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Draft fourth additional protocol to the European Convention on Extradition (ETS No. 24)

Request for an opinion

Committee of Ministers

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Letter from the Secretary to the Committee of Ministers to the Secretary General of the Parliamentary Assembly of 20 December 2011

I enclose herewith the draft Fourth Additional Protocol to the European Convention on Extradition (ETS No. 24) (Appendix to document CM(2011)118) and its Explanatory Report (document CM(2011)118 add) for opinion by the Parliamentary Assembly on the draft Additional Protocol, as agreed by the Ministers' Deputies at their 1123rd meeting (121 October 2011, item 10.2, European Committee on Crime Problems (CDPC) - a. Abridged report of the 60th plenary session (Strasbourg, 14-17 June 2011) - b. Draft Fourth Additional Protocol to the European Convention on Extradition and its Explanatory Report - Transmission to the Parliamentary Assembly for opinion).

[Signed]

Mireille Paulus

Secretary to the Committee of Ministers

Draft Fourth Additional Protocol to the European Convention on Extradition

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 three additional protocols thereto (ETS Nos. 86 and 98, CETS No. 209), done at Strasbourg on 15 October 1975, on 17 March 1978 and on 10 November 2010, 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:

"Lapse of time

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 reserves the right not to 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 reservation 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:

"The request and supporting documents

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 or her identity, nationality and location.”

2. Article 5 of the Second Additional Protocol to the Convention shall not apply as between Parties to the present Protocol.

Article 3 – Rule of speciality

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

“Rule of speciality

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. Any State may, at the time of signature or when depositing its instrument of ratification, acceptance, approval or accession or at any later time, declare that, by derogation from paragraph 1, a requesting Party which has made the same declaration may, when a request for consent is submitted pursuant to paragraph 1.a, 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.a, or later, the date on which it intends to apply such restriction; and

b. the competent authority of 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 person.

4. 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.”

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:

“Transit

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 order 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.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 when depositing its instrument of ratification, acceptance, approval or accession, declare that it reserves the right to grant transit of a person only 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 or her life or freedom may be threatened by reason of his or her race, religion, nationality or political opinion.”

Article 6 – Channels and means of communication

The Convention shall be supplemented by the following provisions:

“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. In any case, the Party concerned shall, upon request and at any time, submit the originals or authenticated copies of documents.

2. The use of the International Criminal Police Organization (Interpol) or of diplomatic channels is not excluded.

3. 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.a, of the Convention it reserves the right to 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 settlement

The Convention shall be supplemented by the following provisions:

“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 – Signature and entry into force

1. This Protocol shall be open for signature by the member States of the Council of Europe which are Parties 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 10 – 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 11 – Temporal scope

This Protocol shall apply to requests received after the entry into force of the Protocol between the Parties concerned.

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 or 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 and the additional protocols 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 and the additional protocols thereto.

2. 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. No reservation may be made in respect of the provisions of this Protocol, with the exception of the reservations provided for in Article 10, paragraph 3, Article 21, paragraph 5, of the Convention as amended by this Protocol, and Article 6, paragraph 3, of this Protocol. Reciprocity may be applied to any reservation made.

4. Any State may wholly or partially withdraw a reservation or declaration it has made in accordance with this Protocol, by means of a notification addressed to the Secretary General of the Council of Europe, which shall become effective as from the date of its receipt.

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 date of entry into force of this Protocol in accordance with Articles 9 and 10;
- d. any reservation made in accordance with Article 10, paragraph 3, and Article 21, paragraph 5, of the Convention as amended by this Protocol, as well as Article 6, paragraph 3, of this Protocol, and any withdrawal of such a reservation;
- e. any declaration made in accordance with Article 12, paragraph 1, and Article 14, paragraph 3, of the Convention as amended by this Protocol, as well as Article 12 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.

Explanatory report to the draft protocol

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 on Co-operation in Criminal Matters (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 Additional 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 international co-operation in criminal matters, 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 and 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 co-operation.

3. At the High-Level Conference of the Ministries of Justice and of the Interior entitled "Improving European Co-operation 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 and channels and means of communication.

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 and supplementing certain provisions of the Convention. The present Fourth Additional Protocol was finalised by the PC-OC at its 60th meeting (17 to 19 May 2011) and submitted 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 60th plenary session (14 to 17 June 2011) 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 Fourth Additional 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 Party 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 Party before deciding on extradition. However, in order to allow the requested Party to fulfil this obligation, the requesting Party should provide the requested Party with a motivated statement specifying the reasons for which there is no lapse of time and including the relevant provisions of its law. In the rare cases that the requested Party has reasons to believe that immunity by reason of lapse of time might have been acquired, it should request information on this question from the requesting Party itself.

