



**EUROPEAN UNION
THE COUNCIL**

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NOTE

from :	Presidency
to :	Working Party on Judicial Cooperation in Criminal Matters
Subject :	Discussions at the fourth session of the Ad Hoc Committee on the drafting of a UN Convention against Transnational Organized Crime (Vienna, 28 June - 9 July 1999) - Article 14, mutual legal assistance

On 9 December 1998, the General Assembly of the United Nations established an Ad Hoc Committee in order to draft a Convention against Transnational Organized Crime (General Assembly resolution 53/111).

The draft of the Convention, which currently consists of some thirty Articles, is based largely on the 1988 United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances. This draft has now been dealt with at four sessions, beginning in January 1999. A first reading has been completed and a second reading has begun.

During the most recent session, from 28 June to 9 July 1999, considerable discussion arose over various aspects of Article 14, on mutual legal assistance. The second reading of the Article could not be completed, due to lack of time, and will be continued at the fifth session, on 4-15 October 1999. The annexed text includes the draft Article 14, as amended at the fourth session of the Ad Hoc Committee and also the various written submissions made by various delegations.

A the request of the EU Coordination Meetings that took place during the fourth session, the Presidency has decided to deal with selected issues related to Article 14 in the Working Party on Judicial Cooperation in Criminal Matters.

The Presidency proposes that primary attention be given to the question as to whether or not the requested State can refuse the request on the ground that in its view the offence is a political offence (paragraph 16(d), in this regard paragraph 17 would also be one point of debate).

The Presidency also invites the views of the delegations on other outstanding issues relating to Article 14, as time permits.

[(c bis) The seizure, confiscation and surrender of property;]⁴⁰

(d) Examining objects and sites;

(e) Providing information, evidentiary items [and expert evaluations];⁴¹

(f) Providing originals or certified copies of relevant documents and records, including bank, financial, corporate or business records;⁴²

(g) Identifying, tracing [or freezing]⁴³ proceeds, property, instrumentalities or other things for evidentiary purposes;

(h) Facilitating the appearance of persons in the requesting State Party;

[(h bis) Locating or identifying persons or objects;]⁴⁴

(i) Any other type of assistance allowed by the law of the requested [or requesting]⁴⁵ State Party.

2 bis. Without prejudice to national law, the competent authorities of a State Party may, without prior request, transmit information relating to criminal matters to a competent authority in another State where they believe that such information could assist the authority in undertaking or successfully concluding inquiries and criminal proceedings or could result in a request formulated by that authority pursuant to this Convention.

⁴⁰ Proposal of the delegation of Mexico.

⁴¹ The text in brackets is a proposal of the delegation of China.

⁴² Some delegations pointed out that the issues of money-laundering and bank secrecy were still under consideration. This subparagraph would therefore need to be reviewed in the light of agreement on article 4 *bis*.

⁴³ Proposal of the delegation of China.

⁴⁴ Proposal of the delegation of China.

⁴⁵ Proposal of the delegation of Finland.

- 2 *ter*. The transmission of such information shall be without prejudice to inquiries and criminal proceedings in the State of the competent authorities providing the information. The competent authorities receiving the information shall comply with a request that said information remain confidential, even temporarily, or with restrictions on its use.⁴⁶
3. The provisions of this article shall not affect the obligations under any other treaty, bilateral or multilateral, that governs or will govern, in whole or in part, mutual legal assistance.⁴⁷
4. Paragraphs 6 to 21 of this article shall apply to requests made pursuant to this article if the States Parties in question are not bound by a treaty of mutual legal assistance. If those States Parties are bound by such a treaty, the corresponding provisions of that treaty shall apply unless the Parties agree to apply paragraphs 6 to 21 in lieu thereof.
5. States Parties shall not decline to render mutual legal assistance under this article on the ground of bank secrecy.⁴⁸

⁴⁶ Paragraphs 2 *bis* and 2 *ter* were proposed by the delegation of Italy (see A/AC.254/5/Add.8) and received wide support. There were suggestions for refinement of the text, also in order to avoid overlap with the provisions of article 19, on law enforcement cooperation. One delegation suggested that the two paragraphs could be placed in a separate article entitled "Spontaneous communication of information".

⁴⁷ It was suggested at the informal preparatory meeting held in Buenos Aires in 1998 that the substance of this paragraph could be integrated into a more general article on the relationship of the Convention to other bilateral or multilateral treaties.

