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EUROPEAN COMMITTEE ON CRIME PROBLEMS
(CDPC)

Committee of Experts on the Operation
of European Conventions in the Penal Field

(PC-OC)

40th meeting
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Practical difficulties arising out of the application of the Conventions (ETS 167)

Secretariat memorandum
prepared by the
Directorate General of Legal Affairs

Article 2 of the Additional Protocol to the Convention on the Transfer of Sentenced Persons (ETS 167) concerns persons having fled from the sentencing State.

Under that Article, upon a request from the sentencing State, the administering State may, pending the arrival of documents supporting the request, arrest the person concerned on a provisional basis.

There is no provision in the Protocol, nor is there any indication in the explanatory memorandum as to any maximum length of time for the provisional arrest of the person concerned. It is thus legitimate to raise that issue, in particular when preparing national legislation allowing for the application of the Protocol.

The explanatory report indicates that the documents supporting the request should be transmitted as soon as practicable. That may be seen as an indication of the sense of urgency that the situation carries. Such a sense of urgency is of course inherent to any situation where a person is arrested on a provisional basis.

However, under the circumstances described above, one might rightly suggest that the person cannot benefit from a presumption of innocence, but rather, on the contrary, that there is a presumption – based upon the declaration of a competent authority of the sentencing State – that the person concerned is a sentenced person whose sentence has not yet been entirely served.

It follows that the sense of urgency inherent to any situation where a person is arrested on a provisional basis is less pressing in the instant case than in other cases. In particular, it is less pressing than in a situation where extradition is requested.

One might therefore conclude that where a limit is established for provisional arrest under Article 2 of ETS 167, that limit may go beyond the limit of 40 days provided in Article 16 of the European Convention on Extradition.