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**EUROPEAN COMMITTEE ON CRIME PROBLEMS**

**(CDPC)**

**COMMITTEE OF EXPERTS**

**ON THE OPERATION OF EUROPEAN CONVENTIONS**

**ON CO-OPERATION IN CRIMINAL MATTERS**

**(PC-OC)**

**Draft review of conventions within the remit of the Committee of Experts on the Operation of  
European Conventions on Co-operation in Criminal Matters (PC-OC)**

## **Draft review of conventions within the remit of the Committee of Experts on the Operation of European Conventions on Co-operation in Criminal Matters (PC-OC)**

### **Introduction**

The Council of Europe conventions on international co-operation in criminal matters within the remit of the PC-OC include:

- the European Convention on Extradition and the four Additional Protocols thereto,
- the European Convention on Mutual Assistance in Criminal Matters and the two Additional Protocols thereto,
- the Convention on the Transfer of Sentenced Persons and the Additional Protocol thereto,
- the European Convention on the Supervision of Conditionally Sentenced or Conditionally Released Offenders,
- the European Convention on the International Validity of Criminal Judgments,
- the European Convention on the Transfer of Proceedings,
- the European Convention and the Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime.

Since its creation in 1981 the PC-OC has been dealing with the functioning of these conventions with a view to facilitating their application through enhanced co-operation. The main tasks entrusted to this committee include the monitoring and evaluation of the conventions, the discussion of legal or practical problems encountered in their implementation and the development of practical tools or legal instruments to address these difficulties.

During its 61<sup>st</sup> plenary meeting, in November 2011, the PC-OC agreed on working methods focussing on improving the value and visibility of its work for practitioners involved in international co-operation in criminal matters. They are reflected in Doc PC-OC(2011) 04 rev 3 "Practical measures to facilitate the application of conventions on international co-operation in criminal matters."

This document presents in its Part I general information on the conventions and protocols mentioned above.

Part II presents the assessment of the conventions by the PC-OC, including an overview of the recent actions undertaken by the PC-OC in respect of the conventions within its remit.

### **Part I: General information on the conventions**

#### **1) European Convention on Extradition (ETS No. 024)**

The European Convention on Extradition provides for the extradition between Parties of persons wanted for criminal proceedings or for the carrying out of a sentence. The Convention does not apply to political or military offences and any Party may refuse to extradite its own citizens to a foreign country.

With regard to fiscal offences (taxes, duties, customs) extradition may only be granted if the Parties have decided to do so in respect of any such offence or category of offences. Extradition may also be refused if the person requesting extradition / in question risks the death penalty under the law of the requesting State.

Opened for signature by the member States of the Council of Europe and for accession by non-member States, in Paris, on 13 December 1957.

**Entry into force:** 18 April 1960

**Number of signatures: -**

**Number of ratifications:** 47 member States of the Council of Europe, as well as Israel, Korea and South Africa.

**1a) Additional Protocol to the European Convention on Extradition (ETS No. 086)**

The European Convention on Extradition bars extradition in respect of all political offences. While it does not define the notion of political offence, it excludes from the scope of such offences the taking of the life of a head of State. The Protocol further limits the scope of such offences by excluding also war crimes and crimes against humanity.

Moreover, the Protocol supplements the provisions of the Convention that deal with the principle “*ne bis in idem*”, namely its Article 9, by enlarging the number of instances in which the extradition of a person is barred where that person has already been tried in a third State, Party to the Convention, for the offence in respect of which the extradition claim was made.. This provision contains a number of conditions and exceptions to this (territorially) wider application of the *ne bis in idem* principle.

Opened for signature by the member States signatories to Treaty ETS No. 24 and for accession by the non-member States which have acceded to Treaty ETS No. 24, in Strasbourg, on 15 October 1975

**Entry into force:** 20 August 1979

**Number of signatures: 1**

**Number of ratifications:** 37 Member States of the Council of Europe, as well as Korea and South Africa.

**1b) Second Additional Protocol to the European Convention on Extradition (ETS No. 098)**

The Second Protocol is designed to facilitate the application of the Convention (ETS No. 024) on several points and aims, in particular, to include fiscal offences among the category of offences for which a person may be extradited under the Convention. This Protocol also contains additional provisions on judgments *in absentia* and amnesty.