13. The requesting Party should provide this information together with the extradition request, without an explicit request to that effect from the requested Party being necessary (see also Article 12, paragraph 2, sub-paragraphs b and c of the Convention, as amended by the present protocol).

14. As regards the law of the requested Party, paragraph 2 of the modified 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, as well as European Union law, which have taken place since 1957.

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 reservation to that effect having been made at the time of signature or when depositing the instrument of ratification, acceptance, approval or accession.

16. This reservation may concern either one of the two sub-paragraphs of paragraph 2, or both. The latter case would allow a Party to make a partial withdrawal of its reservation 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, is intended to apply only in respect of Parties having made a reservation under paragraph 3. The principle reflected in this provision follows from the Resolution (75) 12 of the Committee of Ministers on the practical application of the European Convention on Extradition.

18. 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 Party interrupt or suspend time-limitation in the requested Party.

Article 2 – The request and supporting documents

19. 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 sent by the Ministry of Justice of the requesting Party to the Ministry of Justice of the requested Party. 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.

20. Any Party 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 requests. In the absence of such notification, the competent authority with respect to that state is understood to be the Ministry of Justice.

21. The drafters took note of the practice of some Parties to the Convention to designate more than one competent authority. In such cases, the declaration of the Party concerned should make it clear how competences of the different authorities are apportioned in extradition cases.

22. It is important to note that Article 2, paragraph 2 of this Additional Protocol provides that Article 5 of the Second Additional Protocol shall not apply as between Parties to the Fourth Additional Protocol .

23. Channels and means of communication are now dealt with in Article 6 of this Fourth Additional Protocol so as to create a common system in this respect.

24. It is important to note that although Article 5 of the Second Additional Protocol will not apply, it will still be possible to conclude agreements between Parties in accordance with Article 28, paragraph 2 of the Convention, as foreseen in Article 7, paragraph 2, of the Fourth Additional Protocol.

25. As regards paragraph 2 of Article 12 of the Convention as amended by this Fourth Additional Protocol, contrary to the Convention which requires an original or authenticated copy of the documents mentioned under sub-paragraph a, this Additional Protocol only refers to “a copy”. This is in line with the possibility introduced under Article 6 of the Fourth Additional Protocol to use modern means of communication. However, sub-paragraph a should also be read in conjunction with the reservation provided for under Article 6, paragraph 3 of this Additional Protocol. In cases where the requested Party has made such a reservation, the requesting Party would still have to send the originals or authenticated copies of these documents.

26. In addition, the Fourth Additional Protocol completes the original wording of paragraph 2 of Article 12 of the Convention 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 Fourth Additional 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

27. 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 Party 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.

28. 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, the sentence containing the words “nor shall he or she be for any other reason restricted in his or her personal freedom”, has been restructured in order to align the English and French versions;
3. in paragraph 1, sub-paragraph a, a time limit of 90 days is introduced for the formerly requested Party to communicate its decision on the extension of the extradition to other offences;
4. in paragraph 1, sub-paragraph b, the period of 45 days is reduced to 30 days;
5. a new paragraph 3 is introduced, creating the possibility for the requested Party to authorise the requesting Party to restrict the personal freedom of the extradited person pending its decision on extension of the extradition.

29. 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 Parties to the Convention had interpreted the words “proceeded against” to cover any measure taken by the authorities of the requesting Party, even before a case is brought to trial. This had made it impossible for those 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 Parties or led to the rejection of evidence collected on such offences by courts.

30. The drafters of the Fourth Additional 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.

31. 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 Party 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 of the Convention, as revised by this Fourth Additional Protocol, should also not prevent the requesting Party 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.

32. 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 Party would for example qualify as a restriction of personal freedom.

Paragraph 1, sub-paragraph a

33. As regards point 3, the PC-OC considered that the introduction of a time limit for the requested Party 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 Parties and may also have negative consequences for the defendant. The PC-OC therefore agreed that the introduction of such a time limit would have a clear added value.

34. Even though some 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 Party or the technical nature of many extension requests, may allow for a speedy decision on extension. The drafters thus agreed that 90 days would be sufficient for the requested Party to take its decision on consenting to the extension of extradition.

35. However, in certain cases, it might not be possible for the requested Party 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 Party and limit the disruption to its criminal procedure.

Paragraph 1, sub-paragraph b

36. 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 adoption of the Convention, given that it has become much easier to travel and leave the territory of Parties. They therefore agreed to restrict this delay to 30 days.

