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Strasbourg, 27 February 2004
[PC-OC\Docs 2003\PC-OC (2003) 07 E REVISED Summary of replies]

PC-OC (2003) 07 REV

EUROPEAN COMMITTEE ON CRIME PROBLEMS
(CDPC)

Committee of Experts
on the Operation of European Conventions in the Penal Field
(PC-OC)

**Summary of Answers to the Questionnaire on the Interrelationship of
the Convention on the Transfer of Sentenced Persons (ETS 112) and
the Convention on the Supervision of Conditionally Sentenced or Conditionally
Released Offenders (ETS 51),
in particular the possible more extensive use of ETS 51**

Introduction

The European Convention on the Supervision of Conditionally Sentenced or Conditionally Released Offenders (ETS 51), here and after “the Convention”, has been signed by 23 States¹ and ratified/acceded to by 17² States.

The Convention aims to allow offenders to leave the territory of a Party where a sentence was pronounced, or where the enforcement of a sentence has been conditionally suspended, to establish their ordinary residence in another Party under the supervision of its authorities. The basic principles of the Convention require that Parties agree to assist each other in the social rehabilitation of offenders for facilitating their good conduct and the readaptation to social life of persons convicted abroad. The Convention specifies conditions as regard the enforcement by the requested State of a sentence of which the enforcement has been conditionally suspended in another Party³.

¹ Albania, Austria, Belgium, Bosnia and Herzegovina, Croatia, Czech Republic, Denmark, Estonia, France, Germany, Greece, Italy, Luxembourg, Malta, Netherlands, Portugal, Serbia and Montenegro, Slovakia, Slovenia, Sweden, the former Yugoslav Republic of Macedonia, Turkey and Ukraine.

² Albania, Austria, Belgium, Bosnia and Herzegovina, Croatia, Czech Republic, France, Italy, Luxembourg, Netherlands, Portugal, Serbia and Montenegro, Slovakia, Slovenia, Sweden, the former Yugoslav Republic of Macedonia and Ukraine.

³ Summary of The European Convention on the Supervision of Conditionally Sentenced or Conditionally Released Offenders at <http://conventions.coe.int/Treaty/EN/CadreListeTraites.htm>

In a document⁴ submitted to the Committee of Experts on the Operation of European Conventions in the Penal Field (PC-OC), Mr Örjan Landelius (Sweden) mentioned the possibility of applying the Convention as a way of supplementing the Convention on the Transfer of Sentenced Persons (ETS 112). The matter was discussed during the Committee's 45th meeting in Strasbourg (30 September - 2 October 2002) and the discussion showed that "...while the Supervision Convention is in fact seldom applied, there is potential and probably advantage in applying it more often as a way of securing

- a) that aliens are treated in the same way as nationals, in the sense that courts are not lead to sentence them to imprisonment (where a national would have had a non-custodial sentence) on the assumption that non-custodial sentences cannot be carried out;
- b) that foreign sentenced persons eligible for conditional released (parolees) may be transferred on the understanding that they will be supervised in their home country⁵".

During the 46th meeting of the Committee in Strasbourg (3-5 March 2003) it was decided that a questionnaire would be sent out regarding, in particular, the possible more extensive use of the Convention.

- 1) The Questionnaire forms Appendix I to this summary.
- 2) The Comments submitted by Mr Örjan Landelius form Appendix II to this summary.

Summary

The questionnaire was answered by 22 member States⁶ and 3 non-member States⁷. Out of the 22 member States who answered, 9⁸ have signed and ratified the Convention⁹. Furthermore 2 member States¹⁰ have signed but not ratified the Convention and finally 11 member States¹¹ who answered the questionnaire have not signed the Convention.

1. If your country is a State Party to ETS 51, please:

a) indicate or estimate the amount of times it has been applied.

The Convention has not been frequently applied by the 8 answering States¹² in which it had come into force, when answering this questionnaire. In fact, half of them¹³ have not applied the Convention at all or can at least not give further details about the number of applications since they have been so few. The States which have applied the Convention however, estimate the amount of times of application to between 4 and 38 times¹⁴.

