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

COUNCIL OF EUROPE CONSEIL DE L'EUROPE

Strasbourg, 2 March 2011 PC-OC (2010) 14 rev 2

[PC-OC/Documents 2010/ PC-OC(2010)14E rev 2]

See / Voir PC-OC (2010) 14 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 Explanatory Report to the Fourth Additional Protocol to the European Convention on Extradition

Secretariat memorandum prepared by

the Directorate General of Human Rights and Legal Affairs (DG-HL)

I. The Fourth Additional Protocol to the European Convention on Extradition, drawn up within the Council of Europe by the Committee of Experts on the Operation of European Conventions in the Penal Field (PC-OC), under the authority of the European Committee on Crime Problems (CDPC), has been opened for signature by the member States of the Council of Europe, in …., on …., on the occasion of the ….

II. The text of this explanatory report, prepared on the basis of that Committee's discussions and submitted to the Committee of Ministers of the Council of Europe, does not constitute an instrument providing an authoritative interpretation of the text of the Protocol although it may facilitate the understanding of its provisions.

Introduction

1. Under the authority of the European Committee on Crime Problems (CDPC), the Committee of Experts on the Operation of European Conventions on Co-operation in Criminal Matters (PC-OC) is entrusted, in particular, with examining the functioning and implementation of Council of Europe conventions and agreements in the field of crime problems, with a view to adapting them and improving their practical application where necessary.

2. The need for the modernisation of the legal instruments of the Council of Europe in the criminal justice field, including the European Convention on Extradition (hereinafter referred to as "the Convention"), in order to enhance international co-operation, has been highlighted on several occasions. In particular, the "New Start" report (PC-S-NS (2002) 7, presented to the CDPC by the Reflection Group on developments in international co-operation in criminal matters) approved by the CDPC in June 2002 pointed to the necessity of realising a European area of shared justice. The Warsaw declaration and the Plan of Action adopted by the third Summit of Council of Europe Heads of State and Government of the member States of the Council of Europe (Warsaw, 16-17 May 2005) underlined the commitment, at the highest political level, to making full use of the Council of Europe's standard-setting potential and to promoting implementation and further development of the Organisation's legal instruments and mechanisms of legal cooperation.

3. At the High-Level Conference of the Ministries of Justice and of the Interior entitled "Improving European Cooperation in the Criminal Justice Field" held in Moscow (Russian Federation) on 9 and 10 November 2006, the Council of Europe was encouraged to continue its efforts to improve the operation of the main conventions regulating international co-operation in criminal matters, in particular those regarding extradition, in order to identify the difficulties encountered and to consider the need for any new instruments.

4. At its 52nd meeting (October 2006) the PC-OC put forward a number of proposals relating to the modernisation of the European Convention on Extradition, as amended by the two additional protocols thereto of 1975 and 1978. The Convention, which dates from 1957, is indeed one of the oldest European conventions in the criminal law field and has a direct impact on individuals' rights and freedoms, to which the CDPC asked the PC-OC to pay particular attention.

5. In this context, the PC-OC suggested, on the one hand, to complement the Convention in order to provide a treaty basis for simplified extradition procedures, and on the other hand, to amend a number of provisions of the Convention in order to adapt it to modern needs. These provisions concerned, inter alia, the issues of lapse of time, rule of speciality, channels and means of communication and the use of languages.

6. The CDPC, at its 56th plenary session (June 2007), decided to mandate the PC-OC, to draft the necessary legal instruments for this purpose. Having studied various options, the PC-OC agreed to draw up two additional protocols to the Convention, a Third Additional Protocol providing for simplified extradition procedures by complementing the Convention, and a Fourth Additional Protocol amending certain provisions of the Convention itself. The present Fourth Additional Protocol was adopted by the PC-OC at its … meeting (… 2011) and submitted it to the CDPC for approval.

7. The drafts of the Fourth Additional Protocol and the Explanatory Report thereto were examined and approved by the CDPC at its …th plenary session ([date]) and submitted to the Committee of Ministers.

8. At the …th meeting of their Deputies on [date], the Committee of Ministers adopted the text of the Fourth Additional Protocol and decided to open it for signature, in [place] on [date].

