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**EUROPEAN COMMITTEE FOR CRIME PROBLEMS  
(CDPC)**

**COMITTEE OF EXPERTS  
ON THE OPERATION OF EUROPEAN CONVENTIONS  
ON CO-OPERATION IN CRIMINAL MATTERS  
(PC-OC)**

**Special session of the PC-OC to celebrate the 60<sup>th</sup> anniversary of the  
European Convention on mutual assistance in criminal matters**

**Interventions made and discussions at the workshops on videoconferences and on  
joint investigation teams**

14 November 2019

Strasbourg, Agora,  
Room G03

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## Programme of the Special Session

- 09.30 – 10.00** Opening of the special session  
By: Ms Barbara Goeth-Flemmich, Chair of the PC-OC (Austria)  
Mr Gianluca Esposito, Head of the Action against Crime Department
- 10.00-10.50** Keynote speech on the 60th anniversary of the European Convention on Mutual Assistance in Criminal Matters: History of the Convention and present and future challenges  
By: Prof. Dr. Otto Lagodny, University of Salzburg (Austria)
- Discussion
- 10:50 – 11.20** Recent trends in the case law of the ECHR of relevance to the European Convention on Mutual Assistance in Criminal Matters and the Additional Protocols thereto  
By: Mr Erik Verbert (Belgium)
- Discussion
- 11:20 – 11:40** Coffee break
- 11.40 – 13:00** The exchange of information from judicial records under Articles 13 and 22 of the Convention  
By: Mr Yann Taraud, Head of office for specialised files and international exchanges, National Criminal Record (France)
- Discussion
- 13:00 – 14:30** Lunch break
- 14:30 – 16:30** Two Parallel Workshops (one of them in room G04)
- Legislation and practice regarding the use of videoconferences  
Moderator: Ms Yael Bitton (Israel) (tbc)  
Rapporteur: Mr Adil Abilov (Azerbaijan)
  - Joint Investigation Teams  
Moderator : Mr Slawomir Buczma (Chair of the CDPC, EUROJUST JIT Secretariat)  
Rapporteur: Ms Joana Gomes Ferreira (Portugal)
- 16:30 – 16.45** Break
- 16:45 – 17.15** Presentation of the discussions in the workshops by the rapporteurs
- Conclusions by the Chair
- 17.15** Cocktail

## **Speech**

**by Prof. Dr. Otto Lagodny, University of Salzburg (Austria)**

Dear Ms. President,

dear representatives of the PC-OC,

dear guests,

It is a great honour for me to be chosen as the keynote speaker when you celebrate the 60<sup>th</sup> anniversary of the European Convention on Mutual Assistance in Criminal Matters.

I really do appreciate this because the Council of Europe and especially your committee and its invaluable work have been a permanently present lighthouse when I started to work on issues like extradition and mutual assistance since 1983. And I still and always have in mind when the then president of the PC-OC, Mister Peter Wilkitzki, enabled me to attend some of its meetings just to learn something about the working of the Council of Europe. At that time, there were no books available. The only way in the early 1990ies was to attend meetings: learning by doing.

However, my first lesson was the importance of the coffee-break. Surprisingly to me, the very first question in the very first meeting I attended was: „When will be the coffee-break?“ I was highly irritated. I looked around and noticed: There were top civil servants from all over Europe dealing with essential questions. I asked myself: And their first problem was the time for “the coffee-break”?

I rather understood very quickly, how important these breaks were and are for negotiations like these.

So, in sum, it was a rather friendly and pragmatic atmosphere which I noticed in Strasburg. And this continued all the time when I had the chance to work together with you.

That is also the reason why I was ready to accept your request without any delay.

I will address the following topics:

- The role of transnational mutual assistance in our recent history:  
This will be characterized by the relation between sovereignty on the one side and human rights on the other (infra I)
- The features of the work of the Council of Europe and especially the PC-OC in this field (infra II)
- The overall concept of „international division of labour in criminal proceedings“ and its consequences for the future (infra III)

- As a last point, I want to focus the general, problem of mutual assistance and the question of speciality (infra IV)

## **I. The role of mutual assistance in criminal matters in our recent history: consolidating between sovereignty and human rights**

If we look back in the last century and have a short stop in August 1914, it was the then Austrian emperor Franz-Josef who presented an ultimatum to the King of Serbia after the assassination of Franz-Ferdinand who was the determined to be the successor of Franz-Josef. He asked Serbia to allow *Austrian* prosecutors to participate in *Serbian investigations* on Serbian territory concerning the assassination of Franz-Ferdinand.

In modern language, Austria made a request to Serbia to use cross-frontier investigation teams. Today we have “Joint Investigative Teams” provided for in the European Convention, in Art. 20 of the 2<sup>nd</sup> Additional Protocol of 8 November 2001. You have it also on your agenda for this meeting.