37. 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".

38. 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.”

39. With regard to the words “opportunity to leave the territory”, and as clarified in the explanatory report to Article 14 of the original 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 3

40. 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.

41. 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. Another example would be the situation where a third country submits a request for re-extradition after the surrender of a person. 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.

42. Paragraph 3 contains an optional provision which will only apply between Parties to this Protocol having made a declaration to that effect. The provision introduces a special procedure within 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.

43. 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 Party and before its acquiescence, which is tacitly given by the competent authority acknowledging the receipt of the notification of the requesting Party of its intention to proceed to such a restriction. The competent authority is the authority referred to in Article 12, paragraph 1 of the Convention as modified by Article 2, paragraph 1, of the present Protocol. Parties making a declaration in favour of this optional provision are encouraged to indicate, by the notification foreseen under Article 12, paragraph 1, of the Convention as modified, who will be the competent authority delivering the acknowledgment of receipt. In the absence of such notification, the competent authority will be the Ministry of Justice (reference is made to paragraphs 19 to 21 of this Explanatory Report). An automatically generated receipt of acknowledgment can not be regarded as an explicit acknowledgment of the receipt by the competent authority.

44. 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.

45. 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 or his personal freedom, such as a house arrest or a ban to leave the country.

46. The drafters of the Additional Protocol considered that the changes to the rule of speciality have no impact on surrender procedures between EU member states on the basis of the EU Framework Decision on the European Arrest Warrant.

Article 4 – Re-extradition to a third state

47. 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 not exceeding 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

48. 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 Additional Protocol noted that, for an effective and speedy transit procedure, the request for transit should be sent as soon as possible. The drafters also took note of 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.

49. In accordance with paragraph 2, the request for transit does not have to be accompanied by the documents referred to in the new 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.

50. Pursuant to Article 6 of this Fourth Additional 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.

51. The drafters of this Fourth Additional Protocol considered that the new Article 21 of the Convention 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.

52. It is no longer an obligation under this Fourth Additional 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 this Additional 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.

53. 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 transit in accordance with paragraphs 1 and 2.

Article 6 – Channels and means of communication

54. 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, 16, 17, 18, 19 and 21. The Parties may also request to obtain the original document or an authenticated copy, in particular by mail.

55. The drafters of this Fourth Additional 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 delegations 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 as amended, 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, are more widespread.

56. In order to accommodate these concerns, paragraph 3 of this Article allows states to declare that they reserve the right to require the original or authenticated copy of the request and supporting documents for these specific Articles in all cases. This reservation can be withdrawn as soon as circumstances permit.

Article 7 – Relationship with the Convention and other international instruments

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

58. Paragraph 1 ensures uniform interpretation of this Additional 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), the Second Additional Protocol (ETS No. 98) and/or the Third Additional Protocol (CETS No. 209) thereto.

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

60. Paragraph 2 is designed to ensure the smooth co-existence of this Fourth Additional Protocol with any bilateral or multilateral agreements concluded in pursuance of Article 28, paragraph 2 of the Convention. It states that the Additional 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).

61. 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 this Fourth Additional Protocol and would make it unnecessary for the states concerned to make new declarations to that effect.

Article 8 – Friendly settlement

62. This article recognises the important role of the European Committee on Crime Problems in the interpretation and application of the Convention and the Additional Protocols thereto, and follows the precedents established in other European conventions in the criminal justice field. It also follows Recommendation Rec (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 Convention and the Additional Protocols thereto, so that it may contribute to facilitating friendly settlements and proposing amendments to the Convention and the Additional Protocols thereto which might prove necessary.

Articles 9 to 15 – Final clauses

63. Article 11 has been introduced to ensure clarity about the application in time between Parties to this Fourth Additional Protocol. The Protocol will only apply to new requests, received after the entry into force in each of the Parties concerned. The word “requests” covers requests for extradition, additional requests for consent and requests for transit.

64. The remaining Articles 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 European Convention on Extradition.

65. Since Article 12 concerning territorial application is mainly aimed at overseas territories, it was agreed that it would be clearly against the philosophy of this Additional 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 this Fourth Additional Protocol.

66. Reservations and declarations made by a state with regard to any provision of the Convention or the Additional Protocols thereto, which is not amended by this Fourth Additional Protocol, shall also be applicable to this Additional Protocol, unless that state declares otherwise in accordance with Article 13, paragraph 1.