Opened for signature by the member States signatories to Treaty ETS No. 24 and for accession by the non-member States which have acceded to Treaty ETS No. 24, in Strasbourg, on 17 March 1978

**Entry into force:** 5 June 1983

**Number of signatures: 1**

**Number of ratifications:** 40 member States of the Council of Europe, as well as Korea and South Africa.

**1c) Third Additional Protocol to the European Convention on Extradition (CETS No. 209)**

The Protocol supplements the Convention (ETS No. 24) in order to simplify and accelerate the extradition procedure when the person sought consents to extradition.

Opened for signature by the member States signatories to Treaty ETS No. 24 and for accession by the non-member States which have acceded to Treaty ETS No. 24, in Strasbourg, on 10 November 2010.

**Entry into force:** 1 May 2012

**Number of signatures:** 18

**Number of ratifications:** 12 member States of the Council of Europe

**1d) Fourth Additional Protocol to the European Convention on Extradition (CETS No. 212)**

The Fourth Protocol amends and supplements a number of provisions of the Convention (ETS No. 24) in order to facilitate the surrender of the person sought and to adapt it to modern needs. These provisions concern, in particular, the issues of lapse of time, requests and supporting documents, rule of speciality, transit, re-extradition to a third State and channels and means of communication.

Opened for signature by the member States signatories to Treaty ETS No. 24 and for accession by the non-member States which have acceded to Treaty ETS No. 24, in Vienna, on 20 September 2012.

**Entry into force:** 1 June 2014

**Number of signatures:** 12

**Number of ratifications:** 5 member States of the Council of Europe

**2) European Convention on Mutual Assistance in Criminal Matters (ETS No. 030)**

Under this Convention, Parties agree to afford each other the widest measure of mutual assistance with a view to gathering evidence, hearing witnesses, experts and prosecuted persons, etc.

The Convention sets out rules for the execution of mutual legal assistance requests ("letters rogatory") by the authorities of a Party ("requested Party") which aim to procure evidence (audition of witnesses, experts and prosecuted persons, service of writs and records of judicial verdicts) or to communicate the evidence (records or documents) in criminal proceedings undertaken by the judicial authorities of another Party ("requesting Party").

The Convention also specifies the requirements that requests for mutual assistance and letters rogatory have to meet (transmitting authorities, languages, refusal of mutual assistance).

Opened for signature by the member States of the Council of Europe and for accession by non-member States, in Strasbourg, on 20 April 1959.

**Entry into force:** 12 June 1962

**Number of signatures:** 0

**Number of ratifications:** 47 member States of the Council of Europe as well as Chile, Israel and Korea

**2a) Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters (ETS No. 099)**

The Protocol completes provisions contained in the Convention (ETS No. 30). It withdraws the possibility offered by the Convention to refuse assistance solely on the ground that the request concerns an offence which the requested Party considers a fiscal offence. It extends international co-operation to the service of documents concerning the enforcement of a sentence and similar measures (suspension of pronouncement of a sentence, conditional release, deferment of commencement of enforcement of a sentence or interruption of such enforcement). Finally, it adds provisions relating to the exchange of information on judicial records.

Opened for signature by the member States signatories to Treaty ETS No. 30 and for accession by the non-member States which have acceded to Treaty ETS No. 30, in Strasbourg, on 17 March 1978.

**Entry into force:** 12 April 1982

**Number of signatures:** 1

**Number of ratifications:** 43 member States of the Council of Europe as well as Chile and Korea

**2b) Second Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters (ETS No. 182)**

The Protocol is intended to improve States' ability to react to cross-border crime in the light of political and social developments in Europe and technological developments throughout the world. It serves to improve and supplement the 1959 Convention ([ETS No. 30](#)) and the 1978 Additional Protocol ([ETS No. 99](#)) to it, in particular by broadening the range of situations in which mutual assistance may be requested and making the provision of assistance easier, quicker and more flexible. It also takes account of the need to protect individual rights in the processing of personal data. Finally, it takes into account the provisions of the Convention of the EU on Mutual Assistance in Criminal Matters between the member States of the European Union (2000) thus allowing to widen their application to other, non EU member States.

Opened for signature by the member States signatories to Treaty ETS No. 30 and for accession by the non-member States which have acceded to Treaty ETS No. 30, in Strasbourg, on 8 November 2001.