In 1914, however, such a request – my goodness - was considered a shame on national Serbian sovereignty. Never ever would such an investigation have taken place. This was – at that time – the straw that broke the camel’s back. In short: World War I was to start.

It did not take 100 years that this approach had changed dramatically. We will see the interplay between

- the concept of sovereignty on the one side

and

- Human rights on the other.

My reflections will always turn around these two concepts: Sovereignty and human rights.

The relation of both is always: The more you give to the one side the less you have on the other side.

After two World Wars especially Europe had been tumbled upside down. In 1949, the Council of Europe was founded. Only eight years later, in 1957, the European Convention on Extradition was ready for ratification. Two additional years, and our convention, the “European Convention on Mutual Assistance in Criminal Matters”, was opened for signature on 20 April 1959. On 12 June 1962 it entered into force after Austria, Belgium, Denmark, Germany, Greece, Italy, Luxemburg and Sweden had ratified it. This was 17 years after the end of World War Two. This is comparable to a little bit more of the time between today and “9/11” or the introduction of the Euro at that time.

When we think in such historical comparisons, we have to be aware that today, time is changing very quickly. When I started to work on questions of international cooperation in 1983, our convention seemed to me quite “empty” and not ruling very much. Only later, I realized the

immense progress of the 1959 convention. Just to give you an example: It was only after the Schengen-Implementing-Convention of 1990 and its article 52 entered into force that I realized: sending a letter is regarded in Europe as an act touching on sovereignty if the letter contains e. g. procedural documents. This is seen totally different in Common Law orders like the US.

Generally speaking, the notion and concept of sovereignty has changed as well rapidly as well fundamentally after World War II. And such conventions as our 1959-Convention sustainably changed the approaches. If we look at the whole “chaos” of norms which are relevant nowadays in the field of international cooperation and compare it to the situation in the Fifties of the last century, we have to be satisfied, because the alternative then was that there were only bilateral treaties covering only one subject.

Thus, the progress of having a multilateral convention instead of a whole bundle of bilateral treaties for each and every action in Europe was decisive.

The work of the PC-OC in this respect was comparable to a law-maker without legislative power. What is decisive are the “side-effects”. Just take the “Explanatory report”. There were a few but very decisive explanations to problems of interpretation. In our annotated textbook<sup>1</sup>, my dear friend Wolfgang Schomburg and I always reprinted most parts of it. Together with the “treaty office” of the Council of Europe, we always had so reliable sources. This is the time to say “thank you for that”.

“Thank you” because – for example - we always had the feeling to be well informed and always up to date. By using the work of the “treaty office” we realized that the Official German Federal Law Gazette is far from being up-to-date and reliable.

The Council of Europe was the „main player“ in the field of international cooperation in criminal matters in Europe in the years from 1959 until the early nineties. Then, the European Union took more and more parts thereof.

However, with regard to those states which are not EU-member states but only States of the Council of Europe, the Council of Europe still is the „main player“. These states are mainly former east-European states.

We will see the relation between the Council of Europe and the European Union when addressing the contents and its development. However: We have to keep one thing in mind: The Extradition Convention of 1957 as well as the Mutual Assistance Convention of 1959 of the Council of Europe always served as “mother conventions”, as templates for all additional work. This can be seen in all EU-Instrument. This is so important that we have to keep this in mind. And it is especially true for all instruments of the European Union. All the real or assumed progress of the EU-instruments is based on the Council of Europe instruments. This is a feature which characterizes the development in the 1990ies and the first decade of the new millennium.

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<sup>1</sup> Schomburg/Lagodny/Gless/Hackner, Internationale Rechtshilfe in Strafsachen – International Cooperation in Criminal Matters, 5th edition 2012.

With regard to the two principles, that of sovereignty and that of human rights, one may describe the development from the basic convention (1959) to the 1st protocol (17 March 1978) and the second protocol (8 November 2001) as follows:

The 1st Additional protocol mainly reduced the exception of fiscal offences (art. 2). This was a sign of reduction of sovereignty.

The 2nd Additional protocol already went further. Of course it amended the channels of communication which was a clear sign of reduction of sovereignty. But changes or amendments like the „speedy trial“-requirement in art. 1 or the big change from „*locus regit actum*“ to the principle of „*forum regit actum*“ are at least in favour of the individuals human rights.

Of course, the change from “locum” to “forum”, from: We only care for our own standards to: we adhere to our partner countries standards may as well be explained by a reduction of sovereignty. This is not wrong. There are simply *both* reasons, the reduction of sovereignty as well as the need for more human rights.

