detention exposes them to a risk of suicide, the Federal Criminal Court considers that this risk should be accepted “with great restraint.” This means taking into account physical health problems as well as any mental disorders requiring medical treatment.

- 21 Depending on the circumstances, deprivation of liberty may be enforced in a specialized hospital unit or detention may be accompanied by outpatient treatment. In this context, the authorities must be able to ensure **appropriate care** and a comprehensive treatment strategy aimed at remedying the person's health problems or preventing their worsening, rather than treating their symptoms.
- 22 Where detention is **incompatible with the state of health** and the therapeutic care needs, an arrest warrant may not be issued.

E. Ineffectiveness of alternative measures (Art. 47 para. 2 in fine IMAC)

- 23 An arrest warrant may not be issued if the imposition of **alternative measures** less severe than detention is sufficient to ensure that the person will not abscond or unlawfully obstruct the proceedings. Alternative measures must not offer an “absolute guarantee” that the risk or risks will not materialize, but must be capable of “significantly reducing” the risk identified. In such a case, in accordance with the principle of proportionality, these measures must be ordered, otherwise the personal freedom of the person concerned will be violated.
- 24 With regard to **security**, the amount depends on the seriousness of the acts alleged and the personal circumstances of the person whose extradition is sought. The amount of the guarantee must be assessed in light of the person's resources, their ties to persons who could act as guarantors, and the confidence that can be placed in the prospect of losing the amount committed as a sufficiently powerful deterrent to prevent any attempt to flee.
- 25 This implies an **increased obligation to cooperate** on the part of the person whose extradition is sought in order to establish their financial and relational situation, the financial situation of any relatives who may be called upon to pay the bail, and the origin of the funds offered as security. The lack of concrete information on the financial situation of the person or their relatives is a reason invoked by the Federal Court for declaring itself unable to determine an appropriate amount for a possible financial guarantee.
- 26 It is also recommended that an **amount** be specified by the person offering to pay the security.
- 27 The **security** may take the form of a cash deposit or a guarantee provided by a bank or insurance company established in Switzerland. For this reason, the Federal Criminal Court has refused to accept a guarantee in the form of the registration of a lien on real estate in the land register or the surrender of shares. The question of whether a guarantee can take the form of the surrender of an object of value does not appear to have been decided by case law. However, this assumption seems to be contrary to the intention of the legislature, which deleted this reference from the legal text when the rules of procedure were revised.
- 28 With regard to **electronic surveillance**, two distinct systems should be considered. On the one hand, the fitting of an electronic tag that only makes it possible to know whether a person is within a given perimeter. Such a device only makes it possible to detect *a posteriori* that the person has absconded. It has little preventive effect on the risk that the person will abscond and should therefore be accompanied by other measures, such as the payment of a deposit. On the other hand, a system could be considered that would allow the person to be tracked and monitored in real time, with immediate intervention by the police. The introduction of an “electronic monitoring” system has been expressly recommended by federal case law for several years. This measure significantly reduces the risk of flight and therefore makes it possible to dispense with the issuance of numerous arrest warrants.
- 29 Federal case law takes a very restrictive approach to allowing the imposition of alternative measures to detention that are capable of countering the risk of flight and/or collusion. As noted *above*, the

position adopted by the Swiss courts could be **incompatible with the case law of the European Court of Human Rights**, which states that “pre-trial detention must appear to be the ultimate solution, justified only when all other available options prove insufficient.” We are of the opinion that an arrest warrant in extradition proceedings can only be issued if the authority demonstrates that one or more alternative measures would not mitigate the risks invoked.

III. SEIZURES (ART. 47 PARA. 3)

- 30 At the same time as issuing the extradition arrest warrant or ordering alternative measures, the FOJ shall take a decision on the objects and valuables seized by the police when the person being prosecuted was arrested. It may order that the seizures be maintained, lifted or new seizures be made. This decision may also be taken at a later stage in the proceedings.
- 31 The measure is intended to enable a response to any **request for the surrender of objects or valuables**, the surrender of evidence, or the enforcement of a foreign judgment, in particular in the context of confiscation. Federal court case law also provides for the possibility of ordering seizure to cover costs.
- 32 If extradition is granted, the FOJ will in principle also order the **surrender of any objects or valuables** found on the person being prosecuted that may serve as evidence or are the proceeds of the alleged offense.

About the author

Attorney at the Geneva Bar

BIBLIOGRAPHY

Ludwiczak Glassey Maria, *Entraide judiciaire internationale en matière pénale*, Bâle 2018.

Ludwiczak Glassey, Maria/Moreillon Laurent, *Petit commentaire EIMP*, Bâle 2024.

Forster, Marc, *Commentaire de l'article 47 EIMP*, in: Niggli, Marcel Alexander/Heimgarten, Stefan (édit), *Basler Kommentar, Internationales Strafrecht*, Bâle 2015.

Zimmermann, Robert, *La coopération judiciaire internationale en matière pénale*, Berne 2019.

Message du Conseil fédéral à l'Assemblée fédérale à l'appui d'une loi sur l'entraide internationale en matière pénale et d'un arrêté sur les réserves relatives à la convention européenne d'extradition du 8 mars 1976 (ci-après: “le message du Conseil fédéral du 8 mars 1976”), FF 1976 II 430 ss.

Guide sur l'article 3 de la Convention européenne des droits de l'homme, *Interdiction de la Torture*, 31 août 2024.