



Explanatory Report to the Second Additional Protocol to the European Convention on Extradition

Strasbourg, 17.III.1978

I. The Second Additional Protocol to the European Convention on Extradition, drawn up within the Council of Europe by a committee of governmental experts under the authority of the European Committee on Crime Problems (ECCP) was opened to signature by the member States of the Council on 17 March 1978.

II. The text of the 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 Second Additional Protocol although it may facilitate the understanding of the Additional Protocol's provisions.

Introduction

1. As did the Additional Protocol to the European Convention on Extradition, which was opened for signature on 15 October 1975 ⁽¹⁾, the preparation of the Second Additional Protocol has its origin in a meeting which the Council of Europe organised in June 1969 for the persons responsible at national level for the application of the Convention. The participants in that meeting discussed the various problems arising in connection with the implementation of the Convention and made a number of proposals aimed at improving its functioning ⁽²⁾.

2. At its 20th Plenary Session in 1971, the European Committee on Crime Problems (ECCP) examined the conclusions of the 1969 meeting and set up a sub-committee (Sub-committee No. XXXI of the ECCP) which was instructed to carry out a detailed examination of the problems dealt with and to propose the appropriate means for implementing the conclusions reached at the 1969 meeting.

Mr R. Linke (Austria) was appointed Chairman of the subcommittee. The secretariat was provided by the Division of Crime Problems of the Directorate of Legal Affairs of the Council of Europe.

3. The sub-committee first elaborated the Additional Protocol which was opened for signature on 15 October 1975. It then examined a number of other questions relating to the practical application of the Convention. During its meetings held from 24 to 27 September 1974, from 22 to 25 April 1975 and from 15 to 19 March 1976, it prepared, *inter alia*, the Protocol which is the subject of this report.

(1) European Treaty Series No. 86.

(2) cf. the publication *Legal Aspects of Extradition among European States*, Council of Europe, Strasbourg 1970.

4. For the purpose of examining the draft texts, the ECCP decided, at its 25th Plenary Session in 1976, to enlarge the composition of the subcommittee so as to comprise experts from all member States as well as from the Contracting Parties which are not members of the Council of Europe.

The enlarged sub-committee met from 6 to 10 September 1976 and from 7 to 11 March 1977.

5. The draft Additional Protocol as amended by the enlarged subcommittee was submitted to the 26th Plenary Session of the ECCP in May 1977 which decided to transmit it to the Committee of Ministers.

6. The Committee of Ministers of the Council of Europe adopted the text of the Second Additional Protocol at the 279th meeting of the Ministers' Deputies in November 1977 and decided to open it for signature.

General Observations

7. When preparing the Protocol the sub-committee was faced with a basic choice: either to elaborate separate instruments for each of the subjects to be dealt with, or to include different subjects in one and the same Protocol. Following the method already adopted for the Additional Protocol to the Extradition Convention of 15 October 1975, the subcommittee decided in favour of the latter approach. Consequently, the Protocol contains provisions on a number of different topics; they relate to:

- the extension of accessory extradition to offences carrying only a pecuniary sanction (Chapter I);
- the extension of the Convention to fiscal offences (Chapter II);
- judgments *in absentia* (Chapter III);
- amnesty (Chapter IV); and
- the communication of requests for extradition (Chapter V).

8. It is to be noted that the provisions on fiscal offences and on requests for extradition (Chapters II and V) modify the existing texts of the relevant articles of the Convention, whereas the provisions on accessory extradition, on judgments *in absentia* and on amnesty (Chapters I, III and IV) complement the original articles.

Commentary on the Articles of the Protocol

Chapter I – Accessory Extradition

9. The law of some States draws a distinction between criminal offences properly so-called and certain other types of offences. While criminal offences are punishable by criminal penalties, the other offences are dealt with by pecuniary sanctions which are not regarded as criminal penalties. In the Federal Republic of Germany, for instance, there are offences against public order (*Ordnungswidrigkeiten*) which are dealt with by a fine by the administrative authorities, but are subject to appeal to the ordinary criminal courts.

10. Under the Convention, minor criminal offences which carry only a fine as well as the other types of offences mentioned in paragraph 9 cannot give rise to accessory extradition in accordance with Article 2.2 since they do not fulfil the specified conditions regarding the nature of the sanction. Nonetheless, these offences may cause considerable social harm (e.g. violation of regulations relating to the protection of the environment). It was therefore thought desirable to include them all in the category of offences for which accessory extradition can be granted, particularly since the seriousness of the offence which is normally a condition of extradition does not give rise to concern in the case of accessory extradition.