Such a double character, by the way, must be seen in the non-extradition of nationals or in the double criminality requirement. The latter was only a consequence of reciprocity in the 19<sup>th</sup> century. Only on the basis of double criminality, the requested state as well could make a request in a comparable situation.

Again: In the late 50ies, human rights and international cooperation were not that much an issue. However, there is one landmark-provision which reflects the approach of the Council of Europe who is also the schöpfer of the European Convention on Human rights.

## **II. The features of the work of the Council of Europe in this field and Human rights**

When looking closer at the work of the Council of Europe and especially of the PC-OC, we realize: The PC-OC is the central “creator” of the treaties proposed by the Council of Europe. And it is in this work that the role of the individual has always been stressed. An outstanding example to me is Art. 11 of the Convention on Mutual Assistance of 1959. It concerns prisoners whose personal appearance as a witness or for purposes of confrontation is requested for by a requesting Party. These imprisoned persons shall not even temporarily be transferred to that Party’s territory – as art. 11 strictly provides - “if the person does not consent”.

This is a very early recognition of the individual as a subject with legal standing on his own and not as a mere object of the relations between states. The idea is simple: Whoever may refuse a necessary consent is a subject of law. He or she has a subjective legal right in an international instrument and a standing in court.

And this is in an instrument of the year 1959! A time when we were far from landmark decisions like Soering. And we were far from regarding the individual as a subject in international law. Of course, it “only” concerns imprisoned witnesses and not imprisoned suspects. However, this art. 11 expresses clearly the spirit of the convention.

The importance of a consent of the individual has been stressed by the Council of Europe also in other areas of cooperation, where and when legally protected interests of the individual are at stake. This is especially true for the transfer of sentenced persons of 1983. Just to give you a comparison: It took another 13 years until this message has arrived in Germany: It was only in 1996 that, finally, the Federal Constitutional Court of Germany acknowledged a subjective right of the individual, i. e. a “standing” in the sense of common law, to apply for a court’s decision on the question of a request for transfer.<sup>2</sup>

Adherence to Human Rights in cooperation matters generally was an issue right from the beginning in the 50ies of the 20<sup>th</sup> century. This was taken over for example in Austria as well as in Switzerland, two legal orders with which I am more familiar with these two orders in Europe.

I mention this, because Germany at that time (1959) and a long time after this was clearly “behind the moon” as far as the integration of human rights in that area was concerned. It was only after 1989 with the landmark-decision of the European Court of Human Rights in the Soering case that also Germany joined this club.

The provision of art. 11 of the year 1959 is of the utmost theoretical importance. It reflects a three-dimensional approach already at that time:

*The individual has a right on his own.*

And this is reflected in all instruments of the Council of Europe in international cooperation in criminal matters. We could retrace the development by going through the different conventions and their contents. But this would exceed my time.

A decisive step in this direction was the Soering decision in 1989<sup>3</sup>: The European Court of Human Rights in this decision pointed out that the requested state generally is responsible for what happens to the individual in the requesting state – even if this state is not a member to the European Convention on Human Rights. This tendency has been elaborated ever since. This was totally different from the traditional German view which considered the individual more as an object rather than a subject of international cooperation.

One European development which may not be stressed enough here: It is the Council of Europe’s success to have totally abolished the death penalty in Europe by the protocols to the Convention.

Thinking about human rights, however, does not mean to be lenient towards an offender and to ignore the victim. Basic rights are always to be seen in a twofold way:

To the same extent as they give a right to the offender they take this from the right of a victim and vice versa. An extreme tension of both can be seen in a case and trial concerning the accusation of sexual abuse of a child who is the only witness in such a case. This case shows:

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<sup>2</sup> German Federal Constitutional Court, Decision of 18 June 1997 (2 BvR 483/95 and others)

<sup>3</sup> Judgment 7 July 1989 – 1/1989/161/217.



The more rights of the defence are given to the alleged perpetrator the less rights remain with the victim.

If an alleged perpetrator has no rights of defence at all, this would be the easiest position of a victim to get his or her rights realized: No „disturbing“ rights of the alleged perpetrator are hindering the victim.

If an alleged perpetrator has a dense net of rights of defence, it may be cumbersome if not impossible for a victim to realize his or her rights.

This problem of communicating tubes is inherent to the problem of human rights in general.

In the practice of the European Court of Human Rights as to art. 2 of the Human Rights Convention this becomes obvious: This provision grants a right of the victim or his or her relatives that the state prosecutes any killing involving state organs. This is a duty to prosecute as a direct result from art. 2 of the Human Rights Convention.

Therefore: talking about human rights always includes talking about the legal positions of the victim. This discussion is included in every discussion and decision.