Commentaries on the Articles of the Protocol

Article 1 – Lapse of time

9. This Article is intended to replace the original Article 10 of the Convention which established lapse of time, under the law either of the requested Party or the requesting Party, as a mandatory ground for refusal. The current text takes account of changes that occurred as regards international co-operation in criminal matters since the opening to signature of the Convention in 1957, and notably the relevant provision of the Convention of 23 October 1996 relating to extradition between the member States of the European Union (Article 8).

10. The modified Article draws a distinction concerning immunity by reason of lapse of time from prosecution or punishment, depending on whether it obtains according to the law of the requesting or the requested Party.

11. As regards the law of the requesting Party, lapse of time remains a mandatory ground for refusal in accordance with paragraph 1 of this Article. The drafters considered excluding this as a ground for refusal, given that the requesting State should, as a matter of course, not request the extradition of a person whose prosecution or punishment is statute-barred under its own law. However, they decided to keep this ground for refusal for the rare cases where a Party fails to withdraw an extradition request, despite this immunity.

12. Thus, the requested Party has an obligation to consider whether there is lapse of time under the law of the requesting State before deciding on extradition. However, it is not for the requested Party to determine whether immunity by reason of lapse of time had been acquired in the territory of the requesting Party. In cases where it has reasons to believe that such immunity might have been acquired, it should request information on this question directly from the requesting Party itself and the requesting Party should promptly provide the required information. The drafters agreed that this information should preferably take the form of a motivated statement, specifying the reasons for which there is no lapse of time with references to the relevant provisions of its law, where appropriate.

13. The requesting Party should provide this information together with the extradition request, without an explicit request to that effect from the requested State being necessary (see also Article 12, paragraph 2.b).

14. As regards the law of the requested Party, paragraph 2 of Article 10 provides that lapse of time shall not serve as a ground for refusal in principle. This is in line with developments in international law[1], as well as European Union law[2], which have taken place since 1957. The establishment of the law of the requesting Party as the only reference point for lapse of time considerations corresponds to a higher degree of mutual trust between States Parties, as well as to a reaffirmation of the purpose of international co-operation in criminal matters as helping requesting States to pursue the ends of justice.

---

1 For example, the UN Model Treaty on Extradition and its revised Manual.

2 Notably, the Convention implementing the Schengen Agreement (19 June 1990) and the Convention of 23 October 1996 drawn up on the basis of Article K.3 of the Treaty on European Union, relating to extradition between the member States of the European Union.

15. Paragraph 3 qualifies the principle established under paragraph 2, by allowing the requested Party to invoke lapse of time under its own law as an optional ground for refusal in two hypotheses:

- the requested Party has jurisdiction on the relevant offences under its own criminal law;
- its domestic legislation explicitly prohibits extradition in case of lapse of time under its own law.

However, the possibility of doing so is conditional on a declaration to that effect having been made at the time of signature or when depositing the instrument of ratification, acceptance, approval or accession.

16. This declaration may concern either one of the two sub-paragraphs of paragraph 2, or both. The latter case would allow a State Party to make a partial withdrawal of its declaration as regards the more far-reaching ground for refusal of sub-paragraph b, while maintaining the more limited ground for refusal of sub-paragraph a.

17. Paragraph 4, which is intended to apply only in respect of States having made a declaration under paragraph 3, makes it obligatory for those States to take into consideration acts of interruption and events suspending time-limitation which have occurred in the requesting State, to the extent that such acts and events have the same effect in the requested State. This principle follows from the Resolution (75) 12 of the Committee of Ministers on the practical application of the European Convention on Extradition.

As reflected in the wording “in accordance with its law”, it is the law of the requested Party which determines if and to what extent acts and events in the requesting State interrupt or suspend time-limitation in the requested Party.

Article 2 – The request and supporting documents

18. Article 12, paragraph 1 of the Convention provides that requests for extradition shall be communicated through the diplomatic channel. Chapter V of the Second Additional Protocol to the Convention simplified this system by providing for extradition requests to be communicated between the Ministries of Justice concerned. However, for a number of countries the competent authority for sending and receiving extradition requests is not the Ministry of Justice, but another authority such as the Office of the Prosecutor General. The present wording is designed to accommodate this practice.

