

<http://www.coe.int/tcj/>



Strasbourg, 2 February 2011

PC-OC (2010) 13 rev 2

[PC-OC/GM/Documents 2010/ PC-OC(2010)13 rev 2 E]

See / Voir PC-OC (2010) 13 rev 4

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;

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. When determining whether prosecution or punishment of the person sought would be statute-barred according to its law, any Party having made a declaration pursuant to paragraph 3 of this Article shall take into consideration, in accordance with its law, any acts or events that have occurred in the requesting Party, in so far as acts or events of the same nature have the effect of interrupting or suspending time-limitation in the requested Party."

Article 2 - The request and supporting documents

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

- "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.”
- 2. Article 5 of the Second Additional Protocol to the Convention shall cease to apply for any State becoming a Party to this Protocol.

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 measures 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
 - 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 person¹.”

¹ Two delegations of the PC-OC reserved their position concerning this paragraph, requesting that States have the possibility of excluding the use of this paragraph by way of a declaration. The remaining PC-OC delegations were of the view that there was no need for such a declaration, given the optional nature of this provision, which already gives the Parties the possibility to exclude, at their discretion, any measure restricting the personal freedom of the person concerned.

Article 4 – Re-extradition to a third state

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, and where applicable, of the documents mentioned in Article 12, paragraph 2. 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:
 - 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. a description of the circumstances in which the offence was committed, including the time, place and degree of involvement of the person sought.
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 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.
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.
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.

Article 6 - Channels and means of communication

The Convention shall be supplemented by the following provisions:

[Option 2:]

A new article shall be inserted after Article 12 of the Convention and shall read as follows:

Article 12 bis - ...]

"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 – 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.

Article 8 – Friendly settlement²

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.

[Option 2:]

A new article shall be inserted after Article 25 of the Convention and shall read as follows:

“Article 25 bis – Friendly settlement

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 9 - Amendments

1. Amendments to this Protocol [/the Convention] 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.
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 [with respect to the Parties to the Protocol] on the thirtieth day following notification by all the Parties to the Secretary General of their acceptance thereof.

² 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).

[Option 2:]

1. A new article shall be inserted after Article 25 bis of the Convention and shall read as follows:

Article 25 ter – Amendments

- “1. Amendments to any provision of the Convention may be proposed by any Party to the [Convention?] 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.
 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.”
2. Amendments adopted according to the procedure provided under paragraph 1 shall be applicable as between the Parties to this Protocol.]

Article 10 – 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.

Article 11 – 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 12 – 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 13 – Declarations and reservations

1. Reservations made by a State to the provisions of the Convention, as well as of the Additional Protocol and the Second Additional Protocol thereto, which are 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, the Additional Protocol or the Second Additional Protocol thereto.
2. No reservation may be made in respect of the provisions of this Protocol. Reservations and declarations made by a State to any provision of the Convention which is amended by this Protocol shall not be applicable as between the Parties to this Protocol.
3. 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, Article 21, paragraph 5 [, and Article 12 bis, paragraph 2] of the Convention as amended by this Protocol [, and Article 6, paragraph 2 of this Protocol]. In that event, reciprocity may be applied.
4. Any State may wholly or partially withdraw a 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.
- [5. Reservations and declarations made by a State to any provision of the Convention and the additional protocols thereto shall remain valid for a period of five years from the day of the entry into force of this Protocol in respect of the State concerned. However, such reservations and declarations may be renewed for periods of the same duration.]
6. 24 months before the date of expiry of the reservation or declaration, 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 or declaration. Where a Party notifies the Secretary General of the Council of Europe that it is upholding its reservation or declaration, 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 or declaration 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 or declaration before the expiry of that period shall cause the reservation or declaration to lapse.]

Article 14 – 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 15 – 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:

- 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 9;
- d. any date of entry into force of this Protocol in accordance with Articles 10 and 11;
- 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 13 of this Protocol, and any withdrawal of such a declaration;
- f. any notification received in pursuance of the provisions of Article 14 and the date on which denunciation takes effect;
- g. 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.

* * * * *