**Entry into force:** 1 February 2004

**Number of signatures:** 6

**Number of ratifications:** 35 member States of the Council of Europe as well as Chile and Israel

**3) European Convention on the Supervision of Conditionally Sentenced or Conditionally Released Offenders (ETS No. 51)**

The Convention aims to allow offenders to leave the territory of the 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 therefore facilitating the good conduct and re-adaptation to social life of persons convicted abroad.

The Convention specifies conditions as regards the enforcement by the requested State of a sentence for which the enforcement has been conditionally suspended in another Party.

Opened for signature by the member States of the Council of Europe and for accession by non-member States, in Strasbourg, on 30 November 1964.

**Entry into force:** 22 August 1975

**Number of signatures:** 5

**Number of ratifications:** 19 member States of the Council of Europe

**4) European Convention on the International Validity of Criminal Judgments (ETS No. 070)**

Under the Convention, each Party acquires competence to enforce a sanction imposed in another Party, provided that the requesting State has submitted a request for enforcement, that under the law of the requested State the act for which the sanction was imposed would be an offence, and that the judgment delivered by a requesting State is final and enforceable.

One of the significant aims of the Convention is to promote the rehabilitation of the offender.

Opened for signature by the member States of the Council of Europe and for accession by non-member States, in The Hague, on 28 May 1970.

**Entry into force:** 26 July 1974

**Number of signatures:** 6

**Number of ratifications:** 22 member States of the Council of Europe

**5) European Convention on the Transfer of Proceedings in Criminal Matters (ETS No. 73)**

Under this Convention any Party may request another Party to take proceedings against a suspected person in its stead.

Such a request may be made: if the suspected person is normally resident in the requested State or if he/she is a national of that State; if he/she is to serve a prison sentence or face other proceedings in that State; if the transfer of proceedings is warranted in the interests of a fair trial or if the enforcement in the requested State of a sentence, if one were passed, is likely to improve the prospects of his/her social rehabilitation.

The requested State may not refuse acceptance of the request except in specific cases and in particular if it considers that the offence is of a political nature or that the request is based on considerations of race, religion or nationality.

Opened for signature by the member States of the Council of Europe and for accession by non-member States, in Strasbourg, on 15 May 1972.

**Entry into force:** 30 March 1978

**Number of signatures:** 10

**Number of ratifications:** 25 member States of the Council of Europe

**6) Convention on the Transfer of Sentenced Persons (ETS No. 112)**

While aiming at accomplishing the ends of justice, the Convention is primarily intended to facilitate the social rehabilitation of prisoners by giving foreigners convicted of a criminal offence the possibility of serving their sentences in their own countries. It is also rooted in humanitarian considerations, since difficulties in communication by reason of language barriers and the absence of contact with relatives may have detrimental effects on a person imprisoned in a foreign country.

Transfer may be requested by either the State in which the sentence was imposed (sentencing State) or the State of which the sentenced person is a national (administering State). It is subject to the consent of those two States as well as that of the sentenced person.

The Convention also lays down the procedure for enforcement of the sentence following the transfer. Whatever the procedure chosen by the administering State, a custodial sentence may not be converted into a fine, and any period of detention already served by the sentenced person must be taken into account by the administering State. The sentence in the administering State must not be longer or harsher than that imposed in the sentencing State.

Opened for signature by the member States of the Council of Europe and for accession by non-member States, in Strasbourg, on 21 March 1983.

**Entry into force:** 1 July 1985

**Number of signatures:**

**Number of ratifications:** 46 member States of the Council of Europe as well as 18 non-member States

#### **6b) Additional Protocol to the Convention on the Transfer of Sentenced Persons (ETS No. 167)**

This instrument sets out the rules applicable to transfer of the execution of sentences, firstly where sentenced persons have absconded from the sentencing State to their State of nationality, and secondly where they are subject to an expulsion or deportation order as a consequence of their criminal behaviour.

It supplements the 1983 Convention on the Transfer of Sentenced Persons (ETS No. 112), of which the main aim is to further the social rehabilitation of sentenced foreign nationals by allowing the sentence to be served in the country of origin. This Convention is founded to a great extent on humanitarian principles, being based on the consideration that communication difficulties, language barriers and deprivation of contact with the family can have adverse effects on foreign prisoners. The Protocol furthermore offers a solution to refusal of surrender for reasons of nationality of persons sought for the purpose of execution of a sentence under the extradition convention.