19. Any State wishing to designate a competent authority other than the Ministry of Justice shall notify the Secretary General of the Council of Europe accordingly. The drafters agreed that any such authority shall be competent at the national level to send and receive extradition request. In the absence of such notification, the competent authority with respect to that State is understood to be the Ministry of Justice.

20. As regards paragraph 2 of Article 12, contrary to the Convention which requires an original or authenticated copy of the documents mentioned under sub-paragraph a, the Protocol only refers to “a copy”. This is in line with the possibility introduced under Article 6 of the Protocol to use modern means of communication. However, sub-paragraph a should also be read in conjunction with the declaration provided for under Article 6, paragraph 2. In cases where the requested Party has made such a declaration, the requesting Party would still have to send the originals or authenticated copies of these documents.

21. In addition, the Protocol completes the original wording of paragraph 2 in two respects. Firstly, Under sub-paragraph b, an explicit reference to provisions relating to lapse of time is included, with the understanding that the appraisal of lapse of time according to the law of the requesting Party, pursuant to Article 10, paragraph 1 of the Convention as amended by the Protocol, should be based on the assessment made by that Party of lapse of time according to its

own law. Secondly, under sub-paragraph c, the relevant information to be sent is completed with a reference to the location of the person, due to practical considerations.

Article 3 – Rule of speciality

22. The rule of speciality corresponds to the principle that an extradited person may not be arrested, prosecuted, tried, sentenced or detained for an offence other than that which furnished the grounds for his or her extradition. In this context, it is important to underline the responsibility of the requesting State to ensure that the initial request for extradition is as complete as possible and based on all available information, in order to avoid future requests for the extension of extradition to other offences committed prior to the initial request.

23. This article rewords Article 14 of the Convention, by introducing the following amendments:

1. in paragraph 1, the words “proceeded against” are replaced by the words “arrested, prosecuted, tried” and a new sub-paragraph is inserted under paragraph 2, in order to clarify the scope of the rule of speciality ;
2. in paragraph 1, sub-paragraph a, a time limit of 90 days is introduced for the formerly requested State to communicate its decision on the extension of the extradition to other offences.
3. in paragraph 1, sub-paragraph b, the period of 45 days is reduced to 30 days;
4. a new paragraph 4 is introduced, creating the possibility for the requested State to authorize the requesting State to restrict the personal freedom of the extradited person pending its decision on extension of the extradition.

24. As regards point 1, the reason for the change is the fact that there had been many different and sometimes conflicting interpretations of the words “proceeded against” in different legal systems. The replies to a questionnaire sent by the PC-OC indicated notably that the authorities of some States Parties to the Convention had interpreted the words “proceeded against” to cover any measure taken by the authorities of the requesting State, even before a case is brought to trial. This had made it impossible for those States Parties to investigate and collect evidence in relation to offences committed prior to a person’s extradition and which are discovered after her/his surrender. This has created significant difficulties in some States Parties or led to the rejection of evidence collected on such offences by courts.

25. The drafters of the Protocol were of the view that such an interpretation did not reflect the intention of the drafters of the Convention, as the requesting Party should not be barred from doing whatever is necessary in order to organise the file for a request to be addressed to the Party which surrendered the person in accordance with paragraph 1, sub-paragraph a, seeking the consent of that Party to the extension of the extradition to offences not covered in the initial extradition request. Such a request for consent should notably be accompanied by the documents mentioned in Article 12, which implies that the requesting Party may initiate or continue proceedings up to the point where it obtains the necessary documents for requesting the other Party’s consent, such as a new warrant of arrest.

26. The new wording of paragraph 1, in combination with the new paragraph 2, sub-paragraph a, makes it clear that the rule of speciality does not bar the requesting State from conducting pre-trial investigations and doing what is necessary in order to obtain the documents mentioned under paragraph 1, sub-paragraph a, while still ruling out the possibility for the requesting Party to bring the case to trial or restrict the personal freedom of the extradited person, solely based on these newly discovered offences. In this context, pre-trial investigations are to be understood to comprise intrusive measures such as wiretapping or house searches with regard to the extradited person, as well as confrontation and interrogation of persons other than the extradited person in connection with these additional offences. The extradited person may be interrogated or confronted insofar as this investigative measure does not imply coercion, i.e. the restriction of the personal freedom of the extradited person. Article 14 should also not prevent the

requesting State from summoning the extradited person for the purpose of gathering evidence in order to institute proceedings against other persons who are not covered by the rule of speciality.