This is also valid for the problem of impunity: Of course it is a seducing idea to „throw“ a net of many national criminal laws on the criminal arena. However: Does it work? It works as long as the „other“ states make a retreat as soon as one state has a basis for prosecution. But this is only the beginning of a jealous competition of jurisdictions: „We are first!“ – „We are best!“ – „We have the best link!“ will be the shouts of jealous national authorities.

This is nothing more than the concept of sovereignty of the 19th century. And we are far from sound solutions to this problem of competition. Art.54 of the Schengen agreement serves only as a basis for this jealousy, not as a real remedy. The solution of art. 54 is only that of priority: first come, first served. Not an appropriate principle in criminal proceedings.

### **III. The overall concept of “international division of labour in criminal proceedings”**

Let me enlarge these considerations on the role of human rights. The German Federal Constitutional Court characterized international cooperation in criminal matters as being one transnational prosecution in “division of labour”. Wolfgang Schomburg as the first and later on him and myself have worked on this general idea.<sup>4</sup>

It means that there is one (fictional!) transnational criminal prosecution composed of two or more (real!) criminal prosecutions in two different states. What happens in one state is regarded as also belonging to the procedures in the other state. I speak of “fictional” transnational prosecution because national thinking would become very jealous in a minute!

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<sup>4</sup> See Schomburg/Lagodny/Gless/Hackner, Internationale Rechtshilfe in Strafsachen – International Cooperation in Criminal Matters, 5th edition 2012, Einleituug (introduction), marginnumber 1-12; 97-253 with further references.

The notion of "shared responsibility" has been used by the initiative "New Start" of the PC-OC in 2002 (see doc PC-S-NS 2002 - 7, p. 20). This expresses quite the same starting point as the model of international division of labour. It drifts away from concepts of sovereignty albeit not deleting this notion.

I have made comparable proposals in the project of the PC-OC called START in the year 2004.<sup>5</sup>

The idea or rather the principle of „mutual recognition“, today, is an outstanding tool within the framework of the European Union. However, already its origin in the law of free movement of goods is very irritating to me as a criminal lawyer: Persons are treated like goods? How does this match together? And sometimes the arguments derived from it are not convincing. Even the idea as such has led a life on its own without asking for the sense.

This makes it more than necessary to reassume that the Council of Europe itself has stuck to the idea of mutual recognition for a long time: The European Convention on the International Validity of Criminal Judgements of 28 May 1970 = European Treaties Series No. 70 has – as of now – only been ratified only by 23 States (amongst them e. g. Austria, Norway or Spain) and not by states like Germany, Switzerland or France.

Official explanation of the Treaty Office:

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.

I am fully aware of the fact that here in this room I encounter the best practitioners in criminal procedure of Europe. Why do I bother you with theoretical stuff? Isn't this pure theory what I want to explain to you in a second? Isn't it too far away from the need of practice and so on and so on. However, when looking at your own work, I simply think that I cannot be fundamentally wrong.

However, the idea of “international division of labour” goes back to a phrase in a judgement of the highest court in Germany. It does not stem from an academic. The following examples will show, however, that it is worthwhile to think about it more than a second:

The general principle goes as follows:

A norm in state 1 requires something which does not exist in State 1 but in state 2. The requirements in state 1 are regarded as „quasi“-fulfilled by that what exists in state 2.

Let us take two examples which you are familiar with: double criminality and – second – probable cause in extradition proceedings.

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<sup>5</sup> See PC-TJ (2002) 7; PC-TJ (2004) 02; PC-OC WP (2004) 02; PC-TJ (2005) 02 and 02 add.

## **1. Double Criminality**

Double criminality in its origin had nothing to do with human rights. In the 19<sup>th</sup> century, it was considered to be a mere consequence of reciprocity: If the behaviour is not punishable in the requested state, the requested state might not request extradition in a comparable case.

However, until today, this rationale still seems to underlie the conventions and instruments: It is not for the care for human rights that the principle is maintained. It is the fear to give away aspects of state sovereignty. Why not human rights? The principle of certainty/ of *nulla poena sine lege* is observed. We have a provision in the requesting state. This is sufficient according to the above mentioned principles. It is sufficient that we have it in the requesting state.

Human rights come into play, when this provision itself does not abide by the principle of legality, as it is for example retroactive or totally uncertain. Or it collides with the right to the free expression of thought.

## **2. Probable Cause**

Common law states do require that probable cause is checked by these states themselves. It is not sufficient that probable cause exists in and is checked by the authorities of another state, the requesting state. It is deemed necessary that also the requested state checks it. The requested state does not trust in the check of the probable cause by the authorities of the requesting state.

This is the attitude of Common law states.

In continental law states the check of probable cause in and by the requested state is the absolute exception. The requested state - as a rule with exceptions – trusts in the check done by the requesting state. This is the decisive rationale: trust and distrust.

