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**EUROPEAN COMMITTEE ON CRIME PROBLEMS**  
**(CDPC)**

**Committee of Experts on the operation of European conventions**  
**on international co-operation in criminal matters**  
**(PC-OC)**

**DRAFT PROPOSALS OF THE PC-OC CONCERNING NORMATIVE MEASURES TO**  
**IMPROVE OPERATION OF RELEVANT CONVENTIONS**  
**AS DISCUSSED AND AGREED BY THE**  
**COMMITTEE OF EXPERTS ON THE OPERATION OF EUROPEAN CONVENTIONS ON**  
**INTERNATIONAL CO-OPERATION IN CRIMINAL MATTERS**  
**(PC-OC)**

## Background

1. The PC-OC's terms of reference entrusts it to work on normative measures upon instruction of the CDPC. At this stage, the Committee is presenting to the CDPC the following suggestions for normative changes.
2. The Committee decided to deal in a first stage with extradition matters. The European convention on extradition (1957) is indeed one of the oldest European conventions in the criminal field and deserves to be fully reconsidered. In addition, extradition directly impacts on individuals' rights and freedoms, on which the CDPC asked the PC-OC to pay particular attention.
3. The Committee agreed that in doing so, it could also raise aspects of international co-operation relating to other CoE conventions. Matters linked to extradition can also have an impact on mechanisms foreseen by other conventions and could lead to a change to that instrument.

<b>Extradition</b>
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### **A. Matters for requests for instructions by CDPC:**

#### **I.1 Simplified extradition**

##### Proposal

4. The 1957 European Convention on Extradition (ECE) could be revised in order to include mechanisms of simplified extradition when the person sought consents to his or her extradition. If such consent is expressed, there is no need to go through all the formalities of an extradition procedure. A simplified procedure could be proposed as an amendment to the existing extradition convention. As a result, delays of surrender would in most cases be reduced substantially. This would contribute to reach the main objective to increase the efficiency and rapidity of extradition mechanisms.
5. The simplified extradition mechanism proposed in the EU convention on simplified extradition of 1995 could serve as a reference for discussions in the CoE context.
6. Forms of simplified extradition already exist in practice (one expert informed that 2/3 of extradition requests are dealt with through such simplified procedures). It would be desirable to elaborate a treaty basis for this, accessible to a high number of States. Any new norm should however not have any negative or limitative impacts on the current practice of simplified extradition.

##### Modalities:

- a. Application of the requirements from Art 12 ECE (need for formal extradition request and supporting documents)
  7. The question is whether, in the situation where a person is arrested and consents to his or her extradition, there is a need for a formal request of extradition and for the supporting documents requested by Art 12 ECE or could the "arresting" State surrender the person without such request and documents?
  8. Practice varies among States. In a majority of States where simplified extradition is applied, it is considered that it is of the interest of the person sought to be quickly surrendered once his or her consent has been expressed. States often find the information they need in the request for provisional arrest, in application of Art 16.2 ECE.
  9. In a few States however, there is a need for the extradition request and for the documents requested by Art 12. The consent of the person would, in this case, be taken into account in the extradition procedure in order to have a quicker final decision and a quicker surrender.

10. It was also proposed that Art 4 of the EU 1995 convention on simplified extradition, on “information to be provided” be used as a reference in the CoE context and would describe the information which has to be transmitted to the requested State.
  11. A solution could be to leave it to the States’ discretion whether to ask or not for the application of Art 12. Such an option could either be foreseen in a binding instrument or be made by way of declaration when acceding to such instrument.
- b. Expression and withdrawal of the consent: consequences of the consent
12. The consent expressed by the person sought should be voluntary, conscious and in full awareness of the legal consequences. The person should not be deprived from the procedural guarantees defined by each State, notably the access to a defence lawyer and to an interpreter.
  13. Many states foresee cases where the consent may be withdrawn. It is proposed that a time limit be fixed, after which the consent should not anymore be revocable. Such limit could be the date of the administrative decision on the surrender.<sup>1</sup>
  14. It is understood that:
    - the consent should not deprive the requested State to invoke a ground for refusal set forth in the Convention.
    - the person can consent to the surrender and renounce to the application of the **speciality rule** (Art 14 ECE)<sup>2</sup>, with a possibility for the requested State to oppose.
  15. The Committee also briefly examined in this context the application of Art 15 of the convention on the re-extradition to third States.
  16. It is proposed that States would indicate, in application of any new binding instrument on simplified extradition if articles 14 (speciality rule) and 15 (re extradition) ECE are applicable.

