COUNCIL OF EUROPE

CONSEIL DE L'EUROPE

Strasbourg, 18 May 2016
cdpc/docs 2014/cdpc (2014) 14

CDPC (2014) 14 Fin

EUROPEAN COMMITTEE ON CRIME PROBLEMS (CDPC)

REVIEW OF THE COUNCIL OF EUROPE CONVENTIONS UNDER THE RESPONSIBILITY OF THE CDPC

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GENERAL INTRODUCTION

Since its foundation in 1949, the Council of Europe has prepared more than 200 conventions, building a significant common European legal heritage.

The Secretary General decided to take stock of the situation of the Council of Europe's conventions and has therefore drafted a report on the review of Council of Europe conventions (SG/Inf(2012)12, 12 May 2012). This exercise serves several purposes:

- Draw up a list of key conventions which can provide a common legal platform for all member States in the fields of Human Rights, the Rule of Law and Democracy;
- Identify those conventions which need updating in order to retain or increase their relevance over the next ten years;
- Identify ways of promoting accession to the relevant conventions by non-member States;
- Suggest measures which might increase the relevance, the visibility of, and the number of Contracting Parties to, Council of Europe conventions.

At its 1168th meeting (10 April 2013), the Committee of the Ministers took note of the Secretary General's report and instructed the steering and ad hoc committees to carry out an examination of the conventions for which they have been given responsibility, in order to:

- Propose ways of improving the visibility, impact and efficiency of some or all of the conventions for which they have been given responsibility;
- Draw the attention of member States to the relevant conventions;
- Where necessary, identify any operational problems or obstacles to ratification of the relevant conventions, and draw the attention of member States to reservations;
- Encourage States to regularly examine the possibility and/or desirability of becoming a Party to new Council of Europe conventions;
- Assess the necessity or the opportunity of drafting amendments or additional protocols to the conventions for which they have been given responsibility or drafting supplementary conventions.

The CDPC took note of these two documents and prepared a document containing all relevant information on the conventions within the CDPC's responsibility.

This document aims to, in its Part I, provide general information on the Conventions which are under the CDPC's direct responsibility and within the remit of the PC-OC. Part II presents the assessment of the Conventions by the CDPC and PC-OC, including an overview of the recent actions undertaken and some points of consideration in respect of each of the Conventions.

The Council of Europe conventions within the direct supervision of the CDPC include:

1. European Convention on the Punishment of Road Traffic Offences (ETS No. 52);
2. European Convention on the Control of the Acquisition and Possession of Firearms by Individuals (ETS No. 101);
3. European Convention on the Compensation of Victims of Violent Crimes (ETS No. 116);
4. European Convention on Offences relating to Cultural Property (ETS No. 119);
5. Convention on Insider Trading (ETS No. 130);

6. Convention on the Protection of the Environment through Criminal Law (ETS No. 172).

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

7. European Convention on Extradition (ETS No. 24);
8. European Convention on Mutual Assistance in Criminal Matters (ETS No. 30);
9. European Convention on the Supervision of Conditionally Sentenced or Conditionally Released Offenders (ETS No. 51);
10. European Convention on the International Validity of Criminal Judgments (ETS No. 70);
11. European Convention on the Transfer of Proceedings in Criminal Matters (ETS No. 73);
12. Convention on the Transfer of Sentenced Persons (ETS No. 112);
13. Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime (ETS No. 141).

Due to their recentness, three Conventions have been excluded from the present document, considering that it is not yet possible to make an assessment. These are:

- Council of Europe Convention on preventing and combating violence against women and domestic violence (CETS No. 210), which entered into force on 1st August 2014;
- Council of Europe Convention on the counterfeiting of medical products and similar crimes involving threats to public health (CETS No. 211), which entered into force on 1st January 2016;
- Council of Europe Convention against Trafficking in Human Organs (CETS No. 216).

Finally, in addition to the conventions mentioned above, there are a number of other Council of Europe conventions related to criminal law matters that are under the regular scrutiny of Council of Europe monitoring/conventional bodies. These bodies were consulted by the CDPC. The outcomes of these consultations are the following:

- Conference of the Parties to the CETS No. 198 (CoE Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism):
    a. So far it has 27 ratifications and 13 signatures not followed by ratification (including the EU).
    b. The categories of predicate offences contained in the appendix have been regularly updated.
    c. Once the CETS No. 198 has a *"critical mass"* of ratifying States, the Conference of the Parties will recommend opening negotiations of a protocol to this treaty and, thus, the commencement of an amendment process given that CETS No. 198 was prepared more than 10 years ago.

- Cybercrime Convention Committee (T-CY):
    a. The Convention on Cybercrime (ETS No. 185) currently compromises 49 Parties, including non-member States of the CoE.
    b. The T-CY considers that the allocated resources are not commensurate with the additional functions, meetings, members and observers of the Convention.
    c. The T-CY prepared and adopted Guidance Notes, which represent the common view of the Parties and allow applying existing provisions on the

Convention to new cybercrime phenomena without the need for constant amendments to the treaty.

d. The T-CY is assessing implementation of the Convention by the Parties and establishes working groups to focus on specific problems.
e. A Cybercrime Programme Office (C-PROC) was established in Budapest and has been operational since April 2014.
f. Although the T-CY does not envisage amending the Convention so far, it is giving consideration to a possible Additional Protocol on international cooperation, including criminal justice access to electronic evidence on cloud servers.

- Lanzarote Committee (Committee of the Parties to the Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse):
    a. All 47 CoE member States have signed and 41 of them have ratified the Convention.
    b. A thematic questionnaire was sent out to collect specific information on how Parties implement the CETS No. 201 with respect to the situation of sexual abuse in the circle of trust.
    c. In December 2015, a 1st implementation report was adopted by the Committee (being the replies to the questionnaire the main source of information) setting out a series of recommendations as to the criminalisation of sexual abuse of children in the circle of trust, the collection of data, ensuring child's best interest and child-friendly criminal proceedings, and corporate liability.[1]

- Group of States against Corruption (GRECO):
    a. The Criminal Law Convention on Corruption (ETS No. 173) has been ratified by 44 member States and Belarus, and its Additional Protocol (ETS No. 191), which has been ratified by 40 member States and Belarus. Germany, Liechtenstein and San Marino are the only CoE member States that have not yet ratifies the Convention.
    b. GRECO's monitoring experience shows that the ratification of these two instruments did not lead automatically to a satisfactory level of alignment of domestic legislation with their content. All the States that have ratified these instruments have received recommendations to address certain shortcomings and gaps in their domestic legislation. That said, GRECO's recommendations have prompted a positive response from a large number of member States to address the problems identified in a constructive manner.
    c. GRECO's monitoring work has not revealed any particular need to revise or amend the text of the Convention or its Protocol.

[1] The 1st implementation report is available online at http://www.coe.int/en/web/children/monitoring1

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 (not followed by ratification): 0

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. 86)

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 (not followed by ratification): 2

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. 98)

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 (not followed by ratification): 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 (not followed by ratification): 18

Number of ratifications: 13 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 (not followed by ratification): 12

Number of ratifications: 6 member States of the Council of Europe

2) European Convention on Mutual Assistance in Criminal Matters (ETS No. 30)

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 (not followed by ratification): 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. 99)

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 (not followed by ratification): 1

Number of ratifications: 41 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 (not followed by ratification): 8

Number of ratifications: 33 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 (not followed by ratification): 5

Number of ratifications: 20 member States of the Council of Europe

4) European Convention on the Punishment of Road Traffic Offences (ETS No. 52)

The Convention aimed to address the increase, in the 1990's, in road traffic between Parties and the dangers consequent upon the violation of rules designed to protect road users. It sets out a framework of mutual co-operation for more effective punishment of road traffic offences in the territories of the Parties.

The Convention derogates from the principle of territoriality by empowering a Party in whose territory a road traffic offence has been committed to choose between instituting proceedings itself or requesting the State of residence of the offender to prosecute the offence.

A list of offences to which the Convention applies appears in Annex 1 of the Convention, named the "Common Schedule of Road Traffic Offences".

Open for signature by the member States of the Council of Europe, in Strasbourg, on 30 November 1964.

Entry into force: 18 July 1972.

Number of signatures (not followed by ratification): 10

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

5) European Convention on the International Validity of Criminal Judgments (ETS No. 70)

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 (not followed by ratification): 6

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

6) 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 (not followed by ratification): 10

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

7) European Convention on the Control of the Acquisition and Possession of Firearms by Individuals (ETS No. 101)

The aim of the Convention is to set up a system for controlling the movements of firearms from one country to another. It applies in all cases where a firearm located in the territory of

a Party is sold, transferred or otherwise disposed of to a person resident in the territory of another Party, or where it is transferred permanently and without change in the possession thereof to the territory of another Party.

The Convention offers two alternative methods of controlling the movement of firearms:

- the "notification" system, with an obligation on the Party in which the firearm was originally located to notify the Party on the territory of which the person is resident of the sale, transfer or other transaction;
- the "double authorization" system, whereby the transaction may not take place without the previous agreement of the two States concerned.

The Parties also undertake to afford each other mutual assistance in the suppression of illegal traffic and in the tracing and locating of firearms transferred from the territory of one State to the territory of another.

Open for signature by the member States of the Council of Europe, in Strasbourg, on 28 June 1978.

Entry into force: 1 July 1982.

Number of signatures (not followed by ratification): 8

Number of ratifications/accessions: 15 member States of the Council of Europe.

8) 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 (not followed by ratification): 0

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

8a) 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 extents, 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 (not followed by ratification): 5

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

9) European Convention on the Compensation of Victims of Violent Crimes (ETS No. 116)

This Convention puts upon States that become a Party to it the obligation to compensate the victims of intentional and violent offences resulting in bodily injury or death. The obligation to compensate is limited to offences committed on the territory of the State concerned, regardless of the nationality of the victim.