⁴ Doc. PC-OC (2002) 10

⁵ Summary report of the 45th meeting (Strasbourg, 30 September – 2 October 2002) point 14.

⁶ Albania, Andorra, Armenia, Austria, Belgium, Bulgaria, Cyprus, Czech Republic, Finland, France, Germany, Ireland, Latvia, Lithuania, Malta, Moldova, Netherlands, Norway, Portugal, Slovakia, Sweden and Switzerland.

⁷ Israel, Japan and United States of America.

⁸ Albania, Austria, Belgium, Czech Republic, France, Netherlands, Portugal, Slovakia and Sweden.

⁹ In Slovakia however, the date of entry into force of the Convention had not fallen when the Questionnaire was distributed.

¹⁰ Germany and Malta.

¹¹ Andorra, Armenia, Bulgaria, Cyprus, Finland, Ireland, Latvia, Lithuania, Moldova, Norway and Switzerland.

¹² Albania, Austria, Belgium, Czech Republic, France, Netherlands, Portugal and Sweden

¹³ Albania, Austria, Netherlands and Sweden.

¹⁴ Belgium 21 times, Czech Republic 4 times, France 38 times and Portugal 10,5 times.

b) indicate the categories of cases in which ETS 51 has been applied by your country

Considering the fact that all of the answering States, except for two of them¹⁵, have made reservations under article 38 paragraph 1 concerning enforcement of sentences and/or relinquishment to the requested State (which are dealt with in Parts III and IV) the category of cases in which ETS 51 have been applied is solely supervisory measures. One State¹⁶ indicates that the application of the Convention has exclusively concerned cases of conditional release and has in most of the cases concerned crimes related to drug trafficking.

Part II of the Convention specifies that the requesting State may ask the State in which the released offender is resident to undertake supervision in order to ascertain whether the offender is complying with the conditions imposed on him. The final decision as to whether the offender has amended his conduct satisfactorily or, if not, whether the suspended sentence should be enforced, is decided by the requesting State.

Part III deals with enforcement of sentences and it authorises a requesting State which has revoked conditional suspension of sentence to apply to the State of residence to enforce that sentence on its own territory. Part IV deals with relinquishment to the requested State and institutes a simplified procedure under which the State in which sentence was imposed may transmit the case to the State of residence, which then enforces the sentence as if it has been pronounced on its own territory.

c) indicate whether any particular obstacles to the application of ETS 51 were encountered, as well as any possible solutions.

According to a couple of the answering States¹⁷, the great number of reservations constitute, together with the relatively small number of Contracting Parties, an obstacle regarding the application of the Convention. An additional reason for the minimal use of the Convention might be the relative small interest for transferring only a conditional part of a sentence¹⁸. One of the States¹⁹ specifies that national administrative problems obstruct the application of the Convention and also the fact that the States with which cooperation was intended are not State Parties to the Convention. Further impediments mentioned were the lack of timely responses concerning the supervision from both its national jurisdiction and from the administering State and also the lack of compatibility between the different national legislations²⁰.

2. If your country is not a State Party to ETS 51, please indicate whether there are any particular obstacles in your country's ratification of ETS 51

Half of the States²¹ who answered this question, indicated that there are no obstacles in their country's ratification of the Convention. A couple of States²² are already in the process of ratification while

¹⁵ Albania and Portugal.

¹⁶ Portugal.

¹⁷ Belgium and France.

¹⁸ Netherlands.

¹⁹ Portugal.

²⁰ France.

²¹ Andorra, Armenia, Finland, Latvia and Switzerland.