A second example:

The interruption of a limitation period. Certain procedural acts have as a consequence that the limitation period is interrupted. An example: the interrogation of a witness. If this interrogation does not take place in the requesting state but in the requested State, this may lead to an interruption of the limitation period. This was the sound interpretation of the German Federal Constitutional Court (3. 9. 2009 – 2 BvR 1826/09, RN 38).

These two examples follow the same pattern of argumentation as the European Court of Human Rights does in the *Soering* case: The inhuman treatment required for Art. 3 of the ECHR (here: the death-row-phenomenon) was not fulfilled by the United Kingdom as a member state of the ECHR but by the USA as a non-member state.

The list of examples could easily be enlarged (double criminality, Miranda-Warnings; Restitution; basic rights in general). They all follow that pattern. And should or could be resolved by the very same thought based on the idea that we have to deal with one (fictional) transnational criminal procedure.

In international practice we have already a well-functioning example: The NATO forces status agreements. It is full of creative solutions for transnational problems, e. g. a complete criminal procedure on foreign soil; like the Lockerbie case in the nineties of the last century.

And one of the outstanding conclusions has been drawn by the International Tribunal for Ruanda: „This flows from the rationale that the international division of labour in prosecuting crimes must not be to the detriment of the apprehended person“<sup>6</sup>.

Maybe you consider this all as purely theoretical stuff. German stuff. Whatever: we have a general idea. That's all.

#### **IV. The challenges of our time: Speciality and Mutual Assistance**

Your present draft agenda shows a lot of the challenges of our time. And I am sure that they are in the best hands with your committee. This is something which seems to be quite unusual for an academic reflection. But I am confident and sure that you will address and focus them in a very convincing manner. But let me conclude my remarks by enlarging the topic of sovereignty a little and give you a very concrete example of how to deal with this approach:

Some solutions may be found only by the combination of different legal instruments from different legal bodies:

In the 1959-convention there is no regulation concerning the speciality principle with regard to information transferred from one to another state. The problem is very decisive in daily practice: May information (e. g. documents, the protocol of an investigation etc.) which has been granted from one state to another also be used in other criminal proceedings in the requesting state, e. g. against a different suspect?

Without discussing this issue at length: The solution is to be found in the EU-law of data protection. The first idea in this direction stems from my dear colleague Bert Swart from the Netherlands<sup>7</sup>. His deliberation was as simple as convincing: Data protection is one of the bases for any criminal procedure. A public investigation does not make any sense.

The two relevant EU-data protection instruments are applicable to this question.

The EU-Directive 2016/680 already shows in its official name:

DIRECTIVE (EU) 2016 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 27 April 2016 on the protection of natural persons with regard to the processing of personal data by competent authorities for the purposes of the prevention, investigation,

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<sup>6</sup> Judgment of 23 May 2005, ICTE-98 – 44 A-A, para 220.

<sup>7</sup> The idea that speciality is an important consequence of data protection has been raised by Bert Swart in two workshops (1995 and 1997) for the preparation of a questionnaire for my project: See Eser/Lagodny/Blakesley, *The Individual as Subject of International Cooperation in Criminal Matters. A Comparative Study*, Baden-Baden 2002, in Part 1, p. 3-28, 11 and 17/18. As to Bert Swart's National report see Swart, *The Netherlands [National Report]*, 435-523, 455-457, 471.

detection or prosecution of criminal offences or the execution of criminal penalties, and on the free movement of such data, and repealing Council Framework Decision 2008/977/JHA

Directive 680 It is the direct follow-up directive to the General Data Protection Regulation 679

Regulation (EU) 2016/**679** of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation)

Regulation 679 does not allow the requesting state to use the information transferred to him by another state by the execution of a request under the 1959-Convention (or any other Convention).

### **Conclusion**

We now have a general and international idea of how to deal with the enormous challenges and tasks for the future when we refer to the “division of labour” in prosecuting crimes, thereby sharing responsibility.

I am aware of the fact that your most pressing needs are practical proposals like working on networks, on mechanisms, on institutional developments. I am afraid that my merely theoretical ideas are not very helpful in this concrete direction. However, if they contribute a little to think in new directions, to go on unusual paths or to show developments into wrong directions, this would already be a big success. At least for myself.