Open for signature by the member States of the Council of Europe, in Strasbourg, on 24 November 1983.

Entry into force: 1 February 1988.

Number of signatures (not followed by ratification): 8

Number of ratifications: 26 member States of the Council of Europe.

10) European Convention on Offences relating to Cultural Property (ETS No. 119)

Based on the concept of common responsibility and solidarity in the protection of European cultural heritage, the Convention aims to protect cultural property against criminal activities. To achieve this objective the Parties undertake to enhance public awareness of the need for protection, to co-operate in the prevention of offences against cultural property, to acknowledge the seriousness of such offences and to provide for adequate sanctions or measures with a view to co-operating in the prevention of offences relating to cultural property and in the discovery of cultural property removed.

Open for signature by the member States of the Council of Europe, in Delphi, on 23 June 1985.

Entry into force: The Convention will enter into force after 3 ratifications.

Number of signatures (not followed by ratification): 6

Number of ratifications: 0

11) Convention on Insider Trading (ETS No. 130)

The Convention provides for mutual assistance through the exchange of information between those responsible at national level for the surveillance of stock exchange transactions in order to discover and identify as rapidly as possible the preparation of irregular operations of insider trading.

Parties may, by simple declaration, extend this mutual assistance machinery to the search for those responsible for other irregular deals which could adversely affect equal access to information for all stock market traders or the quality of the information supplied to investors in order to ensure honest dealing (fraudulent financial operations, "rigging" of stock market prices, "laundering" of the proceedings of crime, etc.).

The Parties undertake to afford each other the widest measure of mutual assistance in criminal matters relating to offences involving insider trading.

Open for signature by the member States of the Council of Europe, in Strasbourg, on 20 April 1989.

Entry into force: 1 October 1991.

Number of signatures (not followed by ratification): 1

Number of ratifications: 8 member States of the Council of Europe.

11a) Protocol to the Convention on Insider Trading (ETS No. 133)

The Protocol allows Parties which are members of the European Union to apply Union rules and therefore not to apply the rules arising from this Convention (ETS No. 130) except in so far as there is no Union rule governing the particular subject concerned.

Open for signature by the member States of the Council of Europe signatories to the Convention, in Strasbourg, on 11 September 1989.

Entry into force: 1 October 1991.

Number of signatures (not followed by ratification): 1

Number of ratifications: 8 member States of the Council of Europe.

12) 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 of crime (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 (not followed by ratification): 0

Number of ratifications: 47 member States of the Council of Europe as well as Australia and Kazakhstan.

13) Convention on the Protection of Environment through Criminal Law (ETS No. 172)

The Convention is aimed at improving the protection of the environment at European level by deterring behaviour which is most harmful to it and at harmonising national legislation in this field.

This legal instrument establishes as criminal offences a number of acts committed intentionally or through negligence where they cause or are likely to cause lasting damage to the quality of the air, soil, water, animals or plants, or result in the death of or serious injury to any person.

It defines the concept of criminal liability of natural and legal persons, specifies the measures to be adopted by states to enable them to confiscate property and define the powers available to the authorities, and provides for international co-operation.

The sanctions available must include imprisonment and pecuniary sanctions and may include reinstatement of the environment, the latter being an optional provision in the Convention.

Another major provision concerns the possibility for environmental protection associations to participate in criminal proceedings concerning offences provided for in the Convention.

Open for signature by the member States of the Council of Europe and the non-member States which have participated in its elaboration, in Strasbourg, on 4 November 1998.

Entry into force: This Convention will enter into force after 3 ratifications.

Number of signatures (not followed by ratification): 13

Number of ratifications: 1 member State of the Council of Europe.

PART II: ASSESSMENT OF THE CONVENTIONS

1) The European Convention on Extradition (ETS No. 24) 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.

Conclusion

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 (ETS No. 30) 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 on-going 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 mutual assistance. 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.

Conclusion

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 (ETS No. 51)

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 45th 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 68th 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".*

In addition to the above, it is to be underlined that the *EU Council Framework Decision 2008/947/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments and probation decisions with a view to the supervision of probation measures and alternative sanctions* has entered into force and applies among the EU members, including 14 out of the 19 Parties to the convention.

Conclusion

This Convention is the first instrument to allow enforcement of a foreign sentence if the person under surveillance in the requested Party violates the conditions of the surveillance (see Parts III and IV). It has however a limited level of ratifications. Noting that sentences and alternatives thereto have been greatly diversified in the last decennia, CETS no. 51

appears too limited in scope today. 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 may offer a useful form of co-operation and would significantly benefit from a higher level of ratification, in particular by non EU member states, as well as a revision or withdrawal of the existing reservations in respect of part III and/or IV.

4) European Convention on the Punishment of Road Traffic Offences (ETS No. 52)

The European Convention on the Punishment of Road Traffic Offences was opened for signature by the Council of Europe member States on 30 November 1964. It came into force on 18 July 1972. It has been signed by 10 States[2] and ratified by five of them[3].

International element is a key element to take into consideration in road security. The figures given by the European Commission[4] in November 2013 are alarming; if non-resident drivers represent 5% of all road traffic in the European Union, they are nevertheless responsible for 15% of crimes of speeding. Furthermore, the driver of a registered vehicle abroad is three times more likely to commit a crime than a resident in the country of registration of his/her vehicle. Lastly, the European Union notes that in countries like France, where tourism and transit are important, speeding committed by non-residents represents 25% of crimes committed and can reach as high as 40-50% at certain times of the year[5].

I. The European Convention on the Punishment of Road Traffic Offences

Following its creation by the Committee of Ministers of the Council of Europe in 1957, the CDPC appointed a working party to elaborate a preliminary draft convention which allows the creation of a close link of solidarity on the subject of punishment of road traffic offences between member States. This preliminary draft was presented to the Committee of Ministers in 1961. They decided to open the Convention to signature at its 134th reunion in October 1964.

The Convention intends to address the fact that offenders to different non-resident highway codes avoid their obligations upon return to their country of residence. Also it establishes a double derogation from the principle of territory usually fixing the competent tribunal and the competent criminal law. It thus gives competence to the State of residence of the perpetrator of a road offence to pursue an offence committed on the territory of another state regardless of the nationality of the offender. It also offers the possibility to the State of residence to enforce the sentence handed down in the State of the offence itself.

The Convention is divided into five sections and is completed by two annexes.

Section I lays down the fundamental principles. This section authorises the State of residence to pursue an offence committed on the territory of another State or to enforce a sanction which has become definitive outside of its jurisdiction. Section I equally defines the applicable law in these situations[6].

Section II is dedicated to the prosecution in the State of residence. It permits, in particular, the supply of information in relation to the time-limits for court action and also the legal value of documents issued in the State in which the prosecution occurred.

[2] Germany, Austria, Belgium, Cyprus, Denmark, France, Georgia, Greece, Italy, Luxembourg, Netherlands, Portugal, Romania, Sweden and Turkey
[3] Cyprus, Denmark, France, Romania and Sweden
[4] http://ec.europa.eu/transport/newsletters/2013/11-08/articles/cbe_memo_en.htm (English only)
[5] The English version says the “very busy periods of the year”, we can think of school holidays, but also the tourist periods such as summer or during the period of winter sports
[6] Concerning the definition of the offence, the law of the State of the offence is applicable. Concerning prosecution and execution, it is the laws of the State of residence which apply.

Section III addresses enforcement in the State of residence. The principle of *non bis in idem* is invoked here, as well as the question of payment of fines. One article foresees for example the situation of non-payment of a fine and the recourses available in the State of residence to obtain that payment.

Section IV lays down “general provisions”. It foresees particularly the question of costs of proceedings, but also the question of exchange of information between the different States, particularly concerning the final decision given.

Finally, Section V contains the final provisions.

It is interesting to note that the core of the Convention is found in annex 1. This annex aims to determine the “Common Schedule of Offences”, to know the offences covered by the Convention. Seven offences are covered by the Convention:

1. Manslaughter or accidental injury on the roads.
2. "Hit and run" driving, i.e., the wilful failure to carry out the obligations placed on drivers of vehicles after being involved in a road accident.
3. Driving a vehicle while:
    a. intoxicated or under the influence of alcohol;
    b. under the influence of drugs or other products having similar effects;
    c. unfit because of excessive fatigue.
4. Driving a motor-vehicle not covered by third-party insurance against damage caused by the use of the vehicle.
5. Failure to comply with a direction given by a policeman in relation to road traffic.
6. Non-compliance with the rules relating to:
    a. speed of vehicles;
    b. position and direction of vehicles in motion, meeting of oncoming traffic, overtaking, changes of direction and proceeding over level crossings;
    c. right of way;
    d. traffic priority of certain vehicles such as fire-engines, ambulances and police vehicles;
    e. signs, signals and road markings, in particular "stop" signs;
    f. parking and halting of vehicles;
    g. access of vehicles or classes of vehicles to certain roads (for example, on account of their weight or dimensions);
    h. safety devices for vehicles and loads;
    i. marking descriptive (signalisation) of vehicles and loads;
    j. lighting of vehicles and use of lamps;
    k. load and capacity of vehicles;
    l. registration of vehicles, registration plates and nationality plates.
7. Driving without a valid licence.

Annex II, offers the possibility to States to make reservations.

II. Points for consideration concerning the European Convention on the Punishment of Road Traffic Offences

A number of elements concerning the European Convention on the Punishment of Road Traffic Offences are noteworthy.

a. An unusual convention

Firstly, placing the offences in an appendix can seem surprising and so can the choice to not open the text of the Convention with definitions of key terms. Expressions such as “road traffic offence” or “traffic rules” are defined in Section V, namely the final provisions.