²² Armenia and Moldova.

others²³ have no immediate plans to ratify the Convention and do not give priority to a ratification either, due to the fact that the Convention has almost never been applied by the present State Parties. In one of the States²⁴, the courts can now sentence people to community service as an alternative to imprisonment. The community service replaces the former suspended sentence including supervision. In these circumstances, the Convention becomes less practicable. The States²⁵ which do not consider a ratification feasible refer principally to the lack of relevant national legislation. One of the non-member States²⁶ is for instance unable to ratify the Convention due to the absence of a requirement for the offender to give his consent to the transferred supervision and enforcement of the sentence, which is however required in its Constitution. Another²⁷ indicates similar reasons of the lack of a system of compulsory parole supervision, as well as the fact that its Prisoner Rehabilitation Authority could not legally have jurisdiction over offenders transferred from other countries. Yet another State²⁸ refers to the great difference between its penal law compared to the European countries', which would lead to difficulties when applying the Convention.

3. Please suggest possible ways, if any, to increase the popularity and/or usefulness of ETS 51, in particular as regards the possibility of transferring a person who is subject to an order of probation or conditional release

A great majority of the answering States²⁹ considered it necessary to further inform and raise the awareness of the State Parties, their relevant authorities and non-Contracting Parties about the Convention and the problems which arise in its application. Various suggestions as to the procedure for awareness-raising were presented. The Council of Europe could organize a seminar or a workshop on the topic and invite member States to send their experts in that particular field³⁰ or invite specialists from countries with a notorious experience within this domain³¹. Another proposed possibility was that the meetings of the PC-OC would constitute a forum for discussion in this matter³². A comparative study of the probation system of each member State, focusing on the nature of measures and the functioning of the institutions which guarantee their execution was another suggestion³³. Such a study would lead to a better adaptation of the requests regulated in the Convention. A couple of States³⁴ recommended a system of questionnaires and following evaluations in order to draw attention to the Convention.

An illustrated problem concerning the usefulness is the fact that the Convention does not impose an obligation to take over the supervision³⁵. The sentence must be final and must have executive force before the requesting State can make the request. Due to the lack of obligation to fulfill a request, the

²³ Latvia and Switzerland.

²⁴ Norway.

²⁵ Bulgaria, Ireland, Israel, Lithuania, Malta and United States of America.

²⁶ United States of America.

²⁷ Israel

²⁸ Japan.

²⁹ Albania, Austria, Bulgaria, France, Malta, Moldova, Portugal, Slovakia, Sweden and Switzerland.

³⁰ Albania, Austria, Malta.

³¹ Moldova.

³² Bulgaria.

³³ France and Portugal.

³⁴ Bulgaria and Germany.

³⁵ Finland and Slovakia.

requesting State can not be sure that the pronounced sentence would be carried out if the sentenced person returns to his home country, even though the latter is a State party to the Convention. Finally, some States³⁶ maintain that encouragement to non-State Parties to sign the Convention would both increase the popularity and perhaps foremost the usefulness of the Convention.

Note from the Secretariat

Regarding a comparative study of the probation system of each member State, the Secretariat refers to The European Conference on Probation and Aftercare (CEP)³⁷. The CEP works to promote the social inclusion of offenders through community sanctions and measures such as probation, community service, mediation and conciliation.

4. Please comment on the possible elaboration of a Convention (possibly linked to existing Council of Europe Conventions) which would include provisions on the supervision of conditionally sentenced or conditionally released offenders, as well as provisions on the transfer (supervision) of mentally disturbed offenders

Almost all of the answering States³⁸ agreed that it would not be necessary to elaborate a new Convention. One reason why the idea of a new Convention was rejected by the majority, is the problem of application, which would arise if the new provisions would differ from the existing Convention. If however, the provisions remain the same, then there would be no need for this new Convention³⁹.

However, one of the States⁴⁰ indicated that a new Convention would be successful if there would be an obligation to comply or a consent from the administering State before pronouncing the sentence.