c. Time limits

17. Time limits could be envisaged for the decision on surrender, after the consent is given. States should be encouraged to take a decision and to surrender the person in the shortest delays (which could not exceed the limits expressed in Art 18 ECE).
18. Request to CDPC:

PC-OC requests the CDPC to be mandated to draft the necessary legal instruments to give a treaty basis to simplified forms of extradition when the person sought consent. It could take the form of (a) –framework-provision(s) amending the extradition convention, supplemented by (a) non binding instrument(s) assisting States in implementing this mechanism.

## I.2 Rule of speciality (Art 14 ECE)

19. The principle of the application of the speciality rule should be reaffirmed.
20. Renunciation to the speciality rule could be envisaged:
  - a. in case of simplified extradition, if the person consents
  - b. following the surrender, before the requesting State’s judicial authorities.

<sup>1</sup> See also Art 13.4 of the EAW according to which the consent should not be revocable.

<sup>2</sup> See also see Art 7.1 EU Convention 1995

21. In the latter situation, the following practical questions would need further discussion: should such consent be transmitted to the requested State? Would the requesting State need the agreement of the requested State before prosecuting the person? Should safeguards set forth in Art 13 EAW apply in this case as well (the consent should be expressed “voluntarily and in full awareness of the consequences”, right to legal counsel)? Could States assess the circumstances in which the consent was given, e.g. through its consulates? Should all documents and evidence be sent to the requesting State in application of Art 14 a.? How? Should this requirement be lightened? Should a model form be used for receiving the consent of the person? It has been proposed to include a presumption that the requested State agrees with the waiving of the specialty rule, unless it reacts otherwise?
22. As a conclusion, some members of the group supported the idea to regulate renunciation to the specialty rule following the surrender, before the requesting State's judicial authorities, keeping in mind Article 10.1.d of the Convention of 27 September 1995 drawn up on the basis of Article K.3. of the treaty on European Union, relating to extradition between the Members of the EU.
23. In cases where the requesting state needs the consent of the requested state to proceed against an extradited person for a crime committed prior to his surrender, the rule of specialty, as formulated in Article 14 of the ECE, might prevent the requesting state from arresting that person, awaiting the consent of the requested state. Such a provisional arrest might be necessary when the extradited person is about to be released. The exceptions to the rule of specialty, provided for in Article 14 of the ECE, could be extended to cover this situation. The requesting state should notify the requested state either before or immediately after the arrest of that person and should be under an obligation to ask for the consent of the requested state.
24. The question of the application of the specialty rule in relation with re extradition to third States (Art 15 ECE) was also mentioned in the similar context.

#### **25. Request to the CDPC:**

PC-OC requests the CDPC to be mandated to draft the necessary legal instruments – binding and/or non binding - outlining conditions and modalities of application of the specialty rule and of the renunciation to the rule, with reference to Art 14 ECE.

### **I.3 Channels/means of communication (Art 12 ECE and Art 5, 2nd Protocol)**

26. According to Art 5 of the 2<sup>nd</sup> additional protocol to the ECE, ratified by 40 States: "The request shall be in writing and shall be addressed by the Ministry of Justice of the requesting Party to the Ministry of Justice of the requested Party; however, use of the diplomatic channel is not excluded. Other means of communication may be arranged by direct agreement between two or more Parties." These articles could possibly be updated in order to refer also the central authority “as defined by each Party by declaration”, which can be, as it is the case for some States, the Prosecutor's Office.
27. The advantages of the use electronic means of communication (e-mails) were also mentioned.