Furthermore, the rules proposed by the Convention are very different from the rules of jurisdiction generally used in criminal law. If it is true that to detach jurisdiction is a good initiative in order to achieve the enforcement of a sanction abroad, this view is not compatible with the reality of road traffic sanctions imposed. In fact the majority of criminal sanctions imposed in this domain are fines; other penalties, such as imprisonment are reserved for the most serious offences. At that time, it seemed difficult for a State to collect a fine linked to an offence committed in another State and aiming to repair a public disorder which was caused kilometres away from its territory. In this regard, it is interesting to note that the possibility is given to States to make a reservation in which they will not apply Section III of the Convention, enforcement in the State of residence.

The Convention of the Council of Europe foresees that the request for proceedings is addressed by the Ministry of Justice of the State of the offence to the Ministry of Justice of the State of residence. The communications can then be exchanged directly by the competent authorities. In the age of the Internet and electronic communications, it is worth asking whether the choice of this channel of communication is still relevant.

b. Other international instruments

At European level there exist other rules of co-operation on this subject. In observing the reservations formulated by Denmark, we realise that it applies other provisions in relation to the member countries of the Nordic Council. In the same manner, bilateral agreements for road traffic offences exist already between France, Luxembourg, Switzerland and Belgium.

We can find an Agreement on co-operation in the frame of procedures relating to road traffic offences[7] which is part of the Schengen acquis. This fixes a co-operation procedure and exchange of information on road traffic offences and also effects the question of pecuniary penalties on the subject.

The European Union is trying to establish its own rules relating to road traffic offences. A first attempt was undertaken by Directive 2011/82/EU facilitating the cross-border exchange of information on road safety related offences[8] adopted on 25 October 2011. This establishes a system of exchange of information between member States of the European Union. Following action by the European Commission introduced before the European Court of Justice, Directive 2011/82/EU was annulled[9] by a judgement of 6 May 2014, due to the legal basis chosen. All the same the European Court of Justice chose to keep the effects of the directive ”until the entry into force within a reasonable period of time — which may not exceed twelve months as from the date of delivery of the judgment — of a new directive based on the correct legal basis”.

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[7] http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:41999D0011&from=FR (decision of the executive Committee deciding the approval of this agreement)

[8] http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32011L0082&qid=1415979178076&from=FR

[9] Case C-43/12, European Commission against European Parliament, Council of the European Union http://curia.europa.eu/juris/document/document.jsf?text=&docid=151775&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=742186

The European Union did not delay in taking note of this decision since the European Commission presented a proposal for a new directive facilitating cross-border exchange of information on road safety related offences[10] on 18 July 2014. The substantive rules of the proposal for the new directive are not very different from the annulled directive. It mainly focused on correcting the legal basis of the last directive. A number of elements are interesting if we make a comparison with the text of the European Convention on the Punishment of Road Traffic Offences:

- The European Union opts more for creating an information exchange between authorities, rather than focusing on the enforcement of decision and on the prosecution as such. Thus it provides the access of authorities of member States to the relevant information of other member States. Member States whereby the offence took place can therefore immediately turn towards the person breaking the road traffic regulations without having to seek the intermediate of the authorities of the State of registration.;
- The European Union Directive, unlike the Council of Europe Convention, lays down a model of a letter requesting assistance, but also a letter of notification of an offence[11]. The Council of Europe Convention does not impose any translation obligations, and five States reported that, through the reservations, they wanted to see the documents transmitted accompanied by a translation, either in their official language, or in one of the official languages of the Council of Europe[12]. Imposing the sending of the letter of notification in a language understood by the offender complies with the right to a fair trial set by article 6 of the European Convention on Human Rights[13];
- The offences covered by the European Union Directive are very close to those set by the Convention of the Council of Europe. Nevertheless, certain offences seem to be more up to date than those set by the European Convention on the Punishment of Road Traffic Offences. The European Union takes into account the use of a mobile telephone or any other electronic devices.

c. A Convention directed at the most serious offences

The Convention of the Council of Europe seems to be intended to deal with the most serious road traffic offences, which is to say those which are the most susceptible to be qualified as a crime or an offence. It is not clear if the States initiate such a procedure to obtain the enforcement of a sanction deemed to be weak or a sanction for which the costs of the procedure would be more important than the resulting benefit.

The European Union has put in place a system of mutual recognition to financial sanctions by the member States through the Framework Decision 2005/214/JAI on the application of the principle of mutual recognition to financial penalties[14] of 24 February 2005. The decision imposing the financial penalty is forwarded from the issuing State, i.e. the member State which issued the decision to the executing State, which is the member State which enforces the decision on its territory.

The directive facilitating cross-border exchange of information on road safety related offences refers to this framework decision, and it is without doubt through this channel that its scope is limited: in fact, a State can refuse to recognise and to enforce the decision if the

[10] http://eur-lex.europa.eu/resource.html?uri=cellar:d3ba20c5-0e5f-11e4-a7d0-01aa75ed71a1.0001.01/DOC_1&format=PDF
[11] http://eur-lex.europa.eu/resource.html?uri=cellar:d3ba20c5-0e5f-11e4-a7d0-01aa75ed71a1.0001.01/DOC_2&format=PDF
[12] Cyprus, Denmark, Italy, Romania and Sweden
[13] http://conventions.coe.int/Treaty/EN/Treaties/Html/005.htm
[14] http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32005F0214&from=FR

fine imposed does not exceed 70€, in order to avoid that the costs incurred are less than the expected benefits of the payment of the fine.

Conclusion

The CDPC concluded that most of the Council of Europe member States would not be interested to amend this Convention. Therefore, at the present time, the updating of this Convention is not regarded as a priority.

5) European Convention on the International Validity of Criminal Judgments (ETS No. 70)

The Convention is the first instrument that enables the transfer of the execution of sentences, without any preliminary conditions. This is different in ETS No. 51, where there are certain prerequisites, for example that the sentenced person is the subject of surveillance.

The Convention is not limited to sentences involving the deprivation of liberty (prison sentences and other measures). Indeed it allows the enforcement of all criminal judgments taking into account all criminal sanctions that were imposed. Under the Convention, the execution of prison sentences, measures involving deprivation of liberty, fines, confiscation measures and disqualifications can be transferred to another Party.

The ability to transfer not only the execution of sentences involving deprivation of liberty largely depends on the domestic law of the Parties, yet the Convention's unique strength is that it remains the sole legal basis for an integrated approach in the international enforcement of criminal judgments. This form of co-operation may well be the only alternative to extradition – for the purpose of the execution of sentences - in Europe since many Parties do not allow the extradition of their own nationals.

Conclusion

Despite a limited number of ratifications, the Convention still is a valid basis and future updates could be envisaged that may lead to closer co-operation in the field of the international enforcement of sentences.

6) European Convention on the Transfer of Proceedings in Criminal Matters (ETS 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).

Conclusion

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).

7) European Convention on the Control of the Acquisition and Possession of Firearms by Individuals (ETS No. 101)

The European Convention on the Control of the Acquisition and Possession of Firearms by Individuals was opened for signature on 28 June 1978. It came into force on 1 July 1982. It has been ratified by 14 States[15], one State[16] has acceded to it and it has been signed by 8 States[17].

I. The European Convention on the Control of the Acquisition and Possession of Firearms by Individuals

In the 1970s, there was a growing awareness among European States concerning the danger posed by firearms and their role in endangering public safety and order.

On 6 October 1971, ten members of the Parliamentary Assembly of the Council of Europe (PACE) tabled a motion for a recommendation on the control of crimes of violence (Doc. 3031). They considered that the acquisition and possession of firearms needed to be harmonised across European States.

The European Committee on Crime Problems (CDPC) decided at its 22nd Plenary meeting (in May 1973) to set up a sub-committee, which was in charge of studying how to deal with the issue of the firearms, and how to harmonise member States' regulations on the sale, possession, carriage and use of firearms. The sub-committee fulfilled the first part of its terms of reference ("to consider and prepare effective regulations concerning the import and export of firearms") by drawing up the draft Convention on the Control of the Acquisition and Possession of Firearms by Individuals.

On 23 May 1977, the Bureau of the CDPC decided to transmit the aforementioned draft Convention to the Committee of Ministers. The Committee of Ministers requested an opinion by the PACE.

In its opinion No. 87 (1978), the PACE welcomed the draft Convention. It considered that this Convention would help in combating terrorism and other crimes of violence. The Committee of Ministers was also called upon to open the draft Convention for signature and ratification by member States in a timely manner, which took place in March 1978.

The first chapter of this Convention is devoted to definitions and general provisions. It defines the most important terms of the Convention: firearms, person, dealer and resident. This chapter also calls on States to afford each other mutual assistance through the appropriate administrative authorities in the suppression of the illegal traffic in firearms and in the tracing and locating of firearms transiting through various territories. Article 3 also allows Parties to prescribe laws and regulations concerning firearms which are not incompatible with the provisions of the Convention. Article 4 excludes from its scope of application the transactions between States or between parties acting on behalf of States.

The Convention offers two alternative methods of controlling the movement of firearms:

[15] Cyprus, Czech Republic, Denmark, Germany, Iceland, Italy, Luxembourg, Moldova, Netherlands, Poland, Portugal, Romania, Slovenia and Sweden.
[16] Azerbaijan.
[17] Georgia, Greece, Ireland, Malta, Russia, Spain, Turkey and United Kingdom.

- the "notification" system, with an obligation on the Party in which the firearm was originally located to notify the Party on the territory of which the person is resident of the sale, transfer or other transaction (Chapter II);
- the "double authorisation" system, whereby the transaction may not take place without the previous agreement of the two States concerned (Chapter III).

Chapter IV concerns the Final Provisions.

Finally, there are also two appendixes to the Convention:

- the first one defines what is meant by firearms under the Convention. It provides an exhaustive list. This list gives an accurate description and it is very technical;
- the second one offers the possibility to States to formulate reservations. It contains 4 subparagraphs and gives a wide scope for reservations.