The Protocol also introduces the possibility to transfer the execution of sentences in case the sentenced person has fled to another contracting State. Article 2 of the Protocol extends, as such article 68 of the Schengen Agreement to the CoE level. The provision can be applied as an alternative to extradition in case the sentenced person sought cannot be extradited due to his or her nationality.

Opened for signature by the member States and the other States signatories to Treaty ETS No. 112 and for accession by the non-member States which have acceded to the treaty ETS No. 112, in Strasbourg, on 18 December 1997.

**Entry into force:** 1 June 2000

**Number of signatures:** 5

**Number of ratifications:** 36 member States of the Council of Europe

**7) Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime (ETS No. 141)**

The aim of this Convention is to facilitate international co-operation and mutual assistance in investigating crime and tracking down, seizing and confiscating the proceeds thereof. The Convention is intended to assist States in attaining a similar degree of efficiency even in the absence of full legislative harmony.

Parties undertake in particular:

- to criminalise the laundering of the proceeds of crime;
- to confiscate instrumentalities and proceeds (or property the value of which corresponds to such proceeds).

For the purposes of international co-operation, the Convention provides for:

- forms of investigative assistance (for example, assistance in procuring evidence, transfer of information to another State without a request, adoption of common investigative techniques, lifting of bank secrecy etc.);
- provisional measures: freezing of bank accounts, seizure of property to prevent its removal;
- measures to confiscate the proceeds of crime: enforcement by the requested State of a confiscation order made abroad, institution by the requested State, of domestic proceedings leading to confiscation at the request of another State.

Opened for signature by the member States and the non-member States which have participated in its elaboration and for accession by other non-member States, in Strasbourg, on 8 November 1990.

**Entry into force:** 1 September 1993

**Number of signatures:**

**Number of ratifications:** 49, the 47 member States of the Council of Europe as well as Australia and Kazakhstan

## Part II: Assessment of the Conventions

### 1) The European Convention on Extradition and the four Additional Protocols thereto

Extradition is the oldest form of international co-operation in criminal matters; the European Convention on Extradition (ETS No. 24, 1957) is also the first Council of Europe convention in this area and one of the most important ones. All Council of Europe member States are Parties to this convention as well as Israel, Korea and South Africa. Although the European Arrest Warrant, established by the EU Framework Decision (2002/584/JHA of 13 June 2002), has replaced the convention between EU member States since its entry into force in 2004, the convention remains an essential instrument for the relations with and between Parties that are outside the EU. It should be highlighted that non-European Parties to the Convention are increasingly involved in the activities of the PC-OC. This concerns in particular Israel and Korea.

The Convention has been supplemented by a number of Resolutions and Recommendations to facilitate its implementation:

Resolution (75) 12 on the practical application of ETS No. 24;

Resolution (78) 43 on reservations made to certain provisions of ETS No. 24;

Rec. R (80) 7 concerning the practical application of ETS No. 24;

Rec. R (80) 9 concerning extradition to States not party to the European Convention on Human Rights;

Rec. R (86) 13 on the practical application of ETS No. 24 in respect of detention pending extradition;

Rec. R (96) 9 concerning the practical application of ETS No. 24.

Since its creation in 1981, the PC-OC has devoted many hours to discussing the implementation of the Convention and its additional protocols, trying to reach a common interpretation of its provisions, addressing difficulties encountered and proposing legal or practical solutions. The PC-OC published the main results of these discussions in 2006, under the title "Extradition, European standards". The publication contains explanatory notes on the convention and the first two additional protocols and minimum standards protecting persons subject to transnational criminal proceedings.

In addition, and in order to address needs for improvement that could not be dealt with otherwise, the PC-OC drafted two further additional protocols: the Third Additional Protocol (CETS No. 209, 2010) which simplifies and accelerates the procedure when the person concerned consents to extradition and the Fourth Additional Protocol (CETS No. 212, 2012) which amends and supplements the Convention on a number of issues in order to adapt it to modern needs.

In recent years, the PC-OC has conducted inquiries on several other difficulties affecting extradition and published the replies received on its website. These include the replies to a questionnaire on the reference moment to be applied when considering double criminality or lapse of time as regards extradition requests, questions on provisional arrests and on relationships with Interpol, information received from states on practical problems encountered and good practice as regards the interaction between extradition and asylum procedure, and the replies to a questionnaire concerning judgments *in absentia* and the possibility of retrial.