⁴⁸ This paragraph received broad support. However, some delegations expressed reservations about it.

6. States Parties may not decline to render mutual legal assistance under this article on the ground of absence of dual criminality, unless the assistance required involves the application of coercive measures.⁴⁹
7. States Parties shall⁵⁰ [, where not contrary to fundamental legal principles,] adopt measures sufficient to enable a person in the custody of one State Party whose presence in another State Party is requested to give evidence or assist in the investigations to be transferred if the person consents and if the competent authorities of both States agree.⁵¹ Transfer under this paragraph shall not be for the purpose of standing trial. For purposes of this paragraph:⁵²
- (a) The State to which the person is transferred shall have the authority and obligation to keep the person transferred in custody, unless otherwise authorized by the State from which the person was transferred;

⁴⁹ This paragraph received broad support. However, some delegations expressed reservations on the ground that, in view of the broad scope of the Convention, the principle of dual criminality had to apply to mutual legal assistance. The delegation of China proposed the following reformulation:

“The requested State Party shall provide assistance only if the conduct in relation to which the request was made constitutes an offence under its domestic law. However, the requested State Party may, when it deems appropriate, provide assistance irrespective of whether the conduct would constitute an offence under the laws of both requesting and requested States Parties.”

The United Kingdom of Great Britain and Northern Ireland proposed as a compromise formulation that the original paragraph be made applicable only to offences established by the Convention.

Some delegations noted that the connection between this paragraph and paragraph 16 should be reviewed.

⁵⁰ Although some delegations deemed it important that this provision be mandatory, some other delegations proposed that “shall” be changed to “may”. The delegation of Germany proposed the formulation “States shall endeavour to adopt”.

⁵¹ One delegation proposed that paragraph 20 immediately follow this paragraph.

⁵² Some delegations proposed that this paragraph be made into a separate article.

- (b) The State to which the person is transferred shall return the person to the custody of the State from which the person was transferred [as soon as circumstances permit]⁵³ or as otherwise agreed by the competent authorities of both States;
 - (c) The State to which the person is transferred shall not require the State from which the person was transferred to initiate extradition⁵⁴ proceedings for the return of the person;
 - (d) The person transferred shall receive credit for service of the sentence imposed in the State from which he or she was transferred for time served in the custody of the State to which he or she was transferred.⁵⁵
8. States Parties shall designate a central authority or, when necessary, central authorities⁵⁶ that shall have the responsibility and power to execute requests for mutual legal assistance or to

⁵³ One delegation proposed the deletion of the words “as soon as circumstances permit”.

⁵⁴ The delegation of France proposed that the words “extradition proceedings” be replaced with the words “extradition or other proceedings”.

⁵⁵ The delegation of Mexico proposed the insertion of the following subparagraph: “The authorities of the requested State Party may be present at proceedings conducted in the requesting State Party.”

⁵⁶ Some delegations proposed the deletion of the words “or, when necessary, central authorities”. Some other delegations were in favour of retaining this reference. Several delegations emphasized that a distinction was necessary between the authorities responsible for receiving or forwarding requests and those competent to execute requests. The delegation of Australia proposed to make this distinction by referring to “central offices” for authorities only receiving or forwarding requests and to “competent authority” for authorities executing requests.

The delegation of China proposed the insertion of the following sentence after the first sentence of this paragraph: “States Parties may also designate other authorities for the same purpose for its regions or territories that have separate systems of mutual legal assistance.”

The delegation of Canada referred to a proposal it had made on this matter in document A/AC.254/L.42 and indicated that it would continue consultations with other interested delegations with a view to formulating a text that would attract consensus.

transmit them to the competent authorities for execution. Central authorities shall play an active role in ensuring the speedy execution of requests [, controlling quality and setting priorities].⁵⁷ The Secretary-General shall be notified of the authority or authorities designated for this purpose. Transmission of requests for mutual legal assistance and any communication related thereto shall be effected between the authorities designated by the States Parties. This requirement shall be without prejudice to the right of a State Party to require that such requests and communications be addressed to it through diplomatic channels and, in urgent circumstances, where the Parties agree, through the International Criminal Police Organization, if possible.⁵⁸

9. Requests shall be made in writing or, where possible,⁵⁹ by any means capable of producing a written record in a language acceptable to the requested State Party, under conditions allowing that Party to establish authenticity.⁶⁰ The Secretary-General shall be notified of the language or languages acceptable to each Party. In urgent circumstances and where agreed by the States Parties, requests may be made orally, but shall be confirmed in writing forthwith.