II. Points for consideration concerning the European Convention on the Control of the Acquisition and Possession of Firearms by Individuals

The Convention is inspired by the Benelux Convention on arms and ammunition signed in Brussels on 9 December 1970. This Convention sets up a system which maintains controls in the three States at a satisfactory level through the harmonisation of legislation, without adversely affecting trade with outside States.

The European Union has also drawn up directives concerning firearms:

- Council Directive 91/477/EEC of 18 June 1991 on the control of the acquisition and possession of weapons[18]. It establishes four categories of firearms. It states that a European firearms pass is issued by the authorities of an EU country to any person lawfully entering into possession of and using a firearm. A computerised data-filing system into which these firearms are to be registered must be set up by EU countries. A person that meets the requirements for the acquisition and possession of any firearm may be given a multiannual licence. Any movements of the firearm must be communicated to the competent authorities, regular verifications must be carried out to evaluate whether the person continues to meet the requirements and the maximum time limits specified by national law must be respected. These formalities apply to all firearms, excluding weapons of war;
- This Directive was amended by the Directive 2008/51/EC of the European Parliament and of the Council of 21 May 2008[19].

In 2006, the EU also developed a Strategy to combat illicit accumulation and trafficking of small arms and light weapons and their ammunition[20]. This Strategy was designated after the United Nations noted that 600 million light weapons are in circulation in the world and, of the 49 major conflicts in the 1990s, 47 were fought using those arms as the main weapons. The EU decided to contribute at a regional level to the fight began by the UN against those small arms and light weapons.

There is wide awareness concerning firearms not only in the EU, but also worldwide. The UN has drawn up a number of texts concerning firearms:

[18] http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:31991L0477&from=EN
[19] http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32008L0051&from=FR
[20] http://register.consilium.europa.eu/doc/srv?l=EN&f=ST%205319%202006%20INIT

- Protocol against the Illicit Manufacturing of and Trafficking in Firearms, their Parts and Components and Ammunition, Supplementing the United Nations Convention Against Transnational Organized Crime[21], which was adopted by the General Assembly on 8 June 2001;
- The landmark Arms Trade Treaty, regulating the international trade in conventional arms - from small arms to battle tanks, combat aircraft and warships -, which entered into force on 24 December 2014[22].

Article 2 of the CoE Convention states that "The contracting Parties undertake to afford each other mutual legal assistance through the appropriate administrative authorities in the suppression of traffic in firearms and in the tracing and locating of firearms transferred from the territory of one State to the territory of another". Thus, the criminal law aspects become diluted. Furthermore, the Explanatory Report to the CoE Convention refers to the European Convention on the Obtaining Abroad of Information and Evidence in Administrative Matters, which was opened to signature by the member States of the Council of Europe on 15 March 1978 and entered into force on 1 January 1983 (ETS No. 100)[23].

Lastly, the Convention uses the notion of "habitual residence", which excludes *de facto* a number of situations from its field of application.

Conclusion

Although this was an advantageous convention at the time when the Council of Europe drafted it, since then other international instruments have been set up, in particular by the UN and other international organisations. Therefore, amending this Convention is not regarded as a priority.

[21] http://www.unodc.org/documents/treaties/UNTOC/Publications/A-RES%2055-255/55r255e.pdf
Link to the Convention itself:
http://www.unodc.org/documents/treaties/UNTOC/Publications/TOC%20Convention/TOCebook-e.pdf
[22] https://unoda-web.s3.amazonaws.com/wp-content/uploads/2013/06/English7.pdf
[23] http://conventions.coe.int/Treaty/en/Treaties/Html/100.htm

8) Convention on the Transfer of Sentenced Persons (ETS No. 112) and the Additional Protocol thereto

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 65th 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 66th 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.

Conclusion

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 66th 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.

9) European Convention on the Compensation of Victims of Violent Crimes (ETS No. 116)

The European Convention on the Compensation of Victims of Violent Crimes was opened for signature on 24 November 1983 and came into force on February 1988. Ratified by twenty-five Council of Europe member states[24], it was also signed by eight states which have not yet ratified it[25].

From the 1960s onwards various Council of Europe member states set up schemes to compensate victims from public funds where compensation was otherwise unavailable.

The Council of Europe noted the existence of these various arrangements and elected to issue the European Convention on the Compensation of Victims of Violent Crimes to permit harmonisation of the relevant rules at European level while offering solutions in connection with cross-border procedures.

I. The European Convention on the Compensation of Victims of Violent Crimes

A first step was taken on 28 September 1977 with the adoption by the Committee of Ministers of the Council of Europe of Resolution (77) 27[26] on the compensation of victims of crime. This was followed by the introduction of such schemes in various Council of Europe member states.

In 1981 the CDPC embarked on the drafting of the Convention. This seeks to harmonise the guiding principles on the compensation of victims of violent crimes and to give them binding force at European level. It is also intended to ensure co-operation between the parties in compensating victims of violent crimes.

Part I is devoted to fundamental principles and lays down the general principles which should govern compensation of victims of violent crimes by specifying in particular the types of offences that may create eligibility for compensation. These must be intentional, violent and the direct cause of serious bodily harm or health damage to the victim. There is no exhaustive list of offences in the actual text of the Convention.

Part II of the Convention relates to international co-operation. This part is rather short (two articles) and principally provides that states shall give each other “the maximum possible assistance” in the matter. The explanatory report refers to the European Convention on Mutual Assistance in Criminal Matters (CETS No. 30) and to its Protocol (CETS No. 099), as well as to the European Convention on the Obtaining Abroad of Information and Evidence in Administrative Matters (CETS No. 100), and to bilateral or multilateral agreements concluded between the Contracting States to aid international co-operation in this field.

Finally, Part III of the Convention sets out the final clauses customary for European conventions.

[24] Albania, Germany, Austria, Azerbaijan, Belgium, Bosnia and Herzegovina, Cyprus, Croatia, Denmark, Spain, Estonia, Finland, France, Liechtenstein, Luxembourg, Montenegro, Norway, Netherlands, Portugal, Czech Republic, Romania, United Kingdom, Slovakia, Sweden and Switzerland.
[25] Armenia, Greece, Hungary, Iceland, Lithuania, Serbia, Turkey and Ukraine.
[26] https://wcd.coe.int/ViewDoc.jsp?id=669829&Site=CM&BackColorInternet=C3C3C3&BackColorIntranet=EDB021&BackColorLogged=F5D383

II. Points for consideration concerning the European Convention on the Compensation of Victims of Violent Crimes

Taking account of victims of crime is a frequent concern in the various international instruments.

The UN on 29 November 1985 adopted Resolution 40/34, Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power[27] defining the rights of victims in criminal proceedings, notably the right to redress. The UN supplemented its apparatus by adopting a Resolution G.A. 60/147 of 16 December 2005[28], this time centred on victims of gross violations of international humanitarian law. In this text, the UN confirms the necessity of a right to reparation for victims.

Regarding the European Convention on the Compensation of Victims of Violent Crimes, albeit fairly satisfactory in terms of ratifications and signatures, it is not without criticisms. True enough, when in the explanatory memorandum to the Proposal for a Council Directive on compensation to crime victims[29] it is written that "The 1983 European Convention has undoubtedly had an important impact […]. However, […] it has not reached all the way in ensuring a complete coverage of all citizens of the EU. […] the minimum standard it sought to establish is not commensurate with the degree of protection that EU citizens and legal residents should be able to expect".

As early as 1989 and the entry into force of the Council of Europe Convention, the European Parliament adopted a resolution[30] on compensation to victims of violent crimes. In 1998 the Vienna Programme[31] of the Council and the Commission was approved. This envisages in particular studying the question of aid to victims, making a comparative survey of victim compensation schemes, and assessing the feasibility of deciding appropriate measures within the European Union.

In 1999 the European Commission presented a communication[32] aimed at improving the situation of crime victims in the European Union. On 28 September 2001 the Commission issued a Green Paper on compensation to crime victims[33]. In the Green Paper, the adoption of minimum standards of compensation, by requiring the Member States to guarantee victims a reasonable level of compensation, is seen as a priority field of action. It is also recommended that Member States sign and / or ratify the Council of Europe Convention.

In this framework, Directive 2004/80/EC[34] of 29 April 2004 relating to compensation to crime victims was adopted by the European Union. This establishes the obligation for Member States to provide in their national legislation for schemes on compensation to victims of violent intentional crime, committed in their territories, and for the introduction of a system facilitating access to compensation for victims in cross-border situations. This directive is very comprehensive and exactly itemises the procedure for compensating victims.

Comparing the Council of Europe Convention and the European Union directive, both texts are found to have shortcomings:

[27] http://www.un.org/documents/ga/res/40/a40r034.htm
[28] http://www.ohchr.org/EN/ProfessionalInterest/Pages/RemedyAndReparation.aspx
[29] http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52002PC0562&rid=1
[30] A 3-13/89 C 256 of 12 September 1989, p. 32.
[31] OJ C 19 of 23 January 1999, p. 1, para. 51 (c).
[32] http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:51999DC0349
[33] http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52001DC0536
[34] http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32004L0080&rid=1

- Both exclude legal persons from their scope and do not contemplate the possibility that the state could make up such a body's financial deficit;
- While the two texts concurred in dealing solely with compensation for deliberate "violent" offences, neither defines what it means by "violent". Although this allows the implementing authorities to be left a margin of manoeuver, it may nonetheless form an obstacle to legal certainty. The European Union proposal for a directive moreover suggested an article devoted to defining the terms used by the directive. This provision was not embodied in the final version of the text.