The outcome of these inquiries was discussed by the PC-OC and the conclusions expressed in notes for practitioners published on the website. These include the issues of double criminality (Doc PC-OC (2012)02), the relationship between extradition and deportation/ expulsion (PC-OC (2012) 08 Rev2), criteria to assess whether a judgment *in absentia* and additional guarantees satisfy the rights of defence - in connection with Article 3 of the Second Additional Protocol to the European Convention

on Extradition - (Doc PC-OC Mod(2014)02rev). The Committee furthermore adopted, in 2012, "Guidelines on practical measures to improve co-operation in respect of transfer of proceedings, including a model request form" for practitioners which applies *inter alia* to the implementation of Article 6 paragraph 2 of the Extradition Convention (Doc PC-OC Inf 78).

As part of its efforts to facilitate the application of the Extradition Convention, the PC-OC adopted in 2014 a revised template for country information on national procedures as regards extradition. This information is particularly useful for practitioners.

In conformity with its terms of reference, the PC-OC closely follows the application of the European Convention on Human Rights with regard to international co-operation in criminal matters, including extradition. The PC-OC developed an index, including specific keywords and summaries of the case law of the European Court of Human Rights of particular relevance for practitioners involved in these procedures. This index and case law is published on the PC-OC website and regularly updated by the experts.

Among the human rights concerns effecting extradition, the Committee highlighted in particular the increasing adverse effect of deteriorating conditions of detention in requesting Parties.

In May 2014, the PC-OC organised a special session on extradition, in which non-European Parties were also actively involved. The session was introduced by a presentation by Mr Johannes Silvis, Judge at the European Court of Human Rights, on applicable case law and in particular the question of diplomatic assurances. Further issues addressed concerned the application of the double criminality principle and refusal of extradition requests, grounds and possible solutions to impunity.

#### Summary:

The European Convention on Extradition (ETS No. 24, 1957) has been recently updated with a Third and a Fourth additional Protocol in order to adapt it to modern needs (CETS No. 209, 2010; CETS No. 212, 2012). Although the Convention is generally seen to function in a satisfactory way, a higher number of ratifications of the latest additional Protocols would facilitate significantly the implementation of extradition procedures among the 50 Parties to this Convention.

## **2) The European Convention on Mutual Assistance in Criminal Matters and the two Additional Protocols thereto**

The need to complete the Extradition Convention with a Convention on mutual assistance in criminal matters (ETS No. 30) was felt almost from the outset and the text was opened for signature in 1959, one year before the entry into force of the Convention on Extradition. Like the Convention on Extradition, the Convention on Mutual Assistance is one of the cornerstones of the Council of Europe's legal framework for international co-operation and it has since been ratified by all Council of Europe member States as well as by Chile, Israel and Korea.

The Convention has been supplemented by a number of Resolutions and Recommendations to facilitate its application:

Resolutions (71) 43 and (77) 36 on the practical application of ETS No. 30;

Rec. R (80) 8 concerning the practical application of the ETS No.30;

Rec. R (83) 12 concerning safe conduct for witnesses in application of Article 12.1 of ETS No.30;

Rec (84)16 concerning notification of work involving recombinant deoxyribonucleic acid (DNA);

Rec. R (85) 10 concerning letters rogatory for the interception of telecommunications;

Rec (92)1 on the use of analysis of deoxyribonucleic acid (DNA) within the framework of the criminal justice system;

Recommendation Rec (2005)9 on the protection of witnesses and collaborators of justice;

Recommendation Rec (2005)10 on “special investigation techniques” in relation to serious crimes including acts of terrorism.

The Convention of the EU on Mutual Assistance in Criminal Matters between the member States of the European Union (2000) and its Additional Protocol (2001), as well as mutual recognition instruments such as the Framework Decision on the European Evidence Warrant, replaced by the Directive 2014/41/EU of 3 April 2014 regarding the European Investigation Order, which shall be complied with by EU member States by 22 May 2017, and other ongoing initiatives, supplement the Council of Europe Convention on Mutual Assistance in Criminal Matters and its Additional Protocols between EU member States.