### **[Presentation by Mr Erik Verbert \(Belgium\)](#)**

Recent trends in the case law of EHCR of relevance to the European Convention on Mutual Assistance in Criminal Matters and the Additional Protocols

### **[Presentation by Mr Yann Taraud, Head of office for specialised files and international exchanges, National Criminal Record \(France\)](#)**

The exchange of information from judicial records under Articles 13 and 22 of the Convention:  
Powerpoint (translated from French)

## **Workshop 1: Legislation and practice regarding the use of videoconferences**

### **Discussion paper prepared By Ms Yael Bitton, Moderator (Israël)**

In the ever -shrinking global village, the use of Videoconference (VC) has become a critical tool in the field of international MLA for conducting judicial proceedings. In light of its growing use, the practice of VC is constantly evolving, particularly in relation to the domestic law and practice of requesting and requested countries. The dynamic nature of VC poses a number of challenges, both legal and practical.

The purpose of this workshop is to address these challenges and explore potential solutions, both from sharing best practices as well as discussing potential legislative solutions.

When discussing VC, some of the questions that arise are:

1. What is your experience as regards video conference? How commonly it is used? Has it been overall positive or negative experience.
2. How comfortable are your courts with requesting - and administering- video conference?
3. Do you encounter legal obstacles in the use of videoconferences? Are there any limitations/ challenges stemming from your domestic law?
4. Do you encounter practical obstacles? ( ex. technical requirement, lack of equipment etc.)
5. What have been solutions you have arrived at to resolve these issues?
6. Do you have any proposals on what the PC-OC could do to facilitate the use of videoconferences or to address the (legal/practical) obstacles identified?

## **Workshop 1: Legislation and practice regarding the use of videoconferences**

### **Summary of discussion prepared by Mr Adil Abilov (Azerbaijan)**

The Workshop was moderated by Ms. Yael Bitton (Israel) and was attended by representatives from 20 states.

At the outset it was mentioned that information and communication technology has been going through a spectacular development getting into all areas of human life. It is now impossible to imagine the effective administration of justice without the use of modern IT. This very issue was discussed by the CoE Ministers of Justice at the Ministerial Conference organized by the French Presidency in Strasbourg on 14-15 October 2019.

It was noted that the CoE 1959 Convention on Mutual Assistance in Criminal Matters while providing for summoning of witnesses, experts and suspects, does so without making any reference to the hearings by videoconference as they were barely developed at that time.

Then, the development of modern means of communication techniques in combination with the need to save time and money has led to the introduction of the possibility of hearing suspects, witnesses and experts by means of videoconferencing. And it is the 2001 Second Additional Protocol to the 1959 Convention, which offers this opportunity in Article 9.

Several well-known advantages of using videoconferences were then highlighted:

- For the witness or expert, it could be more convenient to give evidence without having to travel.
- For vulnerable or intimidated witnesses, it reduces the stress of facing a courtroom full of people.
- Low costs for everyone involved.
- Reducing delays in appearing in court;
- No security concerns;
- Interpretation could be provided where necessary.
- Overall increasing promptness and quality of the administration of justice.

A brief look was taken at the case-law of the European Court of Human Rights regarding videoconferencing. Thus, in the *Marcello Viola v. Italy* case, Court held that: "Although the defendant's participation in the proceedings by videoconference is not as such contrary to the Convention, it is incumbent on the Court to ensure that recourse to this measure in any given case serves a legitimate aim and that the arrangements for the giving of evidence are compatible with the requirements of respect for due process, as laid down in Article 6 of the Convention". The same approach was reiterated by the Court in *Ahorugeze v. Sweden* and *Kabwe and Chungu v. the United Kingdom*. In *Zhukovskiy v. Ukraine* which involved mutual assistance requested by Ukraine from Russia the violation was found due to the fact that the prosecutor had been present during the questioning of the witnesses in Russia, while the applicant's representative had not been there. It led to the situation when the applicant found himself convicted of a very serious crime mainly on the basis of evidence given by these very witnesses. Therefore, the Court held that special care must be taken to ensure the principles of immediacy, equality of arms and contradiction are respected.

The Moderator then sounded out several issues below, which fostered very good, productive and lively discussions.

1. What is your experience as regards video conference? How commonly it is used? Has it been overall positive or negative experience.
2. How comfortable are your courts with requesting - and administering- video conference?
3. Do you encounter legal obstacles in the use of videoconferences? Are there any limitations / challenges stemming from your domestic law?
4. Do you encounter practical obstacles? (ex. technical requirement, lack of equipment etc.)
5. What have been solutions you have arrived at to resolve these issues?
6. Do you have any proposals on what the PC-OC could do to facilitate the use of videoconferences or to address the (legal/practical) obstacles identified?

### ***Legal issues***

- During the discussions the vast majority of participants indicated that the experience regarding carrying out videoconferences in order to execute MLA requests is mainly positive.
- It might be said that all countries have no legal obstacles in offering this tool as a response to MLA requests if they concern witnesses or experts.
- Two countries mentioned that even in the absence of a treaty the legislation allows for executing an MLA request via videoconferences.
- Several countries though have made reservations to the Second Additional Protocol not allowing for questioning of suspects or accused persons.
- Some others would allow videoconferences in this kind of cases if only he/she consents to that. Meanwhile, those who offer possibility to question suspects or accused persons mentioned that it has been often made in the less severe cases.
- One jurisdiction indicated the need to get consent of this person prior to sending MLA request for videoconference.
- In any case according to the practice highlighted during the workshop the majority of MLA requests concern witnesses rather than suspects.