The European Union Directive lays down certain rules missing from the Council of Europe Convention:

- The Directive stipulates that the information exchanged by the States Parties be written in the official languages or in one of the languages of the Member State of the receiving authority, corresponding to one of the languages of the Community institutions, or in another language of the Community institutions which the Member State has declared its readiness to accept. Similar linguistic recommendations can be found in the reservations expressed by the member states on the Council of Europe Convention;
- The European Union's use of the term "crime" affords a wider perspective of the offences concerned, not being confined to violent offences alone. Thus it allows more persons to be brought under the state compensation scheme while nevertheless limiting its scope to violations of physical integrity;
- The European Union Directive lays down less restrictive conditions than the Council of Europe Convention. In fact the scope of the Convention *de facto* excludes tourists and frontier workers since it reserves compensation for nationals of the States Parties to the Convention and nationals of member states permanently resident in the state in whose territory the offence was committed. The conclusions of the XIth International Penal Law Congress[35] (Budapest, 9-14 September 1974) also incline towards identical conditions of compensation for all victims, without considerations of nationality or residence;
- The possibilities allowed states by the Council of Europe Convention to reduce and cancel compensation[36] are liable to establish a kind of "rank order" of victims;
- Whereas the information exchange procedure is thoroughly described in the European Directive, the Council of Europe Convention has a more general and less precise intent.

The above-mentioned European Union Directive was supplemented by a decision of the Commission of 19 April 2006[37] establishing standard forms for the transmission of applications and decisions pursuant to Council Directive 2004/80/EC relating to compensation to crime victims.

[35] http://www.penal.org/IMG/pdf/NEP21anglais.pdf
[36] Applicant's financial situation, conduct of the victim before, during or after the offence, or in relation to the damage caused, whether the victim is implicated in organised crime or belongs to an organisation perpetrating violent offences, whether compensation is liable to be conflict with sense of justice or public policy.
[37] http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32006D0337&from=FR

In more general terms, the European Union considered victims' welfare in the framework of the "Stockholm Programme – an open and secure Europe serving and protecting citizens"[38] adopted on 10 and 11 December 2009. In this context, the Council of the European Union adopted on 8 June 2011 a "Roadmap for strengthening the rights and protection of victims"[39] proposing a plan in several stages. One of its key measures is review of the directive on compensation for crime victims. At present, a number of measures have been taken in that respect[40]:

- A directive establishing minimum standards on the rights, support and protection of victims of crime adopted on 25 October 2012[41]. This directive replaces the Framework Decision of 15 March 2001 on the standing of victims in criminal proceedings[42] and guarantees victims recognition and respectful treatment, adequate protection and support, and access to justice. It significantly strengthens the rights of victims and their family members to receive information, support and protection, together with their procedural rights when participating in criminal proceedings. It also contains provisions ensuring that professionals receive training suited to victims' needs and encouraging co-operation between Member States, as well as raising awareness of victims' rights. The Directorate General of Justice of the Commission has published a guidance document to help Member States in that regard[43];
- The regulation on mutual recognition of protection measures in civil matters[44].

Conclusion

The CDPC considers that some improvements could be made to the Convention. However, the question of making amendments or considering practical solutions will be further studied. In particular, the CDPC thinks that it could be possible, for instance, to deal with the situation of tourists becoming victims. Updating the Convention is a possibility.

[38] http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2010:115:0001:0038:en:PDF
[39] http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32011G0628(01)&from=FR
[40] These may be found on the page: http://ec.europa.eu/justice/criminal/victims/index_en.htm (consulted on 5 November 2014).
[41] http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32012L0029
[42] http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2001:082:0001:0004:en:PDF
[43] http://ec.europa.eu/justice/criminal/files/victims/guidance_victims_rights_directive_en.pdf (English only).
[44] http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2013:181:0004:0012:en:PDF

10) European Convention on Offences relating to Cultural Property (ETS No. 119)

The Convention on Offences relating to Cultural Property was opened for signature by Council of Europe member States in Delphi on 23 June 1985, but has never entered into force. Indeed, only six States have signed it, and none have ratified it.

The main aim of this convention is to combat illicit trafficking in cultural property through criminal law and to promote co-operation between States. It thus serves as a complement to the European Convention on Mutual Assistance in Criminal Matters (ECMA) and the European Convention on Extradition (ECEx). A further aim is to protect European cultural heritage and to raise public awareness of the damages caused by illicit trafficking in cultural property.

According to some statistics, illicit trafficking of cultural property is the third most common form of international criminality after arms and drugs trafficking. This estimate should be treated with caution, however, as accurate figures in this area are very difficult to come by.[45] Still, as recent developments illustrate, illicit trafficking in cultural property is a significant phenomenon. Switzerland, for example, returned a number of archaeological objects to Italy in March 2014,[46] and in July 2014 Germany returned a few thousands artefacts to Greece.[47]

The importance of illicit trafficking in cultural property, whether because of its scale or because of a growing awareness of the need to protect cultural heritage, can be seen in the number of international and regional conventions, with many organisations now seeking to curb the traffic in cultural property. At an international level, on 14 November 1970, UNESCO adopted a Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property which is probably the most important convention in this area (127 States Parties).

Similarly, Unidroit adopted a Convention on Stolen or Illegally Exported Cultural Objects on 24 June 1995. The aim of this Convention is to supplement the 1970 UNESCO Convention, by focusing more specifically on civil law aspects. As will be seen below, the rules on bona fide acquisition are a key issue in combating the illicit traffic in cultural property.

At the same time, the United Nations Office on Drugs and Crime (UNODC) is currently framing guidelines on “Strengthening crime prevention and criminal justice responses to protect cultural property, especially with regard to its trafficking”.[48]

At European level, there is a Directive 93/7/EEC on the return of cultural objects unlawfully removed from the territory of a Member State dated 15 March 1993[49] and a Regulation of 9 December 1992 on the export of cultural objects (Council Regulation No. 3911/92). The

[45] This is partly because clandestinely excavated objects are not inventoried before they appear on the market with the result that it is difficult to assess the scale of this traffic, owing to lack of awareness of the unlawful acts. At the same time, most States keep statistics on the types of offences committed and not the type of property affected by the offence, making it difficult to determine which of the offences recorded specifically related to cultural property. See: www.interpol.com.

[46] For further information: https://www.news.admin.ch/message/index.html?lang=fr&msg-id=52210 (consulted on 26 August 2014) (French only).

[47] For further information: http://www.ekathimerini.com/4dcgi/_w_articles_wsite1_1_08/07/2014_541191 (consulted on 26 August 2014) and https://plone.unige.ch/art-adr/news-actualite/over-10-600-artifacts-looted-in-wwii-returned-to-greece (consulted on 26 August 2014).

[48] https://www.unodc.org/unodc/en/organized-crime/trafficking-in-cultural-property-mandate.html (consulted on 26 August 2014).

[49] This directive was revised in May 2014.

Directive concerns the export of cultural objects within EU Member States whereas the Regulation deals with the export of cultural objects outside the European Union.

When discussing illicit trafficking in cultural property, it is important to bear in mind that countries are "split" between "exporting" States which tend to favour tougher laws on trafficking and "importing" States which, on the contrary, wish to protect the art market and prefer flexible laws in this area.

In the light of the above, it is worth looking at the reasons preventing States from ratifying the Council of Europe Convention on Offences relating to Cultural Property.

I. Illicit trafficking in cultural property

It is important firstly to consider briefly what illicit trafficking in cultural property involves. Usually what is meant by the term "illicit trafficking in cultural property" is the following:[50]

- the illicit export of cultural property
- illicit excavations
- criminal offences relating to cultural property

a. Illicit export:

Cultural property is deemed to have been illicitly exported if it is removed from a country's national territory (whether by its legitimate owner or otherwise), in breach of national legislation on the protection of cultural heritage. Such legislation generally comes under the heading of public law. Whenever a State requests the return of cultural property that has been illicitly exported from its territory therefore (i.e. in breach of the national legislation prohibiting the export of the property or making such export subject to authorisation) and imported into the territory of another State, the implication is that the requested State recognises the public law legislation of the requesting State. Recognising and enforcing another State's public law is often problematic, however. As a result, illicitly exported property is seldom returned to the State of origin solely on the ground that there has been a breach of the latter's national legislation, owing to a failure to recognise foreign public law. International co-operation in cases of illicit export of cultural property (which, furthermore, has not been the subject of a criminal offence) very often remains a dead letter therefore.

b. Illicit excavations:

The term "illicit excavations" refers to the unlawful appropriation of property that has been excavated either lawfully or unlawfully. Such excavations generally concern archaeological objects and many States treat the unlawful appropriation of excavated objects as a criminal offence.

c. Criminal offences:

The most common criminal offences as regards illicit trafficking in cultural property are theft, receiving, unlawful appropriation of products of excavations and laundering. Unlike in the case of illicit export, States are favourably disposed towards international co-operation in criminal matters, because the offences in question are, in general, universally recognised as criminal acts.

[50] See also Marie Boillat, Le trafic illicite de biens culturels et la coopération judiciaire internationale en matière pénale, Etudes en droit de l'art, vol. 22, Genève 2012, p. 197 s.

II. The Convention on Offences relating to Cultural Property:

The Convention on Offences relating to Cultural Property is made up of the basic text and three appendices. This Convention has been drafted in such a way as to impose certain "core" requirements on any States wishing to ratify it and to enable States which wish to go further in the fight against illicit trafficking in cultural property to include additional provisions, whether in terms of how cultural property is defined (Appendix II) or in terms of the types of conduct outlawed (Appendix III).

The basic text of the Convention focuses mainly on the scope, the principles governing co-operation in criminal matters and methods of inter-State co-operation with a view to the restitution of cultural property (execution of letters rogatory, proceedings, competence, etc.).

The real substance of the Convention is defined in the appendices, with Appendix II providing a definition of the cultural property covered by the Convention and Appendix III listing the types of conduct considered criminal offences under the Convention. We will therefore focus our attention on the appendices to the Convention.