Alternatives to a potential development of a new Convention were presented by the majority. Some of them⁴¹ thought that satisfactory results can be achieved with combined application of the Convention and the Convention on the Transfer of Sentenced Persons (ETS 112), here and after “the Transfer Convention”, or by the latter alone. In cases when transfer between State Parties would normally have been denied, then a combined application of the two already existing Conventions could be a solution. The essential issue would be that both countries agree that the control of the sentenced person and his or her social rehabilitation would be the joint responsibility of both the sentencing State and the administering State⁴². One State⁴³ considers that the transfer of responsibility for supervising and enforcing the sentences of conditionally sentenced or released offenders can be accomplished through the existing Transfer Convention. Under its law, a deprivation of liberty is not limited to sentences of incarceration but includes other forms of conditional release in the community because the conditions of release restrict the offender’s freedom. Consequently, the Transfer Convention should be interpreted more broadly to encompass the transfer of such offenders. One option would be to issue a protocol approving this interpretation or allowing consenting countries to agree, on a case by case basis, to use

³⁶ Belgium, Portugal and Sweden.

³⁷ <http://www.cep-probation.org/>

³⁸ Austria, Bulgaria, Czech Republic, Finland, France, Germany, Lithuania, Malta, Norway, Portugal, Slovakia, Sweden, Switzerland and United States of America.

³⁹ France.

⁴⁰ Slovakia.

⁴¹ Sweden and United States of America.

⁴² Sweden.

⁴³ United States of America.

the Transfer Convention to transfer conditionally sentenced offenders. One State⁴⁴ does not think that linking the Convention to the Transfer Convention would be the best option, but instead would consider to supplement the Additional Protocol to the Convention on the Transfer of Sentenced Persons (ETS 167) with the inclusion of articles from ETS 51 pertaining to the enforcement of sentences and supervision.

Another alternative to a potential development of an entirely new Convention, is a second additional protocol to the Transfer Convention⁴⁵, since it is already widely applied and has essentially the same objectives as ETS 51.

Furthermore, when it comes to the provisions on the transfer (supervision) of mentally disturbed offenders, several possibilities were suggested. The provisions could either be incorporated in the additional protocol to the Transfer Convention (ETS 167)⁴⁶ or a second additional protocol to the Transfer Convention could be drafted. Together with the latter suggestion, the supervision of the mentally disturbed offenders could be arranged by an additional protocol to ETS 51⁴⁷. Some States⁴⁸ consider that the provisions of the Transfer Convention already cover the transfer (supervision) of mentally disturbed persons and execution of a sentence imposed in another State Party presumes conversion of the sentence pursuant to the Transfer Convention (article 11), either to mental health care or compulsory care⁴⁹. One of the States⁵⁰ goes further when it holds that also the provisions of ETS 51 already cover the above-mentioned possibility.

Some States⁵¹ illustrate the problem which arises when the offender never was tried and convicted because the mental illness prevented him or her from understanding the trial or when the offender was found to have committed the criminal offence but was adjudged not guilty or not responsible because his or her mental condition prevented him or her from forming the requisite criminal intent. In those situations, a criminal sentence was never imposed and thus, the Transfer Convention would not be applicable. The offender will instead be committed to an institution and administrative measures would take over. However, an offender who developed a mental illness after having been tried and convicted of a criminal offence could be transferred according to the Transfer Convention, provided that consent exists⁵².

Finally, one of the States⁵³ recalls that in January 2003, the Committee of Ministers presented a report⁵⁴ of the functioning of the Convention ETS 112, on which the PC-OC had previously given its opinion, with reference to the Parliamentary Assembly Recommendation 1527 (2001)⁵⁵ and suggested

⁴⁴ Finland.

⁴⁵ Austria and Switzerland.

⁴⁶ Lithuania.

⁴⁷ Bulgaria.

⁴⁸ Malta, Norway and Sweden.

⁴⁹ Norway.

⁵⁰ Sweden.

⁵¹ France, Finland and United States of America.

⁵² United States of America.

⁵³ Switzerland.

⁵⁴ CM/AS (2003) Recl 527 final / 23 January 2003

⁵⁵ Parliamentary Assembly Recommendation 1527 (2001) on Operation of the Council of Europe Convention on the Transfer of Sentenced Persons- critical analysis and recommendations.

under point 9 iii (f) to set up a multidisciplinary group of experts in order to study questions connected to the transfer of mentally disturbed persons and make proposals.

