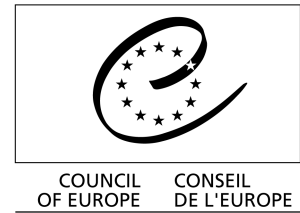


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Strasbourg, 9 September 2010

PC-OC (2010) 13 rev

[PC-OC/GM/Documents 2010/ PC-OC(2010)13 E]

EUROPEAN COMMITTEE ON CRIME PROBLEMS
(CDPC)

COMMITTEE OF EXPERTS
ON THE OPERATION OF EUROPEAN CONVENTIONS
ON CO-OPERATION IN CRIMINAL MATTERS
PC-OC

Draft Fourth Additional Protocol to the European Convention on Extradition

Secretariat memorandum prepared by
the Directorate General of Human Rights and Legal Affairs (DG-HL)

The member States of the Council of Europe, signatory to this Protocol,

Considering that the aim of the Council of Europe is to achieve greater unity between its members;

Desirous of strengthening their individual and collective ability to respond to crime;

Having regard to the provisions of the European Convention on Extradition (ETS No. 24) opened for signature in Paris on 13 December 1957 (hereinafter referred to as “the Convention”), as well as the two Additional Protocols thereto (ETS Nos. 86 and 98), done at Strasbourg on 15 October 1975 and on 17 March 1978, respectively;

Considering it desirable to modernise a number of provisions of the Convention and supplement it in certain respects, taking into account the evolution of international co-operation in criminal matters since the entry into force of the Convention and the additional protocols thereto;

[Considering that the consolidation of the provisions of the Additional Protocol and the Second Additional Protocol to the Convention in a single instrument would simplify the use of the Convention by its Parties and improve legal certainty;]¹

Have agreed as follows:

Article 1 – Lapse of time

Article 10 of the Convention shall be replaced by the following provisions:

- “1. Extradition shall not be granted when the prosecution or punishment of the person claimed has become statute-barred according to the law of the requesting Party.
2. Extradition shall not be refused on the ground that the prosecution or punishment of the person claimed would be statute-barred according to the law of the requested Party.
3. Any State may, at the time of signature or when depositing its instrument of ratification, acceptance, approval or accession, declare that it will not apply paragraph 2:
 - a. when the request for extradition is based on offences for which that State has jurisdiction under its own criminal law; and/or
 - b. if its domestic legislation explicitly prohibits extradition when the prosecution or punishment of the person claimed would be statute-barred according to its law.
4. Any Party having made a declaration pursuant to paragraph 3 of this Article shall, when determining whether prosecution or punishment of the person claimed would be statute-barred according to its law, take into consideration any acts of interruption and any events suspending time-limitation occurring in the requesting Party, in so far as acts or events of the same nature have a similar effect in the requested Party².”

Article 2 - The request and supporting documents

Article 12 of the Convention shall be replaced by the following provisions:

¹ The sections between square brackets in the draft Fourth Protocol correspond to the option of including the provisions of the Additional Protocol and the Second Additional Protocol to the Convention in the Fourth Additional Protocol, thereby consolidating the additional protocols. If the PC-OC decides not to consolidate the Protocols, these sections will be removed from the draft.

At its 10th enlarged meeting (28-30 September 2010), the PC-OC Mod invited the PC-OC “to take stock of its delegations’ assessment of the prospects of their respective States of signing and ratifying a Fourth Protocol limited to new provisions approved by the PC-OC (Articles 1 to 6 in the current draft) by means of a tour de table at its next meeting, and to assess on this basis the added value of a consolidated draft protocol”.

² At the 58th meeting of the PC-OC, one delegation expressed reservations concerning this paragraph. At its meeting in Rome on 7-8 October 2010, the Bureau of the CDPC proposed to the PC-OC to consider adding a reference to the law of the requested State, such as: “[...] take into consideration, in accordance with its law, any acts of interruption [...]”.