Before examining the appendices, it is worth concentrating particularly on article 34 of the Convention on bilateral agreements. Since the aim of the Convention is to promote cooperation among States, article 34 should be drafted positively[51] and not negatively as it is currently drafted.

a. Definition of cultural property (Appendix II to the Convention)

Under Article 1 of the Convention, the definition of cultural property is divided into two parts. The first paragraph constitutes the "core" of the Convention (Art. 1 §1 of the Convention) and States are therefore bound to consider the property listed here as cultural property. They may or may not consider as cultural property the property mentioned in the second paragraph of the Convention (Art. 2 §2 of the Convention).

Article 1 of the 1970 UNESCO Convention defines the concept of cultural property, a definition that is now widely accepted as standard and which was adopted by Unidroit in the Unidroit Convention on Stolen or Illegally Exported Cultural Objects of 24 June 1995.

The definition provided in Article 1 of the Convention on Offences relating to Cultural Property is not the same as the commonly used one found in the 1970 UNESCO Convention. It also differs from the definition used in the European Directive (Art.1 of the Directive) which refers to the concept of "national treasure", on which individual States are then free to elaborate according to their domestic law.

In order to facilitate implementation of the Convention on Offences relating to Cultural Property, it might be helpful to adapt the definition of cultural property given in Appendix II to the definition provided in the 1970 UNESCO Convention, insofar as the vast majority of States which have ratified the 1970 Convention also belong to the Council of Europe. That said, some EU countries have admittedly entered a reservation concerning the definition

[51] See for example the wording of the article 3 of the Unidroit Convention from 1995, which also deals with conclusion of bilateral agreements.

given in the 1970 UNESCO Convention, in order that it should be compatible with their domestic law.[52]

Again in order to make the Convention more effective, it would also be better to have a single definition of cultural property that would be binding for all member States rather than allowing them to pick and choose.

b. Criminal offences covered by the Convention

Appendix III to the Convention on Offences relating to Cultural Property lists the different criminal acts outlawed under the Convention. According to the Convention's explanatory report, this appendix is divided into two sections. The first section constitutes the "core" of the Convention, and is mandatory for all States wishing to ratify the instrument (Art. 3 § 1 of the Convention), while the second section contains a list of additional offences which individual States can decide to include or not when ratifying the Convention (Art. 3 § 2 of the Convention). According to Article 3 § 3 of the Convention, States may also add other behaviours that affect cultural property and are not listed in Appendix III to the Convention.

i. The core of the Convention (Appendix III §1)

Under the terms of Article 3 §1 of the Convention, States must recognise at least the following acts as criminal offences (Appendix III §1):

- thefts of cultural property
- appropriating cultural property with violence or menace
- receiving of cultural property where the original offence is listed in §1 and regardless of the place where the latter was committed.

This handful of offences makes up the "core" of the Convention. Theft (Appendix III §1 lit. a) and receiving (Appendix III §1 lit. c) are treated as offences in most legislations, whether they relate to cultural property or not. In principle, therefore, such illicit acts are already part of criminal law in the majority of States.

Appropriating cultural property with violence or the use of threats, on the other hand (Appendix III §1 lit. b) perhaps constitutes a more recent offence whose substance, because of how it is worded at present, is not easy to grasp. The limits between this type of conduct and theft with violence, for example, are very difficult to be determined. The appropriation of property that has been illicitly excavated is usually carried out without either violence or the use of threats. The difference between violence and the use of threats is likewise rather blurred. It is not easy, therefore, to determine to which types of conduct derived from illicit trafficking in cultural property this offence refers. In addition, "appropriating cultural property with violence or menace" is also related to the offence of receiving, because property which the perpetrator has appropriated with violence or menace may be the subject of a further offence, namely "receiving", under the terms of Appendix III §1. Since "appropriating cultural property with violence or menace" is one of the "core" offences listed in the Convention, it is important that it be defined more clearly.

[52] For a comprehensive assessment on this subject, see Marie Cornu, La mise en œuvre de la Convention de l'UNESCO en Europe, Paris 2012 http://www.unesco.org/new/fileadmin/MULTIMEDIA/HQ/CLT/pdf/Cornu_en.pdf (consulted on 30 September 2014).

Moreover, the offence of "Destruction or damaging of cultural property of another person" (appendix III §1 lit. d) could be a principal offence due to the frequent and recent episodes as well as the UNESCO Declaration concerning the Intentional Destruction of Cultural Heritage, which has been approved unanimously by all the UNESCO member States in 2003.

ii. Illicit export (Appendix III §2):

Recognising the illicit export of cultural property as a criminal offence is not a *sine qua non* for ratifying the Convention (Appendix III § 2 lit. h) as it is not part of the "core".

The Council of Europe was the first to tackle the problem of illicit export of cultural property by outlawing such acts, the aim being to encourage international co-operation whenever property is illicitly exported from a State's national territory (even if no criminal offence has been committed).

It would appear, however, that States are not ready to make illicit export a criminal offence. If we look, for example, at the 1970 UNESCO Convention, it will be observed that, when it comes to implementing this Convention, national attitudes to illicit export can be broadly divided into two groups. Canada, for example, regards as illicit any import carried out in breach of national export legislation. The majority of States, however, have concluded bilateral agreements with various other States Parties to the 1970 UNESCO Convention, and regard as having been illicitly exported only the property referred to in those agreements.

Similarly and in an effort to achieve the best possible consensus, the text of the Unidroit Convention of 1995 has one set of rules for stolen property[53] and another for property that has been illegally exported. Because the Unidroit Convention is a legally binding instrument which places heavy obligations on the States concerned, it was important that property which had been stolen (and hence the subject of an offence) be treated differently from property that had been illegally exported.

Given States' reaction to the 1970 UNESCO Convention and the 1995 Unidroit Convention, and the fact that governments are already reluctant to recognise national legislation banning the export of cultural property, suggest it is too early to make illicit export a criminal offence. The mere mention of illicit export of cultural property as a criminal offence might be enough to deter some States from ratifying the Convention therefore.

iii. *Bona fide* acquisition (Appendix III § 2)

Protecting *bona fide* acquirers is a central plank in the fight against illicit trafficking in cultural property. In civil law systems, bona fide acquirer usually enjoys protection, unlike in common law systems where the "*nemo dat quod non habet* "rule applies.

In contrast to the 1970 UNESCO Convention which is not self-executing, the 1995 Unidroit Convention is directly applicable and contains rules whereby persons who acquired stolen

[53] It is worth noting that under Art. 3 para. 2 of the Unidroit Convention, any object derived from clandestine excavation is considered stolen, when consistent with the law of the State where the excavation took place.

property in good faith are not protected. It is mainly because of this lack of protection for *bona fide* acquirers that the Unidroit Convention has proved less popular than the UNESCO one, with States whose laws protect *bona fide* acquirers unwilling to change the rules in cases where the acquisition related to cultural property. As a result, only 36 States, most of them "exporting States", have signed up to the Unidroit Convention.

The acquisition in a grossly negligent manner of cultural property obtained as the result of theft or of an offence against property other than theft (§2 lit. c Appendix III) is not one of the "core" offences listed in the Council of Europe Convention on Offences relating to Cultural Property. States can thus decide whether to include it or not at the time of ratification. It is not clear from reading this offence whether a *bona fide* acquirer, even if guilty of gross negligence, might, in certain circumstances, be protected. Similarly, it could be useful to specify what we mean by "circumstances" surrounding the acquisition[54].

Even though the acquisition in a grossly negligent manner of cultural property obtained as the result of theft or of an offence against property other than theft is not among the "core" offences listed in the Convention, this could still pose an impediment to ratification therefore. It might also be advisable to make it clear what is meant by "grossly negligent". Even in civil law systems, an acquirer will only benefit from *bona fide* protection if they are deemed to have exercised due diligence when acquiring the cultural property.

III. Final considerations

To sum up, the Convention on Offences relating to Cultural Property introduces a system for combating illicit trafficking in cultural property through criminal law. It is important that the Council of Europe takes the necessary steps to ensure that this Convention, which responds to a real need to combat this problem, is ratified by a greater number of States.

It is felt that, in order to achieve this, a more readable text is needed. For with its dual definition of cultural property and large number of optional offences, the Convention is difficult to implement in practice.

As far as defining cultural property is concerned, it would seem sensible to adopt a definition in line with the one used in the 1970 UNESCO Convention or the European Directive. The disparity between the definitions is hardly conducive to a clear understanding and effective implementation of the Convention.

As regards criminal offences, the "core" of the Convention ought to be clarified, and in particular the offence of "appropriating cultural property with violence or menace".

In view of States' attitudes towards illicit export and the acquisition of cultural property in a negligent manner, it makes sense to keep such acts as non-core offences.

That said, the fact that offences are divided into "core" and non-core offences is hardly helpful when it comes to implementing the Convention. Under Article 26, which establishes the reciprocity rule, States have a duty to co-operate only if the cultural property affected by

[54] For example, article 4 par. 4 of the Unidroit Convention describes the circumstances allowing to judge the buyers' good or bad faith: "In determining whether the possessor exercised due diligence, regard shall be had to all the circumstances of the acquisition, including the character of the parties, the price paid, whether the possessor consulted any reasonably accessible register of stolen cultural objects, and any other relevant information and documentation which it could reasonably have obtained, and whether the possessor consulted accessible agencies or took any other step that a reasonable person would have taken in the circumstances."

the act in question is defined as cultural property in both States and if both States have elected to include this act in the list of offences.

Other points:

- Might it be helpful to take stock of European Union law (Directive and Regulation)?
- Might it be worth creating a link with the Council of Europe Convention on the Protection of the Archaeological Heritage (Malta Convention)?
- Would it be helpful to make a link to UNODC's work and, in particular, the Convention against Transnational Organized Crime? The Council of Europe Convention perhaps does not do enough to underline the international dimension of the illicit trafficking of cultural goods.
- Would it be helpful to make a link with the treaties about the protection of heritage in times of war (simply in the preamble) since recent history demonstrates that it is in periods of instability that the most offences listed in appendices III are committed?