Over the last decennia, the PC-OC has devoted considerable time to discussing the implementation of this Convention, including legal and practical difficulties involved in its application. In 2000, the Committee developed a Second Additional Protocol to the Convention to adapt the Convention to contemporary needs and to facilitate, accelerate and widen the scope of possibilities for mutual legal assistance, taking into account the developments within the EU.

Inquiries were conducted on the implementation of Article 22 of the Convention, dealing with exchange of information from judicial records, of Article 11, concerning the temporary transfer of persons in custody and Article 9 of the Second Additional Protocol on the use of video conferences in mutual legal assistance in criminal matters. The replies received are posted on the website of the PC-OC as practical tools for practitioners. The PC-OC also discussed the dividing line in the Second Additional Protocol between police co-operation and judicial co-operation and published its findings in a note (PC-OC (2001) 20 rev).

In May 2013, the PC-OC organised a special session on mutual legal assistance, addressing topics such as ways to address requests on “*de minimis* cases” and practical problems concerning requests for seizure and confiscation of proceeds of crime. Non-European Parties to the Convention, Chile and Korea, presented their procedures.

Further to this special session and as a follow up to an earlier project on effective tools to facilitate judicial co-operation in criminal matters ( Project VC 2248, Doc DG-HL (2010)06) the PC-OC decided to develop a model form to assist practitioners in submitting requests for mutual assistance in criminal matters as well as guidelines.

In 2014 as part of its efforts to facilitate the application of the Convention on Mutual Assistance in Criminal Matters, the PC-OC adopted a revised template for country information on national procedures as regards extradition. This information is particularly useful for practitioners.

The “Guidelines on practical measures to improve co-operation in respect of transfer of proceedings, including a model request form” (Doc PC-OC Inf 78) published by the PC-OC also apply to the application by practitioners of Article 21 of the European Convention on Mutual Assistance in Criminal matters.

The application of the European Convention on Human Rights with regard to mutual assistance in criminal matters has been reflected in an index, including specific keywords and summaries of the case law of the European Court of Human Rights of particular relevance for practitioners involved in

these procedures. This index and case law is published on the PC-OC website and regularly updated by the experts.

### Summary:

The implementation of the European Convention on Mutual Assistance in Criminal Matters (ETS No. 30, 1959) and the additional Protocols thereto (ETS No. 99, 1978 and ETS No. 182, 2001) is the object of continuous assessment by the PC-OC and proposals to improve the functioning of these instruments are regularly discussed. The PC-OC has agreed to facilitate their practical implementation by the development of model request forms and practical guidelines for practitioners. However, it should be noted that the implementation and reasons for non-ratification by some member States of the second additional Protocol (ETS No. 182) may merit further assessment.

### **3) European Convention on the Supervision of Conditionally Sentenced or Conditionally Released Offenders (CETS No. 51)**

#### **NOTE: new text**

Considering the relatively low number of ratifications of the Supervision Convention and its too limited application, the PC-OC conducted in 2003 an inquiry regarding the possible more extensive use of this instrument. Discussions held during the 45<sup>th</sup> meeting of the PC-OC in 2002 had indicated 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 country ”

.Against this background a questionnaire was sent out and answered by 25 States, including 9 Parties to the Convention. The questionnaire and the summary of answers are contained in Doc PC-OC(2003)07 rev.

During its 68<sup>th</sup> meeting in May 2015, the PC-OC reconsidered the outcome of this inquiry and agreed that its main findings are still relevant today.

The inquiry revealed the following obstacles to the convention's further application and ratification:

- the limited scope of the convention ( only conditional sentences or the conditional part of a prison sentence)
- the lack of ratifications
- the abundance of reservations by Parties
- the lack of compatibility between national legislations in the field
- the lack of timely response concerning supervision, both from the administering and the requesting state

The study conducted in 2003 concluded that “ *almost all of the answering States 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 Convention.*

*Alternatives to a potential development of a new Convention were presented by the majority. Some of them 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 State. One State 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 the Transfer Convention to transfer conditionally sentenced offenders. One State 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 Convention, 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) 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 51. Some States 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 care . One of the States goes further when it holds that also the provisions of ETS 51 already cover the above-mentioned possibility.*

*Some States 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 exists .*

*Finally, one of the States recalls that in January 2003, the Committee of Ministers presented a report 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) and suggested 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."*

#### **Summary:**

This instrument has a limited level of ratifications. Its application is also very limited. Currently, sentences and alternatives thereto have been greatly diversified, which has as an effect that CETS no. 51 is too limited in scope. The instrument offers – for instance – no basis for the transnational supervision of alternative sanctions that are now current.