Note from the Secretariat

Regarding the suggestion of the Committee of Ministers, to set up a multidisciplinary group of experts in order to study questions connected to the transfer of mentally disturbed persons and make proposals, the Secretariat has no further information of such a composition for the present time being.

APPENDIX I

Strasbourg, 4 August 2003

PC-OC (2003) 02

QUESTIONNAIRE

Re: Interrelationship of the Convention on the Transfer of Sentenced Persons (ETS 112) and the Convention on the Supervision of Conditionally Sentenced or Conditionally Released Offenders (ETS 51), in particular the possible more extensive use of ETS 51.

Replies should be submitted to the Secretariat (caterina.bolognese@coe.int) as soon as convenient and preferably by 29 August 2003. As mentioned at the 46th meeting of the PC-OC, experts should consult with prison authorities when considering their replies.

- 1 If your country is a State Party to ETS 51, please:
 - a) indicate or estimate the amount of times it has been applied;
 - b) indicate the categories of cases in which ETS 51 has been applied by your country; and
 - c) indicate whether any particular obstacles to the application of ETS 51 were encountered, as well as any possible solutions.
- 2 If your country is not a State Party to ETS 51, please indicate whether there are any particular obstacles to your country's ratification of ETS 51.
- 3 Please suggest possible ways, if any, to increase the popularity and/or usefulness of ETS 51, in particular as regards the possibility of transferring a person who is subject to an order of probation or conditional release.
- 4 Please comment on the possible elaboration of a Convention (possibly linked to existing Council of Europe Conventions) which would include provisions on the supervision of conditionally sentenced or conditionally released offenders, as well as provisions on the transfer (supervision) of mentally disturbed offenders.

APPENDIX II

Strasbourg, 12 September 2002

PC-OC (2002) 10

**Note by
Mr Örjan Landelius
(Sweden)**

Exploring the possibilities of using the Council of Europe Convention on the Supervision of Conditionally Sentenced or Conditionally Released Offenders

In connection with discussions between Sweden and the United States regarding transfer of sentenced persons the question of how to best provide for the social reintegration of the offender has been brought up on several occasions. One of the main issues has been if and under what conditions the home country would be able to assume the responsibility for the supervision of a person who has been paroled in the sentencing state.

Sweden has a specific law on international cooperation regarding treatment of offenders on parole based upon the European Convention of 30 November 1964 on the Supervision of Conditionally Sentenced or Conditionally Released Offenders. It has now been contemplated applying that law with regard to a request emanating from a country that has not acceded to the Convention. The reason for this is that we thereby see a possibility of abridging difficulties arising from the fact that a parolee deported from the sentencing country to Sweden would else have nobody supervising him or assisting him in his reintegration into society. By using the rules established in the Convention in providing the parolee with a supervisor who would be able to exert a certain control regarding the parolee's life and his following given instructions, we also aim at addressing the concerns of the sentencing country in seeing to it that the parolee does not re-offend.

We are particularly concerned with persons who have been sentenced to long time imprisonment and our hope is that we by providing the possibility of arranging for supervision of a parolee sentenced in a foreign country would in a way supplement the 1983 Convention. The idea is that a parolee shall be transferred to his home country and that the home country shall have the responsibility for seeing to it that the person concerned complies with any conditions and supervisory measures imposed upon him by the sentencing state. This would, we think, make it easier for the sentencing state to find a sentenced person who is serving a prison term in the sentencing country both suitable and eligible for parole and thus facilitate an earlier transfer of the person concerned. At the same time it would also enable the courts to suspend a sentence involving deprivation of liberty or to place the offender on probation without having to pronounce a sentence.

Sweden has never applied the 1964 Convention and we thus lack any experience regarding the application of the Convention. Sweden would be most interested in knowing if other countries have any experience in applying this Convention in particular as a way of supplementing the 1983 Convention where there is a common concern shared by both the state which pronounced the sentence and the home country of the previous offender and now parolee that he should get all possible support in his effort to social rehabilitation and readjustment within his own society.