11. Chapter I extends the scope of application of accessory extradition permissible under Article 2.2 to these offences. The requesting State is thus given the possibility of obtaining extradition also for an offence which is subject to a criminal fine or to any other pecuniary sanction.

12. As regards the principle of double criminality, all these offences must fulfil the general condition laid down in Article 2.1, i.e. they must be subject to a sanction under the laws of both the requested and the requesting States. However, it is not necessary for them to be punishable by the same kind of sanction in both States. The same principle is laid down, for instance, in Article 11.2 of the Swiss-German Agreement of 13 November 1969 supplementing the European Convention on Extradition.

13. As the offences covered by Chapter I are offences within the meaning of Article 14.1 of the Convention, the rule of speciality laid down in that provision applies to accessory extradition for such offences.

14. As regards the documents to be submitted in support of the request for accessory extradition in respect of these offences, Article 12 of the Convention applies, it being understood that the requesting State may present, instead of a warrant of arrest, any other document showing that a charge has been brought against the person concerned.

Chapter II – Fiscal Offences

15. Article 5 of the Convention provides that extradition for fiscal offences, i.e. offences in connection with taxes, duties, customs and exchange, shall be granted only if the Contracting Parties have so decided in respect of any such offence or category of offences. A previous arrangement between the Parties is therefore necessary.

Chapter II of the Protocol gives Article 5 of the Convention a more mandatory form: extradition shall take place irrespective of any arrangements between the Contracting Parties whenever the fiscal offence, under the law of the requesting State, corresponds, under the law of the requested State, to an offence of the same nature.

16. This new rule reflects a tendency towards no longer allowing fiscal offences to fall outside the scope of application of extradition arrangements. It was for a long time thought that fiscal offences should not be treated as ordinary offences as they were akin to military or political offences which traditionally did not give rise to extradition. States hesitated to grant extradition when the victim of the offence was not a private person but another State, because it was thought that it was not the task of one State to protect the finances of another.

However, recently the approach to criminal policy has undergone considerable changes. It is now recognised that greater attention has to be given to economic offences in view of the damage they cause to society. It is also felt that there is now a need for closer international cooperation in this field, and that it is no longer justifiable to distinguish, in the field of extradition, between "ordinary" and fiscal offences.

For the purpose of extradition, Chapter II therefore puts fiscal and "ordinary" offences on the same footing.

17. Under the Convention (Article 2), extradition is subject to the conditions of dual criminal liability: the offence in respect of which extradition is sought must be a punishable offence of the same kind within the competence of the courts in both the requesting and the requested State.

As regards fiscal offences, the laws of member States differ in respect of the constituent elements of the various offences connected with taxes, duties, customs and exchange. To avoid difficulties of interpretation in respect of "fiscal" offences within the meaning of Chapter II, the text, rather than adopt the term "fiscal offence" which has no common meaning, reproduces the words appearing in Article 5 of the Convention ("taxes, duties, customs and exchange"); furthermore it is provided in paragraph 1 that extradition shall take place "if the offence, under the law of the requested Party, corresponds to an offence of the same nature": extradition is to be granted not only where an act is punishable as the same fiscal offence in the requesting and the requested Party, but also where an act of the same nature as that underlying the request for extradition would be punishable in the requested Party.

For example, a person who intentionally evades a tax or duty in the requesting State by giving untrue information in a document which serves as a basis for a decision concerning the amount of that tax or duty, may be extradited if the same kind of deliberate misleading of tax authorities is punishable under the law of the requested State, even if the law of that State does not correspond entirely with the law of the requesting State.

18. It follows from the absence of a definition of the term "fiscal offence" that the requested State has wide discretion in evaluating the eventual nature of the offence.

19. The fact that the law of the requested Party does not impose the same kind of tax or duty as the law of the requesting Party is irrelevant by virtue of paragraph 2. Extradition may not be refused on that ground. Here again, the basic idea is that the essential constituent elements of the offence shall be decisive.

20. Extradition in respect of fiscal offences is granted "in accordance with the provisions of the Convention". It is therefore subject to the conditions laid down in the Convention, including those concerning the level of penalties for the offence in question (Article 2 of the Convention).