27. The concept of “restriction of personal freedom” is to be interpreted so as to include not only deprivation of liberty in accordance with Article 5 of the European Convention of Human Rights, but also restrictions on “liberty of movement”, in accordance with Article 2 of Protocol No. 4 thereto. Thus, a ban to leave the territory of the requesting State would for example qualify as a restriction of personal freedom.

Paragraph 1, sub-paragraph a

28. As regards point 2, the PC-OC considered that the introduction of a time limit for the (formerly) requested State would be an added value in the context of the modernisation of the Convention. This is linked to the observation of the PC-OC that extension of extradition to new offences is sometimes characterised by co-operation which is less prompt compared to the initial request and can cause significant delays, which causes problems in the criminal procedures of requesting States and may also have negative consequences for the Human Rights of the defendant. The PC-OC therefore agreed that the introduction of such a time limit would have a clear added value.

29. While some States Parties to the Convention follow the same procedure for giving consent to the extension of the extradition decision as they do for the initial extradition request, the PC-OC observed that certain elements, such as the presence of the person already in the requesting State or the technical nature of many extension requests, may allow for a speedy decision on extension. The drafters thus agreed that a time limit of 90 days would be sufficient for the (formerly) requested State to take its decision on consenting to the extension of extradition.

30. However, in certain very complicated cases, it might not be possible for the requested State to treat the request for consent within 90 days, in which case this period can be extended. This nonetheless constitutes progress vis-à-vis the mother Convention, as in such cases the requested Party would have an obligation to inform the requesting Party of the reasons for the delay and the time needed for reaching a decision. This would reduce uncertainty for the requesting State and limit the disruption to its criminal procedure.

Paragraph 1, sub-paragraph b

31. The amendment to paragraph 1, sub-paragraph b concerns the delay following the final discharge of the extradited person after which the rule of speciality ceases to apply. The Convention provides that the rule of speciality shall not apply if the person has not left, having had the opportunity to do so, the territory of the requested Party within 45 days of the person’s discharge or if the person has returned to that territory after leaving it. The drafters considered that the 45-day period had no objective justification 50 years after the Convention, given that it has become much easier to travel and leave the territory of States Parties. They therefore agreed to restrict this delay to 30 days.

32. This provision also contains two conditions which have to be fulfilled for the rule of speciality to cease to apply. The person must have been “finally discharged” and had the “opportunity to leave the territory”.

33. The term finally discharged should be interpreted in line with the meaning attributed to that term under the Additional Protocol to the Convention on the Transfer of Sentenced Persons. Paragraph 32 of the explanatory report to that Convention provides that:

> “The expression "final discharge" (in French: "élargissement définitif") means that the person's freedom to leave the country is no longer subject to any restriction deriving directly or indirectly from the sentence. Consequently, where, for instance, the person is conditionally released, that person is finally discharged if the conditions linked to release do not prevent him or her from leaving the country; conversely, that person is not finally discharged where the conditions linked to release do prevent him or her from leaving the country.”

34. With regard to the words “opportunity to leave the territory”, and as clarified in the original explanatory report to Article 14 of the Convention, the person must not only be free to leave the territory, but also not be hindered from doing so for other reasons (for example, for serious health reasons).

Paragraph 4

35. The rule of speciality prohibits any restriction of the personal freedom of the extradited person for offences committed prior to his or her extradition, other than those which furnished the grounds for this extradition. However, there might be rare cases where this principle could potentially create an impediment to the pursuit of the ends of justice, even where there is no oversight on the side of the requesting Party.

36. A typical example would be a situation where the requesting Party discovers new elements after the extradition implicating the extradited person in connection with an offence not included in the original extradition request, on the basis of new evidence or new links to existing evidence. If the release of that person from custody for the initial offence is imminent, the requesting Party may have to release the person before it can obtain the consent from the requested Party to extend the extradition to the new offence.

37. Paragraph 4 introduces a special procedure for mitigating the rule of speciality for such exceptional cases, which allows the requesting Party to continue restricting the personal freedom of the extradited person until the requested Party takes its decision on consent pursuant to paragraph 1, sub-paragraph a.