⁵⁷ Some delegations proposed the deletion of this phrase in brackets, *inter alia*, on the ground that it could be seen to be in contradiction to the principle of the independence of the judiciary. One delegation recalled that the phrase had been taken from the amendments to the Model Treaty on Mutual Assistance in Criminal Matters, adopted by the General Assembly in its resolution 45/117.

⁵⁸ Some delegations were of the view that this paragraph, together with the corresponding provision on central authorities in article 10 (Extradition), should be placed in a separate article entitled "Transmission of requests for extradition and mutual assistance", to precede the articles on those issues. It was also proposed that such a separate article should more generally include provisions on channels of communication in connection with different forms of international cooperation in criminal matters.

⁵⁹ It was agreed at the fourth session of the Ad Hoc Committee to include this clause in order to take into account the limited capabilities of many countries, especially developing countries, and in order to emphasize that modern means of communication are useful for the transmission of urgent requests.

⁶⁰ The last phrase of this sentence was previously contained in a footnote and was moved into the body of the text pursuant to a proposal made by the delegation of France and widely supported at the fourth session of the Ad Hoc Committee.

10. A request for mutual legal assistance shall contain:

- (a) The identity of the authority making the request;
- (b) The subject matter and nature of the investigation, prosecution or proceeding to which the request relates, and the name and the functions of the authority conducting the investigation, prosecution or proceeding;
- (c) A summary of the relevant facts, except in relation to requests for the purpose of service of judicial documents;
- (d) A description of the assistance sought and details of any particular procedure that the requesting State Party wishes to be followed;
- (e) Where possible, the identity, location and nationality of any person concerned;
- (f) The purpose for which the evidence, information or action is sought.⁶¹

11. The requested State Party may request additional information when it appears necessary for the execution of the request in accordance with its domestic law or when it can facilitate such execution.

⁶¹ At the fourth session of the Ad Hoc Committee it was pointed out that the source of this paragraph was the 1988 Convention. The delegation of Colombia expressed its preference for a simplified version of the text.

12. A request shall be executed in accordance with the domestic law of the requested State Party and, to the extent not contrary to the domestic law of the requested Party and where possible, in accordance with the procedures specified in the request.⁶²
13. Wherever possible and consistent with fundamental principles of domestic law, a State Party shall permit [encourage] testimony, statements or other forms of assistance to be given via video link or other modern means of communication and, subject to domestic law, shall ensure that perjury committed under such circumstances is a criminal offence.^{63, 64}

[Paragraphs 14-22 of article 14 were not considered by the Ad Hoc Committee at its fourth session.]

⁶² One delegation noted that this paragraph and paragraph 1 overlapped in part. The delegation of Canada submitted a proposal for reformulation of the text of this paragraph (see A/AC.254/L.42), which received limited support. The delegation of Italy submitted a proposal for reformulation of this paragraph and the addition of another paragraph (see A/AC.254/5/Add.8). The Ad Hoc Committee was of the view that the ideas contained in that proposal merited further consideration. In particular, the second paragraph of that proposal might be considered further in conjunction with paragraph 19 of this article.

⁶³ Several delegations expressed concern about the criminalization of perjury in this paragraph. The clause on domestic law was inserted to make such criminalization optional and thus meet those concerns. Nevertheless, several delegations expressed their preference for the deletion of the provision.

⁶⁴ The delegation of Italy proposed the insertion of several new paragraphs after paragraph 13 (see A/AC.254/5/Add.8). The first paragraph of that proposal was favourably received at the fourth session of the Ad Hoc Committee as a potential alternative to paragraph 13. The first paragraph of the Italian proposal reads as follows:

“Where an individual is in the territory of a State Party and has to be heard as a witness or expert by the judicial authorities of another State Party, the first State Party may, at the request of the other, permit the hearing to take place by videoconference if the criminal proceedings for which the hearing was requested provide appropriate guarantees of conformity with its fundamental principles of law and where it is not possible or desirable for the individual in question to appear in person in the territory of the requesting State.”