#### **28. Request to CDPC:**

PC-OC requests the CDPC to be mandated to consider possible ways of improving the wording of the relevant provisions (Art 12 ECE and Art 5, 2nd Protocol) notably by bringing the text up to date.

### **I.4 Time limits**

29. The need for expedient procedure applies for extradition for the purpose of prosecution as well as for the purpose of executing a sentence. In the latter case, shorter procedures are needed notably because the period of detention pending extradition seems to be not always taken into consideration by requesting States.

30. Some members of the Group expressed the view that time limits could be inserted into a binding instrument. However, the Group referred to the discussions that took place at the last plenary meeting of the PC-OC as regards the ways in which time limits are applied in the various States Parties to the conventions and decided to follow the conclusion of the PC-OC Plenary that “it would not be realistic to insert strict time limits in a binding instrument, as national procedures differ too widely among States”.

**31. Request to the CDPC:**

PC-OC requests the CDPC to be mandated to consider drafting non-binding measures addressing a set of principles so as to reduce time limits and avoid long extradition procedures (and long detention before extradition). Such measures could also address issues of co-operation such as languages and translation, sending of documents/information etc.

**I.5 Language (Art 12, Art 23 ECE)**

32. Practice shows that a request for extradition would have better chances to be quickly handled in the requested State if the request is addressed in the language of that State. However, this could create practical difficulties in some States where access to translators to the various languages of CoE member States is difficult. Such States would easier find translators in CoE official languages (with the risk that the same documents would have to be translated again in the language of the requested State).
33. A distinction could be made between the two types of requests:
- an extradition for the purpose of executing a sentence: it could be sufficient to have the most relevant information without having to translate the full verdict;
  - an extradition for the purpose of prosecution: information that a person is charged with a specific crime with a possible specific sentence could be sufficient. As such, there is little use of having a full national arrest warrant with all the appendices to be sent and translated. The use of an international warrant of arrest has been proposed as a useful solution.
34. The Group also referred in this context to Art 4 of the EU convention on simplified extradition, outlining which information (instead of documents) is needed.

**35. Request to the CDPC:**

PC-OC requests the CDPC to be mandated to draft the necessary legal instruments – of binding and/or of non binding nature- outlining solutions for a simpler, less expensive and quicker extradition procedure and proposing best practices to be followed by States. Such legal text could identify which documents or which information should be transmitted and translated, with reference to Art 12 ECE.

**I.6 Compensation and return of the person**

36. Three hypotheses are to be considered:
- the person is extradited and then acquitted in the requesting State:
37. Some States consider that the requesting State could be held responsible and be asked to pay compensation and to provide with the possibility to return. Some States compensate for detention and pay for the return of the person.
38. Some other States do not consider that they would be liable to compensate in such cases.
39. Some members observed that the acquittal may be caused by factors not dependent from the requesting State (ex: the requested State did not provide with evidence or the person’s lawyer provide with information on a decision related to same facts in a third country - ne bis in idem).