Conclusion

At its Plenary Session in December 2014, the CDPC considered this topic to be very interesting with the offences relating to cultural property worth examining in more detail. The CDPC asked the consultants to draft a Memorandum, containing some key issues on this subject. The Memorandum also contains some questions addressed to all CDPC delegations and has been sent to member States before the Plenary Session of June 2015. At this Session, following the replies received to these questions, the CDPC decided to set up a small drafting group of experts in order to continue working on this Convention.

11) Convention on Insider Trading (ETS No. 130) and the Additional Protocol thereto

The Convention on Insider Trading was opened for signature on 20 April 1989 and came into force on 1 October 1991. Nine Council of Europe member States signed[55], and it was ratified by eight of them[56]. The Protocol on Insider Trading was opened for signature on 11 October 1989 and came into force on 1 October 1991. The signatures and ratifications are the same as for the Convention.

Organised crime and the various financial offences are definitely linked, and the European Union acknowledged this in its Directive 2003/6/EC[57] of the European Parliament and of the Council of 28 January 2003 on insider dealing and market manipulation (market abuse). Indeed, preambular clause 14 thereof states that *"This Directive meets the concerns expressed by the Member States following the terrorist attacks on 11 September 2001 as regards the fight against financing terrorist activities"*.

The Council of Europe Convention on Insider Trading acknowledges the risk posed by these actions to human rights, democracy and rule of law.

I. The Council of Europe Convention on Insider Trading and its Additional Protocol

The Convention is intended to alleviate the difficulties which have emerged at international level in finding facts and culprits and in suppressing operations on organised stock market securities carried out in defiance of those principles. It emerged that one of the most important obstacles was ignorance of the identity and status of the persons actually involved, acting through persons resident outside the country concerned. Insider trading has the essential characteristic that the contentious transaction has the appearance of a lawful one. What makes the act reprehensible is that its perpetrator possesses information unknown to the public owing to his status or to the circumstances.

The Convention has the essential aim of creating mutual assistance by exchange of information between Parties, to enable supervision of securities markets to be carried out effectively and to establish whether or not persons carrying out certain financial transactions on the stock markets are insiders. It complements the Council of Europe European Convention on Mutual Assistance in Criminal Matters (ETS 30) which provides for mutual international assistance in the conduct of criminal justice proceedings.

Chapter I of the Convention supplies the definitions of certain terms used in the text. Accordingly, in Article 1 §1 it straightway makes clear what is to be understood by "insider" within its framework. Other concepts are also clarified in Article 1, such as "organised stock market", "stock" and "transaction".

Chapter II of the Convention establishes collaboration between the different parties' authorities, with due regard to the rights of persons implicated and to the interests of the States concerned. Above all, this chapter provides for collaboration founded on discretion and secrecy, which are essentials in the stock market and financial sector.

Finally, Chapter III of the Convention provides for the eventuality of criminal prosecution. A link is established with the Convention on Mutual Assistance in Criminal Matters.

[55] Cyprus, Finland, Luxembourg, Norway, Netherlands, Czech Republic, United Kingdom, Slovenia and Sweden
[56] Only Slovenia has not ratified it
[57] http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32003L0006

Concerning, the Additional Protocol to the Council of Europe Convention on Insider Trading has added an Article 16 bis to the Convention providing that States Parties also belonging to the European Union shall apply the Community rules, and not those of the Convention, in their mutual relations.

II. Points for consideration concerning the Council of Europe Convention on Insider Trading

Not long after the signature of the Council of Europe Convention, a Council Directive 89/592/EEC[58] was adopted on 13 November 1989, concerning co-ordination of regulations on insider dealing. This directive displayed two shortcomings that can also be held against the Council of Europe Convention:

- The ingredients of the offences had definitions too general for the goal of harmonisation to be deemed genuinely achieved;
- Neither instrument did not / does not cover market manipulations and, principally, dissemination of misinformation about the market, an offence which no doubt has all the gravity of, and may compound, the offence of insider trading.

The European Union therefore carried out an update of its legislation by adopting Directive 2003/6/EC[59] on insider dealing and market manipulation (market abuse) which it amended with Directive 2008/26/EC[60]. These directives exhibit several contrasts with the text of the Council of Europe Convention:

- Where the source of the privileged information behind the insider transaction is concerned, the European Union directives take account of the cases where the transaction does not arise from the culprit's profession or functions but from his criminal activities, whose preparation or perpetration could appreciably influence the price of one or more financial instruments or price formation on a regulated market as such;
- They contemplate the case of legal persons.

The European Union moreover, in each of its directives relating to this offence, takes note of the technical developments affecting the business world and does not rule out the possibility of regularly making updates of its legislation.

In 2014 the European Union carried out a further update of its legislation on insider offences by means of Directive 2014/57/EU[61] of the European Parliament and of the Council of 16 April 2014 on criminal sanctions for market abuse. Through this directive, the European Union again demonstrates the strong link between insider transactions and market abuse.

The European Commission has adduced several reasons to justify this criminal-law directive:

- Deficiencies in the regulation of the new markets, platforms and an open market for trading in financial instruments;
- Deficiencies in the regulation of goods and their derivatives;

[58] http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:31989L0592&from=FR
[59] http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:02003L0006-20110104&from=FR
[60] http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32008L0026&from=FR
[61] http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32014L0057&from=EN

- The regulators' inability to enforce the previous directive effectively;
- Lack of legal certainty undermining the previous directive's effectiveness;
- Heavy administrative burdens, particularly for small and medium-sized enterprises.

Principally, the European Union has recognised that the legal framework provided by the previous directive has been outmoded by extension of the new technologies.

Consequently, Directive 2014/57/EU proves very comprehensive and criminalises attempting to commit, inciting, aiding and abetting.

Conclusion

The CDPC agreed that reviewing this Convention and its additional Protocol is not a priority.

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

This convention, opened for signature in 2000, has been ratified by all CoE member States as well as by Australia and Kazakhstan. Building on and updating the standards set out in the convention ETS No. 141, the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism (CETS No. 198) was adopted in 2005. However, the convention CETS No. 198 has been ratified by 26 member States only. The convention ETS No. 141 remains therefore the main widely ratified Council of Europe instrument specifically dealing with laundering, search seizure and confiscation of proceeds of crime.

This convention contains provisions on measures to be implemented at national level (chapter II) and provisions on international co-operation (chapter III). Unlike the convention CETS No 198, the convention ETS No 141 has no mechanism dedicated to follow its implementation. Compliance with the anti- money laundering standards can be subject to monitoring by MONEYVAL, as set out under its Statute. The PC-OC monitors and assists in the implementation of the conventions' standards as regards international co-operation.

The PC-OC organised on 19 November 2014 a special session on "International co-operation as regards the seizure and confiscation of proceeds of crime, including the management of confiscated goods and asset sharing ". The special session, which lasted a full day, included panel discussions with experts as well as two workshops. The discussions revealed that an important number of PC-OC experts, mainly representatives of central authorities, have no extensive experience in this particular field of international co-operation.

As a first follow-up to this session, it was decided to send out a questionnaire on the use and efficiency of CoE instruments as regards international co-operation in the field of seizure and confiscation of proceeds of crime. The questionnaire and replies were examined during the 69th meeting of the PC-OC on 3-5 November 2015 [Doc. PC-OC (2015)06 Rev]. Question 2 of this questionnaire addresses the convention ETS No. 141.

The replies indicate that Parties generally consider this instrument to be an appropriate basis for requests on search, seizure and confiscation of proceeds of crime. Some experts indicated practical obstacles, linked to the difficulty in identifying the proceeds from crime, in demonstrating the link between the facts under investigation and the assets located in the requested country. Also mentioned is the fact that the classic MLA approach of the convention is often too time consuming to allow for effective search and seizure ("by the time the request is written, the money to be searched or seized is gone"). Not all replies contained information on the possibilities/modalities for the management of seized and confiscated assets. Some Parties had limited or no possibility to assist other Parties in returning assets to victims. Finally, the issue of asset sharing is not covered by the convention, nor any other Council of Europe instrument, and is not always possible. Due to differences in national legislations, further difficulties in international co-operation may arise on issues such as non-conviction based confiscation, and to a lesser extent, value based confiscation.

Finally, the instrument overlaps partially with the European Convention on Mutual Assistance in Criminal Matters (seizure of proceeds, as a preliminary measure) and with the European

Convention on the International Validity of Criminal Judgments ETS 070 insofar the transfer of the execution of confiscation orders is concerned.

Conclusion

An inquiry conducted by the PC-OC in 2015 revealed that the implementation of ETS No. 141 and more generally the issue of international co-operation in the field of search, seizure and confiscation of proceeds of crime would require further discussions. The PC-OC decided during its 69th meeting in November 2015 to develop a template for country information on the national procedures relevant for the implementation of this instrument. It was felt that given the limited experience of PC-OC experts in this field, the PC-OC would need to co-operate with experts from MONEYVAL and/or the Conference of Parties to the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism (COP 198) to discuss ways to improve international co-operation in this particular field.

13) Convention on the Protection of the Environment through Criminal Law (ETS No. 172)

The Convention on the Protection of the Environment through Criminal Law was opened for signature by Council of Europe member states and the non-member states which had contributed to its drafting on 4 November 1998. It has been signed by 14 member states[62] but ratified only by Estonia (in 2002). As three ratifications are required for it to enter into force, the Convention remains thus far dormant.

I. The Convention on the Protection of the Environment through Criminal Law

Following the 17th Conference of European Ministers of Justice held in Istanbul from 5 to 7 June 1990, the Council of Europe's Committee of Ministers set up a select committee of experts in 1991, known as the "Group of Specialists on the protection of the environment through criminal law" (PC-S-EN), later renamed the PC-EN. The committee started its work in October 1991 and completed it in November 1995. At its very first meeting, it decided to draw up a binding international treaty.