67. It is underlined that under the provisions of Article 13, no reservation may be made with regard to the provisions of this Additional Protocol except for the reservations provided for under Article 10, paragraph 3, and Article 21, paragraph 5 of the Convention as amended by this Protocol, and Article 6, paragraph 3 of this Fourth Additional Protocol.

Abridged report of the 60th plenary session (Strasbourg, 14-17 June 2011) of the European Committee on Crime Problems (CDPC)

The European Committee on Crime Problems (CDPC) met in Strasbourg from 14-17 June 2011.

Items submitted to the Committee of Ministers for decision

1. The CDPC invited the Committee of Ministers:

a. to examine and adopt the draft Fourth Additional Protocol to the European Convention on Extradition (see appendix) and take note of its explanatory report (see CM(2011)118 add).

Items submitted to the Committee of Ministers for information

2. The CDPC invited the Committee of Ministers to note that:

a. the CDPC took note of the information provided by Mr Jan Kleijssen, Director of Standard-Setting, on the on-going reform process of the Council of Europe and in particular the recent decisions regarding the restructuring of intergovernmental committees;

b. the CDPC examined the report on the "Sentencing, management and treatment of "dangerous" offenders" which was finalised by the PC-CP at its 66th meeting (December 2010). Concerning the follow-up to be given to the report, the CDPC instructed its Bureau to clarify the scope for possible future standard-setting activities and to present a possible "Roadmap" in this regard to be discussed at its next plenary meeting in December;

c. the CDPC examined the draft recommendation concerning foreign prisoners and its draft commentary. The CDPC instructed the PC-CP to take into account the general comments made by the CDPC during the plenary;

The CDPC also instructed the Secretariat to refer to these general observations to CDPC delegations when asking them for their additional comments by written procedure by 30 September 2011 and to prepare a compendium of the individual comments received. The CDPC should examine these comments when finalising the draft recommendation at its next plenary meeting in November. The CDPC instructed the PC CP to transmit the revised version of the draft recommendation as well as its commentary to the CDPC which will examine and approve both texts at its next plenary meeting in December in view of their adoption by the Committee of Ministers next year;

d. the CDPC examined the draft European Code on Prison Staff Ethics and instructed the PC-CP to continue the examination of this text at its next plenary meeting in November taking into account the comments made by the CDPC at its plenary meeting. The CDPC instructed the PC-CP to transmit the revised text to the CDPC which will examine and approve it at its next plenary meeting in December in view of its adoption by the Committee of Ministers next year;

e. the CDPC considered the discussion paper prepared by the Secretariat containing specific proposals concerning working methods and the adequate time frame for the follow-up to Resolution No. 2 adopted at the 30th Council of Europe Conference of Ministers of Justice, "Modernising Justice and the Third Millennium: transparent and efficient justice; prisons in today's Europe" (Istanbul, Turkey, 24-26 November 2010), approved it with amendments and instructed the Secretariat to initiate the necessary measures to implement the follow-up to Resolution No. 2 as foreseen in the document approved by the CDPC;

f. the CDPC had an exchange of view with the Chair of the PC-OC, Mr Per Hedvall, concerning the ongoing and future activities of the PC-OC. The CDPC welcomed the important work accomplished in modernising the Convention on extradition and the ongoing efforts to increase the Committee's visibility and interaction with practitioners. The PC-OC was instructed to pay particular attention in its future work to the practical operation of the relevant Conventions and to look at possible measures to ensure the authentication of communications forwarded by electronic means as referred to in Article 6 of the draft Fourth Additional Protocol to the Convention on Extradition;

g. the CDPC took note of the information provided by the Secretariat of the Council of Europe, and notably of the Enlarged Partial Agreement on Sport (EPAS) and by the Chair of the GRECO, concerning the current and future work related to the issue of match-fixing, particularly on the related draft recommendation on the Promotion of the Integrity of Sport against the Manipulation of Results. The CDPC was also informed by the EPAS Secretariat of the foreseen schedule leading to the possible adoption of the recommendation by the Committee of Ministers on 28 September 2011. Subsequently, the CDPC provided initial comments on the

part of the "Guidelines" concerning criminal law aspects (Chapter C and Chapter D), appended to the draft Recommendation, and decided to ask the Secretariat of EPAS to transmit to the CDPC a revised version of the text by 21 June. For this purpose, the CDPC requested that its comments made during its plenary, concerning the structure and content of criminal law provisions, be duly taken into account. As for the follow-up procedure, the CDPC decided that its position would depend on the quality of revised text and its compatibility with existing relevant criminal law provisions of other Council of Europe instruments;