Chapter III – Judgments *in absentia*

21. Chapter III complements the European Convention on Extradition with regard to judgments in absentia, i.e. judgments rendered after a hearing at which the sentenced person was not personally present.

(cf. the definition in Article 21.2 of the European Convention on the International Validity of Criminal Judgments). The expression "judgments *in absentia*" means judgments properly so-called and does not include for instance, *ordonnances pénales*.

22. The sub-committee had first considered whether the text of the Protocol might not be based on Articles 21 *et seq.* of the European Convention on the International Validity of Criminal Judgments, since it might be illogical to treat some judgments *in absentia* as contentious for the purpose of that Convention and not for the purpose of the Extradition Convention. It was, however, considered that it was not possible to transfer the machinery of that Convention to a different context: that Convention concerns in particular execution of a judgment in the requested and not in the requesting State and the special procedure of notification followed by opposition would not really be appropriate as the individual claimed would, *ex hypothesi*, have to make an opposition in a State from which he was absent.

23. For these reasons the sub-committee decided to provide for a procedure proper to the Extradition Convention. Paragraph 1 of Chapter III allows the requested Party to refuse extradition if the proceedings leading to the judgment did not satisfy the rights of defence recognised as due to everyone charged with a criminal offence. An exception to this principle is made if the requesting Party gives an assurance considered sufficient to guarantee to the person concerned the right to a retrial which safeguards his rights of defence: in that case extradition shall be granted.

24. At the origin of this amendment is the Netherlands reservation to the Extradition Convention to the effect that extradition would not be granted if the individual claimed had not been enabled to exercise the rights specified in Article 6.3.c of the Human Rights Convention. The sub-committee was, however, of the opinion that any exemption from the obligation to extradite should apply if there had been a violation of any of the generally acknowledged rights of defence, in particular those specified in the whole of Article 6.3 of the Human Rights Convention and not merely those mentioned in sub-paragraph c thereof. Moreover, the Netherlands reservation refers only to extradition to enforce a judgment *in absentia*; it is essential to specify that, if there is no longer an obligation to extradite for this purpose, it will, under certain conditions, remain obligatory to extradite to permit the requesting State to take proceedings.

25. As regards the reference to the "rights of defence recognised as due to everyone charged with a criminal offence", it should be noted that on 21 May 1975, the Committee of Ministers of the Council of Europe adopted Resolution (75) 11 on the criteria governing proceedings held in the absence of the accused. This resolution recommends the governments of member States to apply a number of minimum rules when a trial is held in the absence of the accused. These minimum rules are aimed at guaranteeing the accused's rights as laid down in the European Convention for the Protection of Human Rights and Fundamental Freedoms and may serve for the purpose of determining the scope of the phrase "rights of defence" used in Chapter III. The reference to the rights of defence due to "everyone charged with a criminal offence" is indeed drawn from the Human Rights Convention and is intended to cover in particular the rights specified therein.

26. Reference is made to the purpose of the extradition request because Article 1 of the Convention makes a distinction between requests for the purpose of enforcing a judgment and requests for the purpose of taking proceedings.

27. The phrase "in its opinion" is intended to underline that it is for the requested Party to assess whether the proceedings leading to the judgment (and not the judgment itself) satisfied the rights of defence. If the requested Party has doubts on that point, the requesting Party must try to dissipate them, but otherwise it is incumbent on the requested Party to say why it considers the proceedings unsatisfactory.

28. If the requested Party finds difficulties in extraditing, to enable the requesting Party to enforce the judgment, new contacts will be necessary between the States. The requested Party is obliged to extradite if it receives an assurance of the kind indicated; such an assurance must cover not merely the availability of a remedy by way of retrial but also the effectiveness of that remedy.

Once surrendered in pursuance of the requested Party's obligations to extradite upon receipt of sufficient assurances, the person concerned may, of course, accept the judgment rendered against him in his absence or demand a retrial. This is made clear in the last sentence of Chapter III.

If the domestic law of the requesting Party does not allow a retrial, there is no obligation for the requested Party to extradite.

29. Chapter III provides a further means of strengthening the legal interests of the person to be extradited by stating, in paragraph 2, that communication of the judgment rendered *in absentia* is not to be regarded by the requesting State as a formal notification. The chief object of this provision is to ensure that the person to be extradited will not find himself with only a very short time in which to make an opposition, whereas the formalities relating to his handing over may take several weeks or months.