When the Convention was being drafted, it emerged that many states around the world had already enacted legislation on the environment through administrative law.

The Convention is divided into four sections.

Section I defines the terms used in the Convention. It is worth noting that only two terms are defined here, namely "unlawful" and "water".

Section II is divided into several articles. Article 2, for example, contains a list of intentional acts which states are required to treat as criminal offences. Section II likewise requires state to criminalise aiding or abetting the commission of such offences. Mention is also made of offences committed with negligence, although under the article on "negligent offences", states can choose to criminalise only offences which were committed with gross negligence. Some articles cater for offences that are considered to be less serious and allow states to choose between criminal and administrative sanctions. One article also lays down rules concerning jurisdiction in such matters. It is very broad in scope. The principle of proportionality of offences and penalties, confiscation measures, reinstatement of the environment, corporate liability and co-operation between authorities and rights for groups to participate in proceedings are also addressed in this section.

Section III contains only one article and deals with international co-operation. In this respect, the Convention on the Protection of the Environment through Criminal Law is meant to be supplemented by the Council of Europe conventions on extradition,[63] on mutual assistance in criminal matters, on the supervision of conditionally sentenced or conditionally released offenders, on the international validity of criminal judgments, on the transfer of proceedings in criminal matters, on the transfer of sentenced persons, and on laundering, search, seizure and confiscation of the proceeds from crime. Reference is also made to other international treaties in the environmental sphere which may be relevant in respect of international co-operation.[64]

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[62] Austria, Belgium, Denmark, Estonia, Finland, France, Germany, Greece, Iceland, Italy, Luxembourg, Romania, Sweden and Ukraine.

[63] http://www.conventions.coe.int/Treaty/EN/Treaties/Html/024.htm

[64] In particular the United Nations Convention on the Law of the Sea or the Vienna Convention on the Physical Protection of Nuclear Material

Section IV contains the final clauses.

II. Points for consideration concerning the Convention on the Protection of the Environment through Criminal Law

The Convention on the Protection of the Environment through Criminal Law has not yet come into force. In the opinion of some, such as Paul Chaumont, judge and legal adviser at France's Court of Cassation, this is one of those conventions that is "doomed never to [come into force]", but which still serves as a "model" and has the potential to "influence other international instruments and the case-law of regional courts".[65]

Several factors may account for the fact that the Convention has never come into force.

a. Economic competitiveness

One school of thought is that, for reasons of economic competitiveness, the environment is not a priority for European states. This view holds that European states are reluctant to impose environmental standards on their companies when the same standards are not in force elsewhere, thereby having a distorting effect on competition.

Looking at the matter from an economic competitiveness standpoint, it would seem more sensible to have a global initiative. International efforts have already proven less than satisfactory, however. The Kyoto Protocol[66] was merely declarative in nature and the international community experiences difficulties in adopting a binding instrument in this area.

b. A too complex subject to be unified

Some authors argue that it is difficult for a single text to cover all activities which pose a serious threat to the environment.[67] They claim that the vague and general nature of the concepts of damage and environment, along with the subjective nature of the test for seriousness in this field, make it difficult to reconcile the creation of such a general offence with the requirements of constitutional and international law.

Above all, environmental law is a very wide subject that covers numerous sectorial fields. Most of the international instruments in operation today do not claim to provide comprehensive protection for the environment, preferring instead to deal with a particular sector. Some instruments, for example, are concerned with water[68] (or, even more narrowly, the sea[69]), air[70] or soil.[71] Some even aim to protect a particular region, as in the case of the

[65] See his statement at the inaugural meeting of the environment committee of the *Association des hautes juridictions de cassation des pays ayant en partage l'usage du français* held in Porto-Novo (Benin) on 26 and 27 June 2008, available at: http://www.ahjucaf.org/IMG/pdf/pdf_Actes_Porto-Novo.pdf (French only)

[66] http://unfccc.int/resource/docs/convkp/kpeng.pdf

[67] In particular, Jacques-Henri Robert, *La Convention sur la protection de l'environnement par le droit pénal,* Droit de l'environnement, 09.1999, n°7, p.15

[68] For example, Directive 2000/60/EC of the European Parliament and of the Council of 23 October 2000 establishing a framework for the Community action in the field of water policy, http://eur-lex.europa.eu/legal-content/en/TXT/HTML/?uri=CELEX:32000L0060&rid=1

[69] For example, the United Nations Convention on the Law of the Sea of 10 December 1982, http://www.un.org/depts/los/convention_agreements/texts/unclos/unclos_f.pdf

[70] For example, the Convention on Long-range Transboundary Air Pollution drafted by the United Nations Economic Commission for Europe entered into force on 28 January 1988.

Alpine Convention[72] which was concluded between eight Alpine states and the European Union to preserve biodiversity in the Alps.

c. An overly punitive approach

It could be argued that the Convention went too far, too fast and that in 1998 states were not yet ready to criminalise practices which had an adverse effect on the environment. The Council of Europe was, after all, the first to propose that environmental crimes be treated as criminal offences at international level.

It is important to note that states are often more inclined to prefer civil or administrative sanctions in this area. Despite this tendency, however, the Council of Europe Convention on Civil Liability for Damage resulting from Activities Dangerous to the Environment of 21 June 1993 (ETS No. 150)[73] has not been any more successful than its criminal-law equivalent: it has been signed by nine member states,[74] none have yet ratified it.

It is interesting to note that environmental instruments in general are more influenced by the principle of precaution[75] which governs environmental law. They accordingly aim to establish specific rules to prevent pollution from occurring in the first place. The Council of Europe Convention takes more of a retrospective approach to such acts.

d. An already large body of conventions

The environmental sphere is already extensively regulated, at both international and regional level. There were over three hundred conventions relating to the environment in the 1980s alone and the trend has continued ever since. As early as 1972, we saw the introduction of the United Nations Environment Programme (UNEP)[76] to address environmental problems at regional and national level.

Directive No. 2008/99/EC[77] of the European Parliament and of the Council on the protection of the environment through criminal law was finally adopted on 19 November 2008. This very comprehensive directive requires states to "*provide for criminal penalties in their national legislation in respect of serious infringements of provisions of Community law on the protection of the environment*".

This directive dealing with the criminal aspects of environmental law is part of a wide range of European texts related to the environment. There are about a hundred EU texts establishing rules and limits in the environmental sphere. This particular directive aimed at criminalising infringements of these rules should therefore be seen as an extension of the European Union's work in this area.

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[71] Worth mentioning here is the European Soil Charter adopted by the Committee of Ministers on 30 May 1972, https://wcd.coe.int/com.instranet.InstraServlet?command=com.instranet.CmdBlobGet&InstranetImage=588295&SecMode=1&DocId=644074&Usage=2

[72] http://www.alpconv.org/en/convention/framework/default.html?AspxAutoDetectCookieSupport=1

[73] http://www.conventions.coe.int/Treaty/EN/Treaties/Html/150.htm

[74] Cyprus, Finland, Greece, Iceland, Italy, Liechtenstein, Luxembourg, the Netherlands and Portugal.

[75] This is enshrined in Principle 15 of the Rio Declaration on Environment and Development, "In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities […]". Text of the Declaration available at http://www.un.org/french/events/rio92/rio-fp.htm

[76] UNEP website: http://www.unep.org/

[77] http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32008L0099

There are two main differences between the Council of Europe Convention and the European Directive of 2008:

- While the Council of Europe Convention criminalises all types of negligence, and leaves it to states to reserve the right to punish only those offences committed as a result of serious negligence, the EU Directive restricts its scope to cases of serious negligence;
- In addition, the EU Directive refers only to cases of “significant” deterioration and excludes from its scope activities having a “negligible” impact.

At the same time, one of the advantages of the Council of Europe Convention is that it lays down arrangements for international co-operation, thereby avoiding the presence of “environmental havens” within Europe. In addition, it provides that groups may participate in proceedings, which is a definite plus at a time when the number of environmental NGOs is growing. Lastly, it requires states to establish jurisdiction, which is not provided for in the Directive.

Having overlapping international instruments does nevertheless make it considerably more complicated to implement a coherent set of criminal-law provisions in the environmental sphere.

Conclusion

The CDPC considers that the environment is an important topic. However, taking into account the very comprehensive legislation of the European Union in this field and that only one State has ratified this convention and only two non-member States of the European Union have signed it, the CDPC considers that the updating this Convention is not a priority, for the time being.

APPENDIX

Consolidated list of Conventions assessed in this review

1) European Convention on Extradition (ETS No. 24);
   1a) Additional Protocol to the European Convention on Extradition (ETS No. 86);
   1b) Second Additional Protocol to the European Convention on Extradition (ETS No. 98);
   1c) Third Additional Protocol to the European Convention on Extradition (CETS No. 209);
   1d) Fourth Additional Protocol to the European Convention on Extradition (CETS No. 212);

2) European Convention on Mutual Assistance in Criminal Matters (ETS No. 30);
   2a) Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters (ETS No. 99);
   2b) Second Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters (ETS No. 182);

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

4) European Convention on the Punishment of Road Traffic Offences (ETS No. 52);

5) European Convention on the International Validity of Criminal Judgments (ETS No. 70);

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

7) European Convention on the Control of the Acquisition and Possession of Firearms by Individuals (ETS No. 101);

8) Convention on the Transfer of Sentenced Persons (ETS No. 112);
   8a) Additional Protocol to the Convention on the Transfer of Sentenced Persons (ETS No. 167);

9) European Convention on the Compensation of Victims of Violent Crimes (ETS No. 116);

10) European Convention on Offences relating to Cultural Property (ETS No. 119);

11) Convention on Insider Trading (ETS No. 130);
   11a) Protocol to the Convention on Insider Trading (ETS No. 133);

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

13) Convention on the Protection of the Environment through Criminal Law (ETS No. 172).