- “1. The request shall be in writing. It shall be submitted by the Ministry of Justice or other competent authority of the requesting Party to the Ministry of Justice or other competent authority of the requested Party. A State wishing to designate another competent authority than the Ministry of Justice shall notify the Secretary General of the Council of Europe of its competent authority at the time of signature or when depositing its instrument of ratification, acceptance, approval or accession, as well as of any subsequent changes relating to its competent authority.
2. The request shall be supported by:
 - a. a copy of the conviction and sentence or detention order immediately enforceable or of the warrant of arrest or other order having the same effect and issued in accordance with the procedure laid down in the law of the requesting Party;
 - b. a statement of the offences for which extradition is requested. The time and place of their commission, their legal descriptions and a reference to the relevant legal provisions, including provisions relating to lapse of time, shall be set out as accurately as possible; and
 - c. a copy of the relevant enactments or, where this is not possible, a statement of the relevant law and as accurate a description as possible of the person claimed, together with any other information which will help to establish his identity, nationality and location.”

Article 3 – Rule of speciality

Article 14 of the Convention shall be replaced by the following provisions:

- “1. A person who has been extradited shall not be arrested, prosecuted, tried, sentenced or detained with a view to the carrying out of a sentence or detention order, nor shall he or she be for any other reason restricted in his or her personal freedom for any offence committed prior to his or her surrender other than that for which he or she was extradited, except in the following cases:
 - a. when the Party which surrendered him or her consents. A request for consent shall be submitted, accompanied by the documents mentioned in Article 12 and a legal record of any statement made by the extradited person in respect of the offence concerned. Consent shall be given when the offence for which it is requested is itself subject to extradition in accordance with the provisions of this Convention. The decision shall be taken as soon as possible and no later than 90 days after receipt of the request for consent. Where it is not possible for the requested Party to comply with the period provided for in this paragraph, it shall inform the requesting Party, providing the reasons for the delay and the estimated time needed for the decision to be taken;
 - b. when that person, having had an opportunity to leave the territory of the Party to which he or she has been surrendered, has not done so within 30 days of his or her final discharge, or has returned to that territory after leaving it.
2. The requesting Party may, however:
 - a. carry out pre-trial investigations, except for measures³ restricting the personal freedom of the person concerned;
 - b. take any measures necessary under its law, including proceedings by default, to prevent any legal effects of lapse of time;
 - c. take any measures necessary to remove the person from its territory.
3. When the description of the offence charged is altered in the course of proceedings, the extradited person shall only be proceeded against or sentenced in so far as the offence under its new description is shown by its constituent elements to be an offence which would allow extradition.
4. By derogation from paragraph 1, the requesting Party may restrict the personal freedom of the extradited person, provided that:
 - a. the requesting Party notifies, either at the same time as the request for consent pursuant to paragraph 1, subparagraph a, or later, the date it intends to start such restriction; and

³ Chair: it would be more accurate to specify “except for the execution of measures...”.

- b. the requested Party explicitly acknowledges receipt of this notification.

The requested Party may express its opposition to that restriction at any time, which shall entail the obligation for the requesting Party to end the restriction immediately, including, where applicable, by releasing the extradited person⁴.”

Article 4 – Re-extradition to a third state⁵

The text of Article 15 of the Convention shall become paragraph 1 of that article and shall be supplemented by the following second paragraph:

- “2. The requested Party shall take its decision on the consent referred to in paragraph 1 as soon as possible and no later than 90 days after receipt of the request for consent. Where it is not possible for the requested Party to comply with the period provided for in this paragraph, it shall inform the requesting Party, providing the reasons for the delay and the estimated time needed for the decision to be taken.”

Article 5 – Transit

Article 21 of the Convention shall be replaced by the following provisions:

- “1. Transit through the territory of one of the Contracting Parties shall be granted on submission of a request for transit, provided that the offence concerned is not considered by the Party requested to grant transit as an offence of a political or purely military character having regard to Articles 3 and 4 of this Convention.
- 2. The request for transit shall contain the following information^{6 7}:
 - a. the identity of the person to be extradited, including his or her nationality or nationalities when available;
 - b. the authority requesting the transit;
 - c. the existence of an arrest warrant or other document having the same legal effect or of an enforceable judgment, as well as a confirmation that the person is to be extradited;
 - d. the nature and legal description of the offence, including the maximum penalty or the penalty imposed in the final judgment;
 - [e. information concerning lapse of time;]
 - f. a description of the circumstances in which the offence was committed, including the time, place and degree of involvement of the person sought;
 - [h. in cases where extradition was requested for the enforcement of a final judgment, whether the judgment was rendered *in absentia*.]
- 3. In the event of an unscheduled landing, the requesting Party shall immediately certify that one of the documents mentioned in Article 12, paragraph 2, sub-paragraph a exists. This notification shall have