The rest of the proposal made by Italy was found to contain many useful concepts and ideas, but was deemed lengthy and overly detailed for an international legal instrument.

14. The requesting State Party shall not transmit nor use information or evidence furnished by the requested Party for investigations, prosecutions or proceedings other than those stated in the request without the prior consent of the requested Party.³¹

(proposed replacement of paragraph 14 by the United States; A/AC.254/5/L.33)

The requested Party may request that the requesting Party not transmit or use information or evidence furnished by the requested Party for investigations, prosecutions or proceedings other than those stated in the request without the prior consent of the requested Party. If the requested Party makes such a request, the requesting Party shall use its best efforts to comply with the conditions.

(proposed amendment of paragraph 14 by China; undated paper)

The requesting State Party shall not use any information or evidence provided pursuant to this article for any purposes other than those stated in the request for assistance without the prior consent of the requested State Party.

15. The requesting State Party may require that the requested Party keep confidential the fact and substance of the request, except to the extent necessary to execute the request. If the requested Party cannot comply with the requirement of confidentiality, it shall promptly inform the requesting Party.

³¹ One delegation proposed that the use of evidence be restricted only when the requested State so indicated. One delegation proposed that the paragraph be deleted.

16. Mutual legal assistance may be refused.³²

- (a) If the request is not made in conformity with the provisions of this article;
- (b) If the requested State Party considers that execution of the request is likely to prejudice its sovereignty, security, ordre public or other essential interests;
- (c) If the authorities of the requested State Party would be prohibited by its domestic law from carrying out the action requested with regard to any similar offence³³ had it been subject to investigation, prosecution or proceedings under their own jurisdiction;³⁴
- (d) If it would be contrary to the legal system of the requested State Party relating to mutual legal assistance for the request to be granted;³⁵

³² One delegation proposed as an additional ground for refusal the fact that the requested State reasonably believed that the offence in question did not involve organized crime.

At the informal preparatory meeting held in Buenos Aires in 1998, it was suggested that other grounds for refusal might be required. One possible additional ground might be a "discrimination clause" as in article 6, paragraph 6, of the 1988 Convention. Another ground might be a "political offence", in which case paragraph 17 would require re-examination.

³³ One delegation noted that the phrase "similar offence" required clarification.

³⁴ Some delegations expressed reservations about this subparagraph. One delegation proposed that the subparagraph be deleted, since the issue would nonetheless be regulated by the subparagraph that followed.

³⁵ Some delegations regarded this ground for refusal as overly broad.

- (e) If the offence to which the request relates would not be an offence in the context of criminal organization if committed within its jurisdiction.³⁶

(proposed replacement of subparagraphs (c), (d) and (e) of paragraph 16 by the United States; A/AC.254/5/L.33)

- (c) If the requested State Party has substantial grounds for believing that the request has been made for the purpose of prosecuting or punishing a person on account of that person's gender, race, religion, nationality or political opinion;
- (d) If the request relates to an offence that is considered by the requested State Party to be a political offence.

(proposed replacement of subparagraphs (c) and (d) of paragraph 16, as well as the addition of a new (sub)paragraph, by China; A/AC.254/5/L.50)

- (c) If the execution of the request would be contrary to the fundamental principles of the laws of the requested State Party;
- (d) If the requested Party has already rendered a final judgement on the same suspect or defendant for the same offence in relation to which the request was made.

Before denying assistance pursuant to this paragraph, the requested State Party shall consult with the requesting State Party to consider whether assistance may be granted subject to such conditions as it deems necessary. If the requesting Party accepts assistance subject to those conditions, it shall comply with the conditions.

³⁶ Some delegations proposed that this subparagraph be deleted.

(proposed deletion of subparagraphs (c), (d) and (e) of paragraph 16 and insertion of new subparagraph, by Canada; A/AC.254/5/L.42)

If the request falls under subparagraph [1 bis] of this article and the requested State Party considers, based on the information provided by the requesting State Party, [that there is no basis for the suspicion of the involvement of an organized criminal group in the offence] [that the suspicion is unreasonable].

(comment by Syria on subparagraph (c); A/AC.254/5/L.34)

The meaning of the words "similar offence" requires clarification

(comments by New Zealand on subparagraph (c); A/AC.254/5/L.41)

New Zealand considers that subparagraph (c) of paragraph 16 may be unnecessarily restrictive and would not oppose its deletion. New Zealand would also note that subparagraph (d) is very broad and considers that an "essential interests" ground for refusal would cover the concerns sought to be addressed here. New Zealand also considers that, as between Parties to the Convention, sufficient dual criminality should exist. Accordingly, subparagraph (e) is unnecessary and should be deleted.