38. According to this procedure, in order to restrict the personal freedom of the extradited person on the basis of new offences, the requesting Party must notify its intention to do so to the requested Party. This notification must take place either at the same time as the request for consent pursuant to paragraph 1, sub-paragraph a, or at a later stage. No restriction on the basis of new offences can take place outside the knowledge of the requested State and before its acquiescence, which is tacitly given by acknowledging the receipt of the notification of the requesting Party of its intention to proceed to such a restriction.

39. This acquiescence allows the requesting Party to take measures on the basis of its warrant of arrest for new offences, according to its own law and subject to its procedural guarantees and to the control of its domestic courts. However, the requested Party may at any time express its opposition to such a restriction of personal freedom, either simultaneously with its acknowledgement of receipt or at a later stage. The requesting Party must comply with this opposition, in the former case by abstaining from taking the measure restricting the personal freedom of the extradited person, and in the latter case by putting an immediate end to the measure in question.

40. The drafters considered that the opposition of the requested Party pursuant to this paragraph may be only limited to certain types of restriction. For example, the requested Party could inform the requesting Party that the latter may not detain the person in question, but use alternative measures restricting her/his personal freedom, such as a house arrest or a ban to leave the country.

Article 4 – Re-extradition to a third state

41. The changes to Article 15 of the Convention are in line with the amendments to Article 14 of the Convention, and concern the introduction of a time limit of 90 days for the requested Party to decide whether or not it consents to a re-extradition of the person surrendered to another Party or to a third State.

Article 5 – Transit

42. This article, which was inspired by Article 11 of the Third Additional Protocol to the Convention, simplifies considerably the transit procedure foreseen in Article 21 of the Convention. The drafters of the Protocol noted that, for an effective and speedy transit, the request for transit should be sent before the extradition is granted and, where possible, at the same time as the extradition request. This is in line with the Recommendation No. R (80) 7 of the Committee of Ministers of the Council of Europe concerning the practical application of the European Convention on Extradition.

43. In accordance with paragraph 2, the request for transit does not have to be accompanied by the documents referred to in Article 12, paragraph 2 of the Convention. Accordingly, the information listed in this paragraph may be considered sufficient for the purposes of granting transit. Nevertheless, in exceptional cases where this information is not sufficient for the State of transit to reach a decision on granting transit, Article 13 of the Convention would apply and allow that Party to request supplementary information from the Party requesting transit. While information concerning lapse of time is not included in this list, the drafters agreed that such information should also be provided in cases where lapse of time is likely to be of concern, for example due to the time of commission of the offence.

44. Pursuant to Article 6 of the Protocol, communications for transit purposes may be made through electronic or any other means affording evidence in writing (such as fax or electronic mail), and the decision of the Party requested to grant transit may be made known by the same method. Parties can also make use of these means of communication for practical arrangements. Thus, the Party requesting transit is encouraged to communicate, to the extent possible, information such as the intended time and place of transit, the route, flight details, or the identity of the escorting officers, as soon as this information becomes available.

45. The drafters of the Protocol considered that the new Article 21 could also cover cases where only the Party requesting transit and the Party requested to grant transit are Parties to the Convention, and extradition has been granted on a legal basis other than the Convention.

46. It is no longer an obligation under the Protocol to notify a Party whose air space will be used during transit when it is not intended to land. However, paragraph 3 foresees an emergency procedure in the event of an unscheduled landing. As soon as the requesting Party is informed of such an event, it shall notify to the Party on whose territory the unscheduled landing occurs that one of the documents mentioned in Article 12, paragraph 2, sub-paragraph a exists. While the Protocol does not specify the form this notification should take, the relevant documentation carried by the escorting officers, or information contained in the INTERPOL or Schengen Information Systems could, for example, be considered sufficient in this respect.

47. Similarly to the original wording of Article 21, paragraph 4 of the Convention, the Party on whose territory the unscheduled landing occurs shall consider this notification as a request for provisional arrest, pending the submission of an ordinary request for transfer in accordance with paragraphs 1 and 2.