⁴ At the 58th meeting of the PC-OC, one delegation expressed reservations concerning this paragraph. At its meeting in Rome on 7-8 October 2010, the Bureau of the CDPC proposed to the PC-OC to consider clarifying in the text that the competent authority which can acknowledge receipt in accordance with sub-paragraph b must be the same as the authority competent to give consent in accordance with paragraph 1 of this article.

⁵ At the 10th meeting of the PC-OC Mod, the Russian Federation made a proposal concerning this article (see document PC-OC (2010) 16).

⁶ The purpose of the proposed article is to simplify the transit procedures on the basis of the information required to set in motion the simplified extradition procedure in accordance with the Third Protocol to the Convention. The parts between square brackets could be eligible for deletion. There was no agreement to that effect within the PC-OC Mod.

⁷ At its 10th meeting, the PC-OC Mod agreed that there was no need to provide for a paragraph concerning requests for supplementary information given Article 13 of the Convention.

the effect of a request for provisional arrest as provided for in Article 16, and the requesting Party shall submit a request for transit to the Party on whose territory this landing has occurred.⁸

4. Transit of a national, within the meaning of Article 6, of a country requested to grant transit may be refused.
5. A State may at the time of signature or of the deposit of its instrument of ratification of, or accession to, this Convention, declare that it will only grant transit of a person on some or all of the conditions on which it grants extradition. In that event, reciprocity may be applied.
6. The transit of the extradited person shall not be carried out through any territory where there is reason to believe that his life or his freedom may be threatened by reason of his race, religion, nationality or political opinion.⁹

Article 6 - Channels and means of communication

The Convention shall be supplemented by the following provisions:¹⁰

"Channels and means of communication

1. For the purpose of the Convention, communications may be forwarded by using electronic or any other means affording evidence in writing, under conditions which allow the Parties to ascertain their authenticity, as well as through the International Criminal Police Organization (Interpol) channel. The use of the diplomatic channel is not excluded. In any case, the Party concerned shall, upon request and at any time, submit the originals or authenticated copies of documents.
2. Any State may, at the time of signature or when depositing its instrument of ratification, acceptance, approval or accession, declare that, for the purpose of Article 12 and Article 14, paragraph 1, subparagraph a, of the Convention it will require the original or authenticated copy of the request and supporting documents."

[Article 7 – Political offences¹¹

For the application of Article 3 of the Convention, political offences shall not be considered to include the following:

- a. the crimes against humanity specified in the Convention on the Prevention and Punishment of the Crime of Genocide adopted on 9 December 1948 by the General Assembly of the United Nations;
- b. the violations specified in Article 50 of the 1949 Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Article 51 of the 1949 Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked members of Armed Forces at Sea, Article 130 of the 1949 Geneva Convention relative to the Treatment of Prisoners of War and Article 147 of the 1949 Geneva Convention relative to the Protection of Civilian Persons in Time of War;
- c. any comparable violations of the laws of war having effect at the time when this Protocol enters into force and of customs of war existing at that time, which are not already provided for in the above-mentioned provisions of the Geneva Conventions.

⁸ At the 10th meeting of the PC-OC Mod, one delegation expressed the view that, contrary to the situation in 1957 where detention was less strictly regulated, the notification of the existence of a document may not be sufficient for detention and that more information may be necessary. Another delegation was of the view that a time limit, such as 96 hours, would be desirable for the purpose of the protection of the rights of the individuals concerned.

⁹ At the 10th meeting of the PC-OC Mod, one delegation suggested to merge this paragraph with paragraph one.

¹⁰ At the 10th meeting of the PC-OC Mod, it was suggested that this new Article be inserted in the Convention as Article 12bis. The Secretariat will clarify with the Legal Advice Department and Treaty Office if such a provision would be compatible with Council of Europe treaty practice with respect to additional protocols.