Furthermore, in some States the opposition entered by the person sentenced nullifies the judgment rendered *in absentia*, with the result that those States will consider only the time limitation of the criminal proceedings. Others follow the principle that the time limitation of the sentence only should be taken into account. Since it is generally true that the time limitation is reached sooner in respect of the proceedings than in respect of the sentence, opposition by the person sentenced (in the case of formal notification in the requested State) might prevent extradition if the requesting and requested States do not follow the same principle in matters of time limitation.

It goes without saying that this provision applies only to a communication made subsequent to a request for extradition of a person referred to in a judgment rendered *in absentia*.

Chapter IV – Amnesty

30. Chapter IV deals with the question whether an amnesty granted in the requested State is a ground for refusing extradition. The Convention is silent on this point. The Protocol now offers a solution following the examples already contained in some bilateral extradition agreements.

31. Chapter IV does not deal with amnesties in the requesting Party, as the sub-committee considered it unlikely that a State would ask for extradition for an offence in respect of which it had previously granted an amnesty.

32. An amnesty (referring either to criminal prosecution or to the enforcement of sentences) in the requested Party is a barrier to extradition only if that State has jurisdiction over the offence concurrently with the requesting State (e.g. by virtue of the principles of active and passive personality).

Chapter V – Communication of Requests for Extradition

33. According to Article 12.1 of the Convention, requests for extradition shall be communicated through the diplomatic channels. Experience in some States having shown that the diplomatic channel may give rise to delay, the sub-committee decided to substitute a more expeditious way of communication for the way prescribed by the convention. The sub-committee also noted that for some countries there might be difficulties in submitting a request for extradition within the minimum period of eighteen days provided for in Article 16 of the Convention where a request for provisional arrest has been made.

34. Chapter V provides for extradition requests to be communicated between the Ministries of Justice concerned without, however, excluding the use of diplomatic channels and allowing two or more Contracting Parties to resort to other specifically agreed channels.

This method of communication has been adopted in the light of similar provisions in Article 15.1 of the European Convention on Mutual Assistance in Criminal Matters.

In those States where there is no Ministry of Justice, the term is understood to mean the department of government, by whatever name it is known, which is responsible for the administration of criminal justice.

Chapter VI – Final Clauses

35. The provisions contained in Chapter VI are based on the model final clauses of agreements and conventions which were approved by the Committee of Ministers of the Council of Europe at the 113th meeting of their Deputies. Most of these articles do not call for specific comments, but the following points require some explanation.

36. As regards Article 6.4, it should be noted that member States of the Council of Europe which have signed but not ratified the Extradition Convention may sign the Protocol before ratifying the Convention. However, paragraph 4 of this article makes it clear that the Protocol may be ratified, accepted or approved only by a member State which has ratified the Convention. There would be no obligation on a member State ratifying the Convention in the future to become a Contracting Party to the Protocol.

37. The Protocol may be acceded to by a non-member State only if it has acceded to the Extradition Convention (Article 7).

Accession to the Convention by non-member States of the Council of Europe has been and remains conditional on invitation from the Committee of Ministers, but no such invitation is required for accession to the Protocol. A non-member State that has at any time acceded to the Convention thus has an automatic right (but not an obligation) to accede to the Protocol; the only limitation is that no such accession may be effected until after the Protocol's entry into force which, under Article 6.2, is conditional on ratification, acceptance or approval by three member States.

38. With regard to reservations, Article 9.1 lays down the principle that in the absence of a declaration to the contrary, existing reservations to the Extradition Convention apply also to the Protocol.

39. Article 9.2 refers to the possibility for Contracting Parties not to accept one or more of the four chapters and to limit their non-acceptance of Chapter II to certain offences or to certain categories of offences. Contracting States have wide discretion in defining the categories of offences in respect of which they wish to accept Chapter II, for instance by reference to the acts constituting an offence, or by reference to the fiscal regulations which are affected. As regards Chapter III, they may limit their non-acceptance to paragraph 2.

These provisions were inserted in order to enable States which, for the time being, find it impossible to accept all chapters, to become, nevertheless, Parties to the Protocol. They may withdraw any reservation made under Article 9.2 (Article 9, paragraph 3).