- the person is arrested in the requested State and the requesting State withdraws its request of extradition:
- 40. Compensation could be provided by the requesting State. A member underlined that this could also apply if the requesting State sends the extradition request too late.
- 41. In one State, compensation is paid by the requested State, which took the responsibility to affect the person's rights and freedoms. The same could apply for instance if an authority from the requesting State does not in fact take the person over, despite a positive decision on extradition.
- the person is arrested in the requested State which refuses to extradite the person, following a period of detention:
- 42. If a compensation is to be granted in such a case, it could be provided either by the requesting State, which issued the request and lead to the detention, or by the requested State, who effectively arrested the person.
- 43. As it seems, practice in terms of compensation widely varies among States. An approximation of legislation or practice would be desirable in this matter, in particular as it directly concerns the individual's rights. Any future work should therefore carefully consider the case law of the ECHR in this matter.
- 44. In conformity with the idea of the development of a transnational criminal justice, the PC-OC is of the opinion that the treatment of persons in transnational criminal procedures such as extradition should not in principle be too different than the treatment of nationals in the same circumstances.
- 45. As a conclusion, the group agreed that a questionnaire to all PC-OC members should be prepared. Mr Selvaggi offered to assist the Secretariat to prepare such a questionnaire before the next meeting.

**46. Request to the CDPC:**

PC-OC requests the CDPC to take note of the matter, which will be followed by the PC-OC through a questionnaire to all members. The PC-OC will elaborate future proposals on the basis of the result of the questionnaire and on further discussions on this matter.

**I.7 Lapse of time (Art 10 ECE)**

- 47. Art 10 of the convention foresees that the laws of either the requesting or the requested State shall be considered. In practice, experts seem to consider that the laws in the requesting State prevail. The Schengen agreement (Art. 623) shares the same approach. This can however lead to legal or practical difficulties: the requested State is not always best equipped to interpret the application of the legislation of another State.
- 48. On the other side, the EAW foresees (Art 4.44), as an optional ground for refusal to surrender, the situation where the prosecution or the punishment is statute barred according to the law of the requested state and where that State has jurisdiction over the acts according to its law. This legal basis appeared to be supported by several experts.
- 49. Some members observed that States developed a practice under bilateral treaties, dealing with this matter.
- 50. A possible way forward could be to keep the optional basis (the laws of either the requesting or the requested State) but to transform lapse of time as an optional ground for refusal. Art 10 can be amended

<sup>3</sup> Art 62, Schengen agreement: "As regards interruption of limitation of actions, only the provisions of the requesting Contracting Party shall apply."

<sup>4</sup> Art 4.4 EAW: "The executing judicial authority may refuse to execute the European arrest warrant: 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 acts fall within the jurisdiction of that Member State under its own criminal law"

by transforming “shall not be granted” by “may not be granted”. Further work would also be needed on modalities and consequences of interruption of lapse of time.

#### 51. Request to the CDPC:

PC-OC requests the CDPC to be mandated to draft the necessary legal instruments – of binding nature, possibly completed by instrument of non binding nature- dealing with lapse of time.

#### ***B Outstanding questions: positions and requests to be finalised by the PC-OC. They are sent to the CDPC at this stage for information only.***

***The CDPC should not take any action on these items and is invited to take a decision on these items only after the PC-OC has finalised discussions on them.***

#### 1.8 Grounds for refusal (Art 3, 4, 5 ECE)

52. Difficulties have mostly emerged in practice when States have considered the application of Art 3 – Political offences. The number of such cases where difficulties appeared is however rather limited even if they often attract great attention. Solutions presented by the conventions on terrorism, hijacking of aircrafts, European Arrest Warrant, restricting the use of this ground for refusal, were considered.
53. The majority of the group questioned therefore the opportunity to embark in a revision of Art 3 ECE.
54. One member of the group insisted on the difficulties to which the use of that article can lead to in practice, which can have a detrimental effect on relations between member States, in the field of international co-operation in criminal matters, and beyond. He reiterated the suggestion that offences should not be regarded as political offences when the crime for which co-operation is required is subject to an international convention to which both States at stake are parties (see also the 2003 Protocol to the Convention on suppression of terrorism and the 2005 Convention on the prevention of terrorism - Art 20: exclusion of the political exception clause)<sup>5</sup>;
55. Consideration could also be given to developments in the EU, in particular the European Arrest Warrant (EAW) where, in view of political prosecution, a general clause of non discrimination was included in its Preamble (para. 12) <sup>6</sup>.
56. The Committee agreed not to deal with fiscal offences but rather to encourage States to accede to the 2<sup>nd</sup> additional Protocol to the ECE, which Art.2 offers solutions in this regard. It also agreed not to deal with military offences at this stage, as they do not seem to create much difficulty in practice.