¹¹ Corresponds to Article 1 of the Additional Protocol.

Article 8 – *Non bis in idem*¹²

Article 9 of the Convention shall be supplemented by the following text, the original Article 9 of the Convention becoming paragraph 1 and the under-mentioned provisions becoming paragraphs 2, 3 and 4:

- "2. The extradition of a person against whom a final judgment has been rendered in a third State, Contracting Party to the Convention, for the offence or offences in respect of which the claim was made, shall not be granted:
- a. if the afore-mentioned judgment resulted in his acquittal;
 - b. if the term of imprisonment or other measure to which he was sentenced:
 - i. has been completely enforced;
 - ii. has been wholly, or with respect to the part not enforced, the subject of a pardon or an amnesty;
 - c. if the court convicted the offender without imposing a sanction.
3. However, in the cases referred to in paragraph 2, extradition may be granted:
- a. if the offence in respect of which judgment has been rendered was committed against a person, an institution or any thing having public status in the requesting State;
 - b. if the person on whom judgment was passed had himself a public status in the requesting State;
 - c. if the offence in respect of which judgment was passed was committed completely or partly in the territory of the requesting State or in a place treated as its territory.
4. The provisions of paragraphs 2 and 3 shall not prevent the application of wider domestic provisions relating to the effect of *ne bis in idem* attached to foreign criminal judgments."

Article 9 – Extraditable offences¹³

Paragraph 2 of Article 2 of the Convention shall be supplemented by the following provision:

"This right shall also apply to offences which are subject only to pecuniary sanctions."

Article 10 – Fiscal offences¹⁴

Article 5 of the Convention shall be replaced by the following provisions:

"Fiscal offences

1. For offences in connection with taxes, duties, customs and exchange extradition shall take place between the Contracting Parties in accordance with the provisions of the Convention if the offence, under the law of the requested Party, corresponds to an offence of the same nature.
2. Extradition may not be refused on the ground that the law of the requested Party does not impose the same kind of tax or duty or does not contain a tax, duty, custom or exchange regulation of the same kind as the law of the requesting Party."

Article 11 – Judgments in absentia¹⁵

The Convention shall be supplemented by the following provisions:

"Judgments *in absentia*

¹² Corresponds to Article 2 of the Additional Protocol.

¹³ Corresponds to Article 1 of the Second Additional Protocol.

¹⁴ Corresponds to Article 2 of the Second Additional Protocol.

¹⁵ Corresponds to Article 3 of the Second Additional Protocol.

1. When a Contracting Party requests from another Contracting Party the extradition of a person for the purpose of carrying out a sentence or detention order imposed by a decision rendered against him *in absentia*, the requested Party may refuse to extradite for this purpose if, in its opinion, the proceedings leading to the judgment did not satisfy the minimum rights of defence recognised as due to everyone charged with criminal offence. However, extradition shall be granted if the requesting Party gives an assurance considered sufficient to guarantee to the person claimed the right to a retrial which safeguards the rights of defence. This decision will authorise the requesting Party either to enforce the judgment in question if the convicted person does not make an opposition or, if he does, to take proceedings against the person extradited.
2. When the requested Party informs the person whose extradition has been requested of the judgment rendered against him in *absentia*, the requesting Party shall not regard this communication as a formal notification for the purposes of the criminal procedure in that State".

Article 12 - Amnesty¹⁶

The Convention shall be supplemented by the following provisions:

"Amnesty

Extradition shall not be granted for an offence in respect of which an amnesty has been declared in the requested State and which that State had competence to prosecute under its own criminal law."]

Article 13 – Relationship with the Convention and other international instruments

1. The words and expressions used in this Protocol shall be interpreted within the meaning of the Convention. As regards the Parties to this Protocol, the provisions of the Convention shall apply, *mutatis mutandis*, to the extent that they are compatible with the provisions of this Protocol.
2. The provisions of this Protocol are without prejudice to the application of Article 28, paragraphs 2 and 3, of the Convention concerning the relations between the Convention and bilateral or multilateral agreements.
- [3. Parties to this Protocol which are at the same time Party to the Additional Protocol and/or the Second Additional Protocol to the Convention:
 - a. shall apply the provisions of the present Protocol in their mutual relations;
 - b. shall continue to apply the said Protocols in their relations with other States, which are Party to those Protocols but not to the present Protocol.
4. Parties to this Protocol which are not Party to the Additional Protocol or the Second Additional Protocol to the Convention undertake to abstain from becoming a Party to the said Protocols.]