17. For the purpose of cooperation under this article, the offences covered by this Convention shall not be considered fiscal offences or political offences³⁷ or regarded as politically motivated, without prejudice to the constitutional limitations and the fundamental domestic law of the States Parties.
18. Reasons shall be given for any refusal of mutual legal assistance.

³⁷ One delegation was of the view that the "political offence" exception could be discretionary except in certain heinous cases. Another delegation proposed the deletion of the reference to political offences.

19. Mutual legal assistance may be postponed by the requested State Party on the ground that it interferes with an ongoing investigation, prosecution or proceeding. In such a case, the requested Party shall consult with the requesting Party to determine if the assistance can still be given subject to such terms and conditions as the requested Party deems necessary.
20. A witness, expert or other person who consents to give evidence in a proceeding or to assist in an investigation, prosecution or judicial proceeding in the territory of the requesting State Party shall not be prosecuted, detained, punished or subjected to any other restriction of his personal liberty in that territory in respect of acts, omissions or convictions prior to his departure from the territory of the requested Party.³⁸ Such safe conduct shall cease when the witness, expert or other person having had, for a period of fifteen consecutive days, or for any period agreed upon by the Parties, from the date on which he has been officially informed that his presence is no longer required by the judicial authorities, an opportunity of leaving, has nevertheless remained voluntarily in the territory or, having left it, has returned of his own free will.³⁹

(proposed replacement of the first sentence of paragraph 20 by the United States; A/AC.254/5/L.33)

If the central authority of the requesting State Part requests that a person appear in the requesting State to give evidence in a proceeding or to assist in an investigation, prosecution or judicial proceeding and the person does appear, he shall not be prosecuted, detained, punished or subjected to any other restriction of his personal liberty by reason of any acts or convictions that preceded his departure from the requested Party.

³⁸ One delegation expressed concern about cases where a dangerous offender might deliberately utilize this provision in order to evade justice.

³⁹ At the informal preparatory meeting held in Buenos Aires in 1998, some delegations thought a degree of discretion could be provided to the requesting State in determining whether to provide safe conduct. One delegation expressed a reservation on this paragraph.

21. The ordinary costs of executing a request shall be borne by the requested State Party, unless otherwise agreed by the Parties concerned. If expenses of a substantial or extraordinary nature are or will be required to fulfil the request, the Parties shall consult to determine the terms and conditions under which the request will be executed, as well as the manner in which the costs shall be borne.⁴⁰

(proposed new paragraph by Italy; A/AC.254/5/Add.8)

On a reciprocal basis, States Parties may conclude bilateral or multilateral agreements or understandings whereby, in relation to matters that are the subject of criminal proceedings in one or more States, the judicial authorities concerned may, where necessary together with police authorities and after informing the central authority or authorities referred to in paragraph 8 of this article, act jointly within joint investigative bodies. In the absence of such agreements or understandings, such joint investigations may be undertaken by agreement on a case-by-case basis.

(proposed new paragraphs by the United States; A/AC.254/5/L.33:)

The requested State Party shall provide copies of publicly available government records, documents or information in its possession.

The requested State Party may provide copies of any government records, documents or information in its possession that are not publicly available, to the same extent and under the same conditions as would be available to its own law enforcement authorities. The requested Party may at its discretion deny, entirely or in part, a request under this paragraph.

The provisions of this article are intended solely for mutual legal assistance between the parties and do not give rise to a right on the part of any private person to obtain, suppress or exclude evidence or to impede the execution of a request.

⁴⁰ One delegation noted that the wording of this paragraph required clarification.

22. States Parties shall consider, as may be necessary, the possibility of concluding bilateral or multilateral agreements or arrangements that would serve the purposes of, give practical effect to or enhance the provisions of this article.⁴¹

(comment on paragraph 22 by New Zealand; A/AC.254/5/L.41)

New Zealand does not consider that an obligation to consider concluding agreements is necessary and paragraph 22 should be deleted accordingly.

⁴¹ One delegation noted that the wording of this paragraph required clarification. Another delegation proposed that the paragraph be deleted.