Article 6 – Channels and means of communication

48. This Article, which is based on Article 8 of the Third Additional Protocol to the Convention, provides a legal basis for speedy communication, including electronic means of communication, while ensuring the authenticity of the documents and information transmitted. It would affect means of communication in relation to several provisions of the Convention, including Articles 12, 13, 14, 15, 17, 18, 19 and 21. The Parties may also request to obtain the original document or an authenticated copy, in particular by mail.

49. The drafters of the Protocol agreed that the current trend was towards a more intensive use of electronic means of communication, and that the text of the Convention should be open to future developments in this respect, including the possibility of sending all extradition documents using electronic means. However, some States considered that for the most essential documents, namely those referred to in Article 12, paragraph 2 and Article 14, paragraph 1, sub-paragraph a of the Convention, it would be premature in the current circumstances to abolish the requirement for transmission by mail, until more reliable electronic means, such as communication with secure electronic signatures, will be more widespread.

50. In order to accommodate these concerns, paragraph 2 of this Article allows States to declare that they will require the original or authenticated copy of the request and supporting documents for these specific Articles in all cases. This declaration can be withdrawn as soon as circumstances permit and States Parties having made this declaration are encouraged to make use of this possibility.

Article 7 – Relationship with the Convention and other international instruments

51. This article clarifies the relationship between the Protocol on the one hand, and the Convention and other international agreements on the other hand.

52. Paragraph 1 ensures uniform interpretation of the Protocol and the Convention by providing that the words and expressions used in the Protocol shall be interpreted within the meaning of the Convention. The Convention should be understood as the European Convention on Extradition of 1957 (ETS No. 24), as amended between Parties concerned by the Additional Protocol (ETS No. 86) and/or the Second Additional Protocol (ETS No. 98) thereto.

53. Paragraph 1 further clarifies the relationship between the provisions of the Convention and those of the Protocol, i.e. as between the Parties to the Protocol, the provisions of the Convention shall apply to the extent that they are compatible with the provisions of the Protocol, in accordance with general principles and norms of international law.

54. Paragraph 2 is designed to ensure the smooth co-existence of this Protocol with any bilateral or multilateral agreements concluded in pursuance of Article 28, paragraph 2 of the Convention. It states that the Protocol does not alter the relation between the Convention and such agreements or the possibility for Parties to regulate their mutual relations with regard to extradition exclusively in accordance with a system based on a uniform law (Article 28, paragraph 3 of the Convention).

55. This implies in particular that declarations made by EU member States in relation with the European Union Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between member States (2002/584/JHA) would automatically apply to the Protocol and would make it unnecessary for the States concerned to make new declarations to that effect.

Article 8 – Friendly settlement

56. This article makes the European Committee on Crime Problems the guardian over the interpretation and application of the Convention and the Protocols thereto, and follows the precedents established in other European conventions in the criminal justice field. It also follows Recommendation (99) 20 of the Committee of Ministers, concerning the friendly settlement of any difficulty that may arise out of the application of the Council of Europe conventions in the penal field. The reporting requirement which it lays down is intended to keep the European Committee on Crime Problems informed about possible difficulties in interpreting and applying the Protocol, so that it may contribute to facilitating friendly settlements and proposing amendments to the Convention and its Protocols which might prove necessary.

Article 9 - Amendments

;;;

Articles 10 to 15 – Final clauses

57. Articles 10 to 15 are based both on the "Model final clauses for conventions and agreements concluded within the Council of Europe" which were approved by the Committee of Ministers at the 315th meeting of their Deputies in February 1980, and the final clauses of the Convention.

58. Since Article 12 concerning territorial application is mainly aimed at overseas territories, it was agreed that it would be clearly against the philosophy of the Protocol for any Party to exclude parts of its main territory from the application of this instrument, and that there would be no need to lay this down explicitly in the Protocol.

59. Reservations and declarations made by a State with regard to any provision of the Convention or the two Additional Protocols thereto shall also be applicable to this Protocol, unless that State declares otherwise. In accordance with Article 13, paragraph 1.

60. It is underlined that under the provisions of Article 13, no reservation may be made with regard to the provisions of this Protocol. However, any State may avail itself of the right to make the declarations provided for under Article 10, paragraph 3, Article 21, paragraph 5 [, and Article 12 bis, paragraph 2 / Article 6, paragraph 2] of the Convention as amended by this Protocol.