#### 1.9 Procedural safeguards

57. PC-OC considered two ways to provide higher protection of individuals in extradition procedures<sup>7</sup>:
  - The insertion of “procedural safeguards” for the person involved in an extradition procedure. These safeguards would include notably: obligation to inform, access to legal counsel, access to interpreter, right to expedient procedure, possibility to challenge the lawfulness of the detention, obligation to hear

5 Article 20 – Exclusion of the political exception clause . 1 None of the offences referred to in Articles 5 to 7 and 9 of this Convention, shall be regarded, for the purposes of extradition or mutual legal assistance, as a political offence, an offence connected with a political offence, or as an offence inspired by political motives. Accordingly, a request for extradition or for mutual legal assistance based on such an offence may not be refused on the sole ground that it concerns a political offence or an offence connected with a political offence or an offence inspired by political motives

6 Art 12 of the Preamble on the EAW: “This Framework Decision respects fundamental rights and observes the principles recognised by Article 6 of the Treaty on European Union and reflected in the Charter of Fundamental Rights of the European Union(7), in particular Chapter VI thereof. Nothing in this Framework Decision may be interpreted as prohibiting refusal to surrender a person for whom a European arrest warrant has been issued when there are reasons to believe, on the basis of objective elements, that the said arrest warrant has been issued for the purpose of prosecuting or punishing a person on the grounds of his or her sex, race, religion, ethnic origin, nationality, language, political opinions or sexual orientation, or that that person's position may be prejudiced for any of these reasons.”

7 Background information is to be found essentially in the PC-TJ final report (PC-TJ(2005)10) and in the research made by Ms Azaria (PC-TJ(2005)07).

the person on his/her extradition, obligation to compensate. The safeguards applicable to a person who was tried in absentia should also be included. This approach is consistent with the CDPC's instruction that the PC-OC deals with this as a priority matter. It would give a direct and coherent follow-up to the conclusions of the PC-TJ, in its final report. It should also be considered in the light of the perspective to broaden the access to the convention to non CoE member States (which are not bound by the ECHR).

Several experts found that these rights or safeguards were already in some ways guaranteed by the ECHR and its case law; their insertion in the extradition treaties would therefore not be needed. Furthermore, these additional procedures could impede the efficiency of extradition procedures.

- the insertion of a “general clause on human rights” in the convention. As fundamental rights (mainly right to life, rights not to be tortured or to be subject to inhumane or degrading treatment) are protected by the ECHR and the Court's case law and by the UN Convention on torture, there is no need to amend the extradition Convention on this. A general clause on human rights could be envisaged, by which States are recalled that extradition treaties have to be implemented in full respect of obligations deriving from international human rights treaties, including ECHR. Reference can be made to such non discrimination clause foreseen in the preamble of the FD on the European Arrest Warrant.
58. Future discussions in the CoE committees should take duly into account the current discussions in the EU on a draft framework decision on procedural rights.
59. Due consideration should also be given to the difficulties that some States may have in acceding to any new legally binding instrument which would include such rights or safeguards in a mandatory manner.

#### **I.10 Concurrent requests (Art 17 ECE)**

60. The PC-OC considered that cases of concurrent requests for extradition/surrender issued by several States and/or by (an) international criminal jurisdiction(s) deserved further discussions. It agreed however that such situation appears rarely in practice.
61. PC-OC considered the difference in nature of an extradition and a surrender requested by an international tribunal. The PC-OC consequently decided not to embark at this stage in a normative exercise on this question and to insert it among other matters under “longer term issues”.