Article 14 – Friendly settlement¹⁷

The European Committee on Crime Problems of the Council of Europe shall be kept informed regarding the application of the Convention and the additional protocols thereto and shall do whatever is necessary to facilitate a friendly settlement of any difficulty which may arise out of their interpretation and application.

Article 15 - Amendments

1. Amendments to this Protocol may be proposed by any Party to the Protocol or by the Committee of Ministers. Proposals for amendment shall be communicated by the Secretary General of the Council of Europe to the Parties.

¹⁶ Corresponds to Article 4 of the Second Additional Protocol.

¹⁷ The precedent for an Additional Protocol which opens the friendly settlement procedure to the Convention it amends is to be found in the Second Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters (ETS No. 182).

2. After having consulted the non-member States Parties and, if necessary, the European Committee on Crime Problems, the Committee of Ministers may adopt the amendment in accordance with the majority provided for in Article 20.d of the Statute of the Council of Europe. The Secretary General of the Council of Europe shall submit any amendments adopted to the Contracting States for acceptance.
3. Any amendment adopted in accordance with the above paragraph shall enter into force on the thirtieth day following notification by all the Parties to the Secretary General of their acceptance thereof.

Article 16 – Signature and entry into force

1. This Protocol shall be open for signature by the member States of the Council of Europe which are a Party to or have signed the Convention. It shall be subject to ratification, acceptance or approval. A signatory may not ratify, accept or approve this Protocol unless it has previously ratified, accepted or approved the Convention, or does so simultaneously. Instruments of ratification, acceptance or approval shall be deposited with the Secretary General of the Council of Europe.
2. This Protocol shall enter into force on the first day of the month following the expiration of a period of three months after the deposit of the third instrument of ratification, acceptance or approval.
3. In respect of any signatory State which subsequently deposits its instrument of ratification, acceptance or approval, this Protocol shall enter into force on the first day of the month following the expiration of a period of three months after the date of deposit.
- [4. No Party to the Additional Protocol and the Second Additional Protocol to the Convention may ratify, accept or approve this Protocol without considering itself bound by at least the provisions corresponding to the provisions of the said Protocols.]

Article 17 – Accession

1. Any non-member State which has acceded to the Convention may accede to this Protocol after it has entered into force.
2. Such accession shall be effected by depositing an instrument of accession with the Secretary General of the Council of Europe.
3. In respect of any acceding State, the Protocol shall enter into force on the first day of the month following the expiration of a period of three months after the date of the deposit of the instrument of accession.

Article 18 – Territorial application

1. Any State may, at the time of signature or when depositing its instrument of ratification, acceptance, approval or accession, specify the territory or territories to which this Protocol shall apply.
2. Any State may, at any later time, by declaration addressed to the Secretary General of the Council of Europe, extend the application of this Protocol to any other territory specified in the declaration. In respect of such territory the Protocol shall enter into force on the first day of the month following the expiration of a period of three months after the date of receipt of such declaration by the Secretary General.
3. Any declaration made under the two preceding paragraphs may, in respect of any territory specified in such declaration, be withdrawn by a notification addressed to the Secretary General of the Council of Europe. The withdrawal shall become effective on the first day of the month following the expiration of a period of six months after the date of receipt of such notification by the Secretary General.

Article 19 – Declarations and reservations

1. Reservations made by a State to any provision of the Convention [which is not amended by this Protocol] shall also be applicable to this Protocol, unless that State otherwise declares at the time of

signature or when depositing its instrument of ratification, acceptance, approval or accession. The same shall apply to any declaration made in respect or by virtue of any provision of the Convention.