### ***Practical problems***

Alongside this, several participants raised practical problems in organizing videoconferences.

- A few states have only one or two courts equipped with the necessary IT applications, which make arranging videoconferences possible. Therefore, sometimes it takes time to bring the persons sought to be questioned to these facilities in order to carry out necessary actions.
- Even though when certain jurisdictions allow for carrying out videoconferences, yet it takes some time to complete necessary arrangements.
- In certain cases judges would prefer to have direct contact with a witness or expert and fear technical problems in setting up connections in videoconferencing and therefore are not in favor of this option of questioning.



- Moreover, sometimes due to technical incompatibilities videoconferences when even agreed upon, do not take place.
- Occasionally according to several participants language problems arise, which also end up with postponing the videoconferences.
- Some participants mentioned that it is more efficient to send the MLA request to the Central authority, rather than directly to courts (it is first necessary to find out, which court has the jurisdiction in a particular case), as the authority may better facilitate and coordinate the prompt execution of the request.
- Several states mentioned that videoconferences might be also arranged (legally and technically) not only between judicial agencies, but - if courts are located far away - with the other institutions as well, such as, for example, Embassies.
- It also seems from the statements made during the workshop that videoconferences are more widely used within the EU - based on the other legal instrument, i.e. European Investigation Order (EIO), rather than between the CoE member-states according to the Second Additional Protocol.

### ***Conclusions***

The general experience in using videoconferences was mainly positive. There are no legal obstacles in carrying out videoconferences with the CoE member-states. There could be some problems though in questioning suspects as some states made reservations not allowing this possibility. There are some practical problems as to the court facilities, technical connections, interpretation and timing in arrangement of the videoconferences.

It would be expedient to use a Model MLA request developed by the PC-OC, which contains a section devoted to videoconferences, including technical points of contact. It would soon be made user-friendly and might be very helpful in seeking questioning by videoconferences.

The PC-OC might also consider possibility to draft a compendium of good practices as regards videoconferencing among the CoE member-states so that all members can benefit from legislative and practical achievements Europe wide.

## **Workshop 2: Joint Investigation Teams (JITS)**

### **Discussion paper prepared by Mr Slawomir Buczma, Chair of the CDPC, EUROJUST JIT Secretariat**

As criminal activities across Europe as well as on the global level are increasingly taking place, the challenges related to ways in which to investigate and prosecute the most serious crimes have also increased. For this reason, it is important to identify and highlight limitations concerning the fight against organised crime and explore solutions through which to combat them. The setting up of JITS can provide an efficient tool to overcome some of the shortcomings.

JITS enable direct cross-border exchange of information and intelligence as well as gathering of evidence without the need of using MLA requests. This is a key advantage in many complex investigations. Information and evidence collected in accordance with the legislation of the State where a JIT operates can be shared on the basis of the JIT agreement.

This offers a flexible framework, enabling real-time cooperation between competent authorities and facilitating the performance of urgent operations which in turn speeds up the investigation. The JIT provides a framework to share the often huge workload coming with this task among the parties involved.

JITS create a unique opportunity to collect practitioners from the judiciary (judges and prosecutors) and law enforcement agencies and to use their experience and knowledge while jointly conducting investigative measures.

Setting up and running JITS can be nevertheless a challenge where a large number of parties are involved, investigations in States involved are conducted at different stages, national legislation differs in terms of JITS, etc. Against this background, this paper aims at identifying challenges while using JITS and solutions to overcome these obstacles (legal, practical, etc.).

#### **Points for discussion :**

1. Which circumstances of the case justify setting up of a JIT (type of crime involved, its gravity, cross-border nature of crime, etc.)?
2. How to set up a JIT in the most efficient way (e.g. the choice of one language to draft and sign a JIT agreement, accelerate procedures to establish a JIT, etc.)?
3. What is your experience as regards the use of JITS? (how(often) and when JITS have been used, is the experience generally good or bad, etc.)
4. Do you encounter legal obstacles in the setting up and/or operational phase of JITS (e.g. by finding legal basis to cooperate with non-CoE members, using certain investigative techniques, admissibility of evidence, etc.)?
5. Do you encounter practical obstacles? ( e.g. due to the lack of secure channel of communication, limited human and financial resources, the lack of expertise, etc.)
6. What can be done to improve the use of JITS (exchange of best practices, spread knowledge and raise awareness of JITS, etc.)