#### **C. Longer term issues**

62. Following the instructions given by the CDPC, the PC-OC will discuss the following issues in the perspective of longer term results:

#### **I.11 Extradition of nationals (Art 6 ECE)**

63. The issue of extradition of nationals was discussed in connexion with the application of the principle “aut dedere aut judicare” and while having in mind constitutional guarantees set forth by several States protecting their nationals.
64. Future discussions could deal with the following matters:
- the introduction of the “Dutch clause”, by which States can extradite their nationals on the condition that the person is sent back for the execution of his/her sentence;
  - the prosecution in the requested State if the extradition is refused, bearing in mind possible difficulties of having a mandatory application of this principle and
  - the opportunity to elaborate a non binding instrument on co-operation between the requesting and the requested States in cases where the latter refuses extradition and initiates prosecution against the person sought (e.g. transmission of evidence by the requesting State)
  - the links with the application of the convention on the transmission of criminal proceedings (ETS 73).



**I.12 Non bis in idem (Art 9 ECE)**

65. The PC-OC observes, at this stage, the need to come back later to this issue, notably in order to clarify some ambiguities in the languages of the instruments (“offences” against “faits”). Recent decisions by the Court of Justice in Luxembourg could help in clarifying the matter.

**Transversal issues****II. 1 Dispute settlement**

66. The PC-OC discussed this issue on the basis of:
1. the proposal from the Russian Federation to foresee, by way of an additional Protocol to the Conventions on extradition and on mutual assistance, an arbitral procedure to settle disputes, on the basis of the provisions set forth in the 2003 Protocol to the convention on suppression of terrorism;
  2. the note prepared by the Secretariat which describe the dispute settlement mechanisms foreseen by the CoE Conventions, i.e. mostly, the role of the CDPC, and the other possibilities to settle disputes: arbitration or international jurisdiction.
67. As to the first proposal, the PC-OC observed the difficulty for several members to be possibly bound by a procedure of arbitration which would be initiated by only one party to the dispute. It also underlined some legal difficulties linked notably to the authority that any arbitral decision could possibly have on a final judicial decision taken by a national –independent- competent jurisdiction. Several States underlined that such authority could hardly be compatible with their national constitutional provisions.

**II.2 Reservations (Art 26 ECE)**

68. The following proposals are submitted to the CDPC for consideration:
- reservations should be limited to specific provisions;
  - existing reservations should be reviewed and, where necessary, updated or withdrawn,
  - a limited duration of validity could be envisaged, through a new legal basis, for future reservations. The interest of such a limitation should however be balanced with the interest to have as many States as possible ratifying the instrument and with the necessity of an efficient co-operation.

**Other conventions****III.1 Transfer of sentenced persons**

69. Further to the follow-up to be given to § 11 of the high Level Conference of Ministers of Justice and of the Interior in Moscow in November 2006, the PC-OC could envisage following area of possible developments:
- increasing the level of ratifications of the Additional Protocol;
  - normative developments, binding or not binding, could be envisaged as regards notably;
  - procedural guarantees for the sentenced person in a transfer procedure;
  - the consent of the detainee to be transferred, which should be given freely and in full awareness of the legal consequences and its revocability, as well as suitable time limits for the withdrawal;
  - an obligation to inform the executing State of any contagious illness contracted by the sentenced person;
  - the transfer of mentally disturbed offenders.

### **III.2 Mutual assistance**

70. It is probably too early to discuss the modernisation of a mechanism which has been recently updated by a 2<sup>nd</sup> additional Protocol (ratified by 12 States). Some practical applications of the convention and its Protocols could however be discussed further, such as the application of Art 22 on the transmission of information from criminal records and the application of MLA mechanisms to requests for DNA samples.

### **III.3 Transmission of criminal proceedings**

71. The PC-OC underlined the positive aspects of the Convention on the transmission of criminal proceedings (ETS 73) and considers it opportune to look further into its status of ratification and into matters pertaining to its application.