- [2. Reservations made by a State to the provisions of the Additional Protocol or the Second Additional Protocol to the Convention shall not be applicable to the corresponding provisions of this Protocol, unless that State otherwise declares at the time of signature or when depositing its instrument of ratification, acceptance, approval or accession.
3. Any State not Party to the Additional Protocol or the Second Additional Protocol to the Convention may, at the time of signature of this Protocol or when depositing its instrument of ratification, acceptance, approval or accession, declare that it avails itself of the right not to accept wholly or in part Articles 7, [8,] 9, 10, [11,] 12 of this Protocol. No other reservation may be made.]
4. Any State may, at the time of signature or when depositing its instrument of ratification, acceptance, approval or accession, make the declarations provided for in Article 10, paragraph 3 and Article 21, paragraph 5 of the Convention as amended by this Protocol, and Article 6, paragraph 2 of this Protocol.
5. Any State may wholly or partially withdraw a reservation or declaration it has made in accordance with this Protocol, by means of a notification addressed to the Secretary General of the Council of Europe, which shall become effective as from the date of its receipt.
6. Any Party which has made a reservation in respect of any of the articles of this Protocol in accordance with paragraphs 2 or 3 above may not claim the application of those articles by another Party. It may, however, if its reservation is partial or conditional, claim the application of those articles paragraph in so far as it has itself accepted them.
- [7. The reservations referred to in paragraph 3 of this article shall be valid for a period of [three]¹⁸ years from the day of the entry into force of this Protocol in respect of the State concerned. However, such reservations may be renewed for periods of the same duration.
8. [Twelve]¹⁹ months before the date of expiry of the reservation, the Secretariat General of the Council of Europe shall give notice of that expiry to the Party concerned. No later than three months before expiry, the Party shall notify the Secretary General of the Council of Europe that it is upholding or withdrawing wholly or partially its reservation. Where a Party notifies the Secretary General of the Council of Europe that it is upholding its reservation, it shall provide an explanation of the grounds justifying its continuance. In the absence of notification by the Party concerned, the Secretary General of the Council of Europe shall inform that Party that its reservation is considered to have been extended automatically for a period of six months. Failure by the Party concerned to notify its intention to uphold or modify its reservation before the expiry of that period shall cause the reservation to lapse.]

Article 20 – Denunciation

1. Any Party may, in so far as it is concerned, denounce this Protocol by means of a notification addressed to the Secretary General of the Council of Europe.
2. Such denunciation shall become effective on the first day of the month following the expiration of a period of six months after the date of receipt of the notification by the Secretary General of the Council of Europe.
3. Denunciation of the Convention automatically entails denunciation of this Protocol.

Article 21 – Notifications

The Secretary General of the Council of Europe shall notify the member States of the Council of Europe and any State which has acceded to this Protocol of:

¹⁸ At the 10th meeting of the PC-OC Mod, two delegations proposed periods of five and ten years respectively.

¹⁹ Depending on the period retained for the purposes of paragraph 6, one delegation suggested that the notice should be given twenty four months before the date of expiry of the reservation.

- a. any signature;
- b. the deposit of any instrument of ratification, acceptance, approval or accession;
- c. any proposal for amendment received in pursuance of the provisions of Article 15;
- d. any date of entry into force of this Protocol in accordance with Articles 16 and 17;
- e. any declaration made in accordance with Article 10, paragraph 3 and Article 21, paragraph 5 of the Convention as amended by this Protocol, as well as any declaration made in accordance with Article 6, paragraph 2 and Article 19, paragraphs 1 and 2 of this Protocol, and any withdrawal of such a declaration;
- f. any reservation made in accordance with Article 19, paragraph 3, and any withdrawal of such a reservation;
- g. any notification received in pursuance of the provisions of Article 20 and the date on which denunciation takes effect;
- h. any other act, declaration, notification or communication relating to this Protocol.

In witness whereof the undersigned, being duly authorised thereto, have signed this Protocol.

Done at [Strasbourg], this [...] day of [...], in English and in French, both texts being equally authentic, in a single copy which shall be deposited in the archives of the Council of Europe. The Secretary General of the Council of Europe shall transmit certified copies to each member State of the Council of Europe and to the non-member States which have acceded to the Convention.

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