## **Workshop 2: Joint Investigation Teams (JITS)**

### **Summary of discussion prepared by Ms Joana Gomes Ferreira, rapporteur (Portugal)**

The **Chair** introduced the workshop by presenting a power point that focused on the concept of JITS (a group of Judges, Prosecutors and Law enforcement agents, established, by a written agreement, for a fixed period of time, aiming at the specific purpose of carrying out investigative measures).

The environment of such a modern form of mutual legal assistance is the work on a complex national investigations having links with other States or connected cases that require coordinated investigations, involving formal and informal cooperation and, therefore, the possibility of requesting investigative and coercive measures. A flexible structure to exchange information and evidence is aimed solely on the basis of a JIT agreement.

The legal basis at the level of the EU, COE and UN have been identified.

Key issues remain the discussion of Prosecution strategies, the identification of investigative objectives, the subsequent coordination of investigations, conditions to exchange information but also disclosure issues, how to address/ solve the question of the admissibility of evidence.

Usual challenges while setting up and running JITS are language issues, administrative constraints, different law systems, costs and the need for contributions or funding and the lack of trust between systems/authorities.

The Chair also compared traditional MLA (based on requests, information/evidence sent only after execution, or partially, during execution, limited participation of requesting authorities) with JITS (joint initiative with a common purpose, real-time exchange of information and evidence, active participation from all States involved), elaborated on EUROJUST's support to JITS and the work of the JITS Network (practical guide, model agreement, fiches espagnoles and periodical reports on JITS evaluation).

Debates were then opened. Main points of discussion were:

1. **International legal basis:** the question relates with JITS formed with States that are not EU nor COE member States. Are the UN Instruments (UNCAC or UNTOC) enough legal basis to start a JIT?
  - a) Some States consider that they are not and, in such case, they will need a Treaty basis, to be negotiated, signed and enforced with the other State before agreeing on a JIT to be started up;
  - b) Other States need an internal procedure of permission to be given by the Minister of Justice;

- c) For other group of States this kind of instrument is enough. A JIT can be started on basis of UNCAC or UNTOC's very generic legal dispositions.

2. **Internal decision to start a JIT**; who is competent to decide on this?

- a) For some States the decision is taken, like all other investigative decision, by the internal competent authority that directs the criminal investigation (Prosecutor, Judge...).
- b) Other States will involve the Minister of Justice, since it's needed to obtain a ministerial decision in all JITs. However, this hasn't been identified as an obstacle (the State that has this procedure organised already more than 145 JITs). This intervention is again needed when the time limit of the JIT must be expanded; however, the involvement of a third State will require another ministerial decision.

3. **Main legal problems**; intelligence is easy to share, which is not the case for evidence:

- a) At least one State needs traditional MLA in order to be able to allow the evidence obtained during the functioning of the JIT to be used by the other(s) contracting State(s); so the JITs functions, produces evidence but in order for this evidence to be validly used MLA requests must be received and accepted;
- b) When the JIT involves States that have different legal systems (continental versus common law) the validity of the evidence may be assured by getting it in accordance with the Law of the State that will use that evidence. This raised the issue of when do States identify which of the States will concentrate the cases?
- c) The background of this issue is the fact that many times JITs are started and work in an environment of investigations that are connected. When do States take the strategic decision to identify which of them will concentrate the procedures and, therefore, will use the evidence?

c.1. Some States will postpone this decision to a later stage, after the execution of JIT/MLA procedures, as a balance between facts and evidence; basically identify the State that is in a better position to bring the case to Court;

c.2. Other States prefer, with some flexibility, to take this decision to identify the State where the procedures will be concentrated, as soon as possible in order to bring an early solution to:

4. **Practical issues** such as:

- a) **Translation**: several States mentioned translation costs as a main problem, even when the support by EUROJUST can be considered. In these cases an early identification of the State that will use the evidence as well as will need the acts produced during the functioning of the JIT

in its own language, will allow for the drafting of these pieces in its own language, what will avoid double translations;

b) **Financial problems** were identified as a dissuasive initial factor;

c) **Limited use of JITs, lack of good practices**: delegations voiced an enthusiastic support but mentioned that this is a procedure that has been difficult to encourage; among other factors lack of awareness and information and bureaucratic internal issues. Several examples of promotion were shared: local training involving EJM and EUROJUST, making well known a first successful case, sharing good national practices.

**Main generic conclusions: JITs are still used only for complicated cross border cases due to time consuming organisation, financial aspects and personal commitment issues. It has been difficult to encourage competent authorities to consider starting a JIT and, yet, the very good experiences provided by them, in what concerns the possibilities to get valid evidence, are a factor of encouragement.**