h. the CDPC took note of the information provided by the Secretariat on the reform process in the Council of Europe and decided to instruct the Secretariat to revise its proposed draft terms of reference for 2012-2013 as well as those for its subordinate structures (PC-OC and PC-CP). The CDPC asked to see the proposed terms of reference before they would be sent to the Committee of Ministers;

i. in the context of the general discussions related to the "Future activities and priorities of the CDPC", the CDPC examined the discussion paper prepared by the Secretariat upon instruction by the Bureau containing proposals on future priorities and main activities of the CDPC. The CDPC supported the proposal of addressing organised crime with a global and multi-disciplinary approach. The CDPC stressed the importance of providing added value in this respect and considered therefore that it should stay realistic taking account of its own capacities as well as of existing activities on this issue by other international organisations to avoid duplications. It instructed the Bureau to address further the possibility of establishing a new sub-committee to work on this issue by identifying clearly its composition and functions possibly aiming at preparing an international event;

j. the CDPC examined the replies by the CDPC delegations to the questionnaire sent by the Secretariat on 13 May on "Reinforcing the effectiveness of Council of Europe treaty law" and considered that the large majority of CDPC delegations agreed with the proposed classification of Conventions. The CDPC decided to draw the attention of the Secretary General to the readiness of the CDPC to provide its advice/contribution when the update of relevant criminal law conventions is envisaged. Concerning criminal law conventions classified as "inactive"/"obsolete", the CDPC considers that the legal validity of Council of Europe criminal law conventions which have entered into force should be respected. Furthermore, the CDPC considers that the existence of international legal instruments of other international organisations, in particular the European Union, should not be a ground for considering Council of Europe criminal law conventions as being invalid. The CDPC instructed the Secretariat to send to CDPC delegations an updated compendium containing additional replies as well as a document summarising them;

k. the CDPC examined the preliminary draft opinion on criteria and procedure for the accession of non-member states and instructed the Secretariat to amend it in accordance with the comments made during the plenary and to transmit the revised version to CDPC delegations by written procedure for their comments. The CDPC instructed its Bureau to examine and approve the new version of the opinion taking account of the written comments received with a view to transmitting it to the Committee of Ministers;

l. the CDPC further took note of the preliminary draft opinion of the T-CY on criteria and procedure for the accession of non-member states to the Budapest Convention and instructed the Secretariat to provide the T-CY with the comments and suggestions of the Committee.

3. The CDPC took note of:

a. the information provided by the Secretariat concerning 16th Council of Europe Conference of Directors of Prison Administration (CDAP) (13-14 October 2011, Strasbourg);

b. the presentation by Professor Marcelo Aebi, scientific expert, of the 2009 Council of Europe Annual Penal Statistics SPACE I and SPACE II and the additional information provided by the Secretariat in this regard. The CDPC delegations underlined once again that SPACE statistics are a very useful tool for the national authorities in their work in the field of prisons and community sanctions and measures. The CDPC encouraged all delegations to send in time the replies to the questionnaires and to involve competent professionals in the preparation of the answers in order to improve the quality of such data and their comparability;

c. the presentation by Professor Nicola Padfield of her report on the "Sentencing, management and treatment of "dangerous" offenders" which was finalised by the PC-CP at its 66th meeting (December 2010);

d. the information provided by the Secretariat concerning a possible new binding criminal law instrument on trafficking in human organs, tissues and cells to be elaborated under the auspices of the CDPC and the possible work schedule involved;

- e. the information provided by the Secretariat on the current and future work of the T-CY, notably with regard to possible new standard-setting work on jurisdiction and related issues in relation to cross-border investigative measures on the Internet;
- f. the information provided by the Secretariat with regard to the preparation of a report by the Secretary General to the Committee of Ministers on how to reinforce the effectiveness of Council of Europe treaty law;
- g. the information provided by the Secretariat with regard to the new Convention of the Council of Europe on preventing and combating violence against women and domestic violence;
- h. the information provided by the Secretariat concerning the opening of signature of the new Council of Europe Convention on counterfeiting of medical products and similar crimes involving threats to public health (Medicrime Convention) which is expected to take place on 28 October in Moscow;
- i. the information provided by the Secretariat on the follow-up to the ratification process of the Council of Europe Convention on the protection of children against sexual exploitation and sexual abuse (Lanzarote Convention), and in particular the setting-up of the Committee of the Parties and its first meeting on 20 21 September 2011.

4. The CDPC decided to hold its next meeting during the week of 5 December 2011.

The CDPC invited the Committee of Ministers to take note of this report as a whole.