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EUROPEAN COMMITTEE ON CRIME PROBLEMS
(CDPC)

Committee of Experts on the Operation
of European Conventions in the Penal Field
(PC-OC)

EUROPEAN CONVENTION ON EXTRADITION
Reservations and declarations to Article 16 (Provisional arrest)

41st meeting
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Secretariat memorandum
prepared by the
Directorate General of Legal Affairs

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The new Council of Europe web site “conventions” incorporates a data base where statements entered by States in respect of Conventions to which they are a Contracting State, are included either under the heading “reservation” or under the heading “declaration”.

The classification is made by the Secretariat under its own responsibility. In no way does it engage the responsibility of the States concerned. It is designed to facilitate the search of information concerning the conventions.

In some instances, statements make reference to conventional provisions that themselves indicate how such statements should be classified. For example, Article 5 of the Mutual Assistance Convention indicates that statements to the effect that a State may “reserve the right to make the execution of letters rogatory ... dependent on [pre-established] conditions” should come under “declarations”, not under “reservations”.

In all other instances, the Secretariat makes reference to the definition of “reservation” under Article 2 of the Vienna Convention on the Law of Treaties (23.05.69). It reads as follows:

“reservation” means a unilateral statement, however phrased or named, made by a State, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State.

That definition excludes any criteria which would be based on the “name” given by any State to its own statement.

Doubts may arise from time to time on whether given statements should come under “reservations” or under “declarations”. In respect of the conventions in the penal field, it is proper to submit such doubts to the PC-OC.

Doubts arise, for example, with respect to certain statements made by States with reference to Article 16 of the European Convention on Extradition. That Article reads as follows:

Article 16 – Provisional arrest

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

France, Switzerland, Moldova, Austria and Hungary all entered statements in respect of that Article, to the effect that they require demands for provisional arrest to be accompanied by a description of the facts attributed to the person concerned.

Such statements read as follows:

France:

In the case of a request for provisional arrest, France shall require a short memorandum of the facts alleged against the person sought.

Switzerland:

Switzerland asks that any request addressed to it in accordance with Article 16, paragraph 2, contain a brief description of the offence alleged against the person claimed, including the essential particulars by which the nature of the offence can be appraised with reference to the law of extradition.

Moldova:

The Republic of Moldova asks that any request addressed to it in pursuance of Article 16, paragraph 2, contain a brief description of the offence alleged against the person claimed, including the essential particulars by which the nature of the offence can be appraised in accordance with the present Convention

Austria:

In case of a request for provisional arrest Austria also requires a short statement of the facts the person claimed is charged with.

Hungary:

In case of request for provisional arrest Hungary also requires a short statement of the facts the person claimed is charged with.

Presently, the data base reports the statements of France, Switzerland and Moldova under “reservations”, and the statements of Austria and Hungary under “declarations”.

Because there is no substantial difference between the different statements, the discrepancy on classification must be overcome.

Two different approaches may be taken in respect of the substance of the matter.

Under the first approach, one might say that Article 16.2 is worded in such detail that it may not be interpreted to include any requirement not explicitly mentioned therein.

In fact, Article 16.2 requires that requests for provisional arrest be accompanied by:

- a statement that a document exists that justifies the arrest of the person
- a statement of the intention to request extradition;
- a statement indicating the offence for which extradition will be requested;
- a statement indicating the place where the offence was committed, and
- so far as possible, a description of the person sought.

Such a detailed enumeration should be interpreted as an indication that any other information is not required. Should a State, by way of a statement, require any other kind of information, it is proper to conclude that that State is *modifying the legal effect of the provisions of Article 16.2 in their application to it*. In other words, that State is making a reservation.

A second approach remains however possible. One may indeed question the meaning of the provision of Article 16.2 under which requests for provisional arrest must be accompanied by a statement indicating the offence for which extradition will be requested. Should that mean that the offence is to be described by its “name”, then a difficulty arises because names given to offences vary from one country to another. Murder, assault and fraud are names given to a set of facts and circumstances that differ from one country to another. It follows that any information that would describe an offence by its name would in most cases not reflect any intelligible notion. The only helpful description of an offence consists in describing the facts that allegedly amount to such an offence.

Therefore, where a State requires a description of the facts, it does no more than re-state in a clearer fashion what is already contained in the Convention. It is therefore producing a “declaration”, not a “reservation”.

The Committee PC-OC might wish to comment on these matters.