In spite of these limitations, the Convention offers a useful form of co-operation and would significantly benefit from a higher level of ratification.

#### **4) European Convention on the International Validity of Criminal Judgments (CETS No. 070)**

##### **NOTE: analysis is lacking: to be discussed in the plenary?**

Despite a rather limited level of ratifications, this Convention allows for an 'integral' transfer of a criminal judgment: other than the mere transmission (of the execution of) the sentence involving deprivation of liberty, also fines, confiscation measures and even disqualifications can be obtained.

#### **5) European Convention on the Transfer of Proceedings in Criminal Matters (CETS No. 73)**

Transfer of proceedings, as regulated by the 1972 European Convention on the Transfer of Proceedings in Criminal Matters, is in essence a transfer of jurisdiction. Upon agreement to transfer a case, the requesting party will lose its original forum to prosecute the matter, while the requested party will acquire procedural jurisdiction over a case that was 'built' abroad.

The Convention has been supplemented by Recommendation N° R (79)12 concerning the application of ETS No. 73.

The 1972 Convention has not been very successful in terms of ratification. Out of 47 member States, only 25 have ratified the instrument. Ten other member States have signed it. In order to assess the fundamental reasons for the lack of accessions to this particular instrument or even for being against the very concept of the 'transfer of proceedings', in 2011 the PC-OC decided to send out a questionnaire covering three different forms of transfer of proceedings:

- the "real transfer" as regulated in the European Convention on Transfer of Proceedings;
- the possibility to lay information to another state in view of its prosecution in application of Article 21 of the European Convention on Mutual Assistance in Criminal matters;
- the application of the '*aut dedere, aut judicare*' principle for cases of the refusal of the extradition of nationals, laid down in Article 6, paragraph 2 of the European Convention on Extradition.

The first objective of this questionnaire was to gather information about the application (or the lack of it) of the Council of Europe's existing instruments on the 'transfer of proceedings'. The second was to obtain the member States' points of view regarding the need for the development of a new instrument in this field or for initiatives to improve the effectiveness of the current instruments.

It was found that the lack of ratifications was not linked to shortcomings in the Convention itself but merely to the fact that some States found sufficient legal basis for co-operation in other existing instruments. In order to address the practical difficulties reported by the Parties as regards the implementation of this Convention, in 2012 the PC-OC developed Practical measures to improve co-operation in respect of transfer of proceedings, including a model request form (PC-OC INF 78).

### Summary

In 2011, the PC-OC conducted an inquiry into the European Convention on the Transfer of Proceedings in Criminal Matters (ETS No. 073), noting that this instrument has only been ratified by 23 member States. It was found that the lack of ratifications was not linked to shortcomings in the Convention itself but merely to the fact that some states found sufficient legal basis for co-operation in other existing instruments. In order to address the practical difficulties reported by the Parties as regards the implementation of this Convention, in 2012 the PC-OC developed, Practical measures to improve co-operation in respect of transfer of proceedings, including a model request form (PC-OC INF 78).

## **6) Convention on the Transfer of Sentenced Persons (ETS No. 112) and its Additional Protocol (ETS No. 167)**

The Convention on the Transfer of Sentenced Persons is, with its 64 Parties, including 18 non-European Parties, the most ratified Council of Europe Convention. This high level of ratification is mainly due to the fact that the Convention creates no obligation for Parties to grant a request for transfer.

The Convention has been supplemented by three Recommendations to facilitate its application:

Recommendation R (84) 11 concerning information about ETS No.112;

Recommendation R (88) 13 and Recommendation R (92) 18 concerning the practical application of ETS No.112.

Together with the European Convention on Extradition and the Convention on Mutual Assistance in Criminal Matters, the Convention on the Transfer of Sentenced Prisoners is one of the major conventions to which the PC-OC has devoted much attention and many inquiries and discussions on issues concerning its application.

Many of the discussions on the application of particular provisions in the Convention and its Additional Protocol are reflected in Doc PC-OC / INF 67 Explanatory notes to the Convention on the Transfer of Sentenced persons.

