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PC-OC (2006) 08

EUROPEAN COMMITTEE ON CRIME PROBLEMS
(CDPC)

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

LIST OF DECISIONS
AND DOCUMENTS

Adopted at the 51st meeting
Strasbourg, 1-3 March 2006

1. Opening of the meeting

The meeting was opened by the Chair of the Committee, Mr E. SELVAGGI.

2. Adoption of the Agenda

The Committee adopted the agenda as is set out in Appendix I to this document.

3. Report of the 50th meeting (27-29 June 2005) : [PC-OC \(2005\) 16rev2](#)

The Committee took note of the report and confirmed that it reflected accurately the discussions and conclusions from the 50th meeting. It took also note of the report of the meeting of the Committee's Bureau (Strasbourg, 24-25 October 2005; [PC-OC Bu \(2005\) 03](#)).

4. Follow up to the New Start report: proposals to the CDPC on the visibility and consistency of the Council of Europe norms

The Committee considered the draft report to the CDPC on follow-up suggestions to the "New Start" report (PC-OC (2005) 17rev2). It adopted a final report (PC-OC (2006)10 – see Appendix II), to be sent to the CDPC.

5. Modernisation of the Council of Europe Conventions in the criminal field

5.1. Dispute settlement mechanisms

The Committee considered the information note drafted by the Secretariat on the friendly settlement of disputes on the application or the interpretation of the Council of Europe criminal conventions ([PC-OC \(2006\) 02](#)). It decided that this issue should be considered in the framework of the modernisation of the Conventions in the criminal field (see next agenda item).

5.2. Extradition and mutual assistance in criminal matters

The Committee considered the information note presented by the Secretariat on the need to modernise the European Conventions on judicial co-operation in criminal matters: extradition and mutual legal assistance ([PC-OC \(2006\) 01](#)).

In respect of items 5.1 and 5.2, the Committee adopted document PC-OC (2006) 09 (Appendix III) which summarises the main elements to be considered in future work to modernise the European Conventions on international co-operation in criminal matters.

In view of this objective, having in mind Resolution (2005)47 of the Committee of Ministers, the Committee adopted a proposal for **revised terms of reference** (Appendix VII). Such proposal foresees the setting up of a drafting group within the Committee; it would be composed of a maximum of 9 members.¹

The document PC-OC (2006) 09, as well as the draft revised terms of reference, will be transmitted to the CDPC.

6. Replies to CDPC requests on

6.1. Witness protection

The Committee took note of document [PC-OC \(2005\)19rev2](#), comprising the questionnaire on the application of the Art 23 of ETS 182, the national replies and a brief analysis. It adopted its opinion on the matter (document PC-OC (2006)11 - Appendix IV). The opinion and the national replies will be transmitted to the CDPC.

6.2. Protocol to the Convention on the transfer of sentenced persons

The Committee took note of document [PC-OC \(2005\)21 rev2](#), comprising the questionnaire on the Protocol (ETS 167) to the European Convention on the Transfer of Sentenced Persons and the national replies. The PC-OC adopted its opinion (PC-OC (2006)05 rev – Appendix V) and decided to send it to the CDPC.

It also discussed a question submitted by the expert from Sweden [PC-OC \(2006\)07](#). While noting that the Protocol does not create an obligation to transfer between Parties, the Committee was of the opinion a refusal to transfer on the grounds that the sentenced person did not consent to the transfer or refused to give his or her opinion to the transfer, is contrary to the spirit of the Protocol.

6.3. Counterfeiting

The Committee held an exchange of views with two experts, one from the field of public health and the other from the field of quality of medicines. The Committee adopted its opinion on the matter (PC-OC (2006) 04 rev – see Appendix VI), which proposes to the CDPC the preparation of a feasibility study on the elaboration of a legally binding instrument on counterfeiting/pharmaceutical crimes.

¹ In case of a positive decision by the Committee of Ministers on the Committee's Terms of Reference, this drafting Group would be composed of the Bureau (Chair and 2 Vice Chairs) and the experts from Austria, Estonia, the Netherlands, Slovakia, Sweden and the Russian Federation.

7. Other matters on the application of the Conventions in the criminal field

7.1. Transfer of mentally disturbed offenders

The Committee took note of document [PC-OC \(2005\) 20rev2](#), comprising the questionnaire on the application of the European Convention on the transfer of sentenced persons, the national replies and a brief analysis of the replies. It decided to invite States which have not done so to send their replies to the Secretariat, to forward the document to the CDPC for information as well as to make it available to practitioners and to the public via the web site of the Committee.

7.2. Transfer of prisoners with contagious or other serious diseases

The Committee discussed the application of the European Convention on the transfer of sentenced persons in the case of prisoners affected by contagious diseases.

On points 7.1 and 7.2, it agreed that the follow-up will be considered in the wider context of the future exercise on modernisation of international co-operation in criminal matters.

8. Miscellaneous

8.1 Application of the European Convention on mutual assistance in criminal matters to collect DNA samples

The Committee was informed on the newest developments in this field and decided to continue to follow this matter, notably in the wider context of the future exercise on modernisation of international co-operation in criminal matters.

8.2 Application of the European Convention on the transfer of criminal proceedings: question by the expert from Slovakia

The Committee discussed the question raised by the expert from Slovakia ([PC-OC \(2006\)03](#)). The Committee members agreed, in general, that the European Convention on the transfer of criminal proceedings does not foresee the possibility to require guarantees on the application of its Art 21 (discontinuation of prosecution in the requesting State). Should such a request for such guarantees be expressed by a requested State, the Committee understands that the failure to provide such guarantees by the requesting State should not constitute a ground for refusal nor a reason for postponing a decision on the request for transfer.

8.3 Election of a 2nd Vice-Chair of the Committee

The Committee elected Ms Joanna GOMMES FERREIRA (Portugal) as 2nd Vice Chair of the Committee for one year. She will replace Ms Imbi MARKUS (Estonia). The Committee thanked her for her committed work as Vice-Chair over the last year.

8.4 Information: 27th Conference of the European Ministers of Justice in Yerevan (Armenia) 12-14 October 2006 on “victims: place rights and assistance”.

8.5 Information: new web site on transnational criminal justice: www.coe.int/tcj

8.6 Dates of next meeting – working methods –

- The Committee was informed of the new resolution of the Committee of Ministers (Res (2005)47) and its impact on the limitation in time of the terms of reference for all Committees, as well as on convocations, elections and working methods. It adopted draft revised terms of reference accordingly (Appendix VII).
- The proposed dates for the next plenary meeting are 4-6 October 2006, subject to the availability of meeting rooms. Alternative dates could be 15-