Further discussions have concerned *inter alia*: undue delays in transfer procedures (Doc PC-OC (2000) 22), national legislation and procedures with regard to conditional release and measures involving deprivation of liberty (PC-OC (2013) 02BilRev.2), difficulties with ratification, reservations, application (PC-OC (2000) 02), the requirement of double criminality (PC-OC (2000) 07), transfer of mentally disordered offenders (PC-OC (2004) 18), the unconvicted mentally disordered patient who absconds to another jurisdiction (PC-OC (2001) 16) and the consequences of transfer and penalties.

The PC-OC has also conducted several inquiries on the application of the Convention and its Additional Protocol. These include the inquiry on the “Interrelationship of the Convention on the Transfer of Sentenced Persons (ETS No. 112) and the Convention on the Supervision of Conditionally Sentenced or Conditionally Released Offenders (ETS No. 51), in particular the possible more extensive use of ETS No. 51” (see summary of answers in doc PC-OC (2003)07), the questionnaire on the application of the Additional Protocol conducted in 2006 and, most recently, the questionnaire as regards the implementation of the Convention on the transfer of sentenced persons (ETS No. 112) by its 64 Parties and of the Additional Protocol thereto (ETS No. 167, 36 ratifications).

This inquiry revealed a number of obstacles to the speedy and successful implementation of this Convention and its Additional Protocol (see Doc PC-OC (2013)10 Rev and PC-OC (2013)10 ADD rev).

The functioning of the Convention and its Additional Protocol was further discussed at a special session on transfer of sentenced persons, organised at the 65<sup>th</sup> meeting of the PC-OC on 27 November 2013. The session, introduced by Mr Vincent De Gaetano, Judge at the European Court of Human Rights, included workshops devoted to an exchange of experiences on the application of the Convention and of the Additional Protocol as well as proposals for improvement. All Parties to the Convention had been invited to participate in this special session.

Further to the outcome of the inquiry and the special session, the PC-OC presented proposals on how to address these obstacles to the CDPC during its 66<sup>th</sup> meeting in 2014. Following the mandate given by the CDPC, the PC-OC developed a draft protocol amending the Additional Protocol to the Convention (ETS No. 167). The preparation of a second additional protocol to the Convention and the possible development of an electronic tool to facilitate transfer procedures are also being considered.

In order to facilitate the application of the Convention, the PC-OC published on its website country information by each Party to the Convention and the Additional Protocol, a Guide to National Procedures (PC-OC INF5 Rev 4), a Standard text providing information about the Convention to sentenced persons (PC-OC Inf 12), national requirements with respect of languages in requests (PC-OC Inf 7), as well as a list of bilateral treaties of member States (PC-OC Inf 8 Bil).

The application of the European Convention on Human Rights with regard to the transfer of sentenced persons has been reflected in an index, including specific keywords and summaries of the case law of the European Court of Human Rights of particular relevance for practitioners involved in these procedures. This index and case law is published on the PC-OC website and regularly updated by the experts.

Finally, when conflicts arise over the implementation of this convention, the PC-OC has at several occasions been involved and consulted by the CDPC, in friendly settlement procedures.

#### Summary:

In 2013 the PC-OC conducted a comprehensive inquiry as regards the implementation of the Convention on the transfer of sentenced persons (ETS No. 112) by its 64 Parties and of the Additional Protocol thereto (ETS No. 167, 36 ratifications). This inquiry revealed a number of obstacles to the speedy and successful implementation of this Convention and its Additional Protocol (see Doc PC-OC (2013)10 Rev and PC-OC (2013)10 ADD rev). The PC-OC presented proposals on how to address these obstacles to the CDPC during its 66<sup>th</sup> meeting in 2014. Following the mandate given by the CDPC, the PC-OC developed a draft protocol amending the Additional Protocol to the Convention (ETS No. 167). The preparation of a second additional protocol to the Convention and the possible development of an electronic tool to facilitate transfer procedures are also being considered. .

**7) Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime (ETS No. 141)**

**NOTE: Analysis to be conducted on the basis of the replies to the questionnaire**

This instrument is also indirectly monitored by the Moneyval committee.

The instrument overlaps partially with the MLA-instruments (seizure of proceeds, a preliminary measure) and with instruments that regard the transfer of the execution of sentences, esp. CETS 070 insofar the transfer of the execution of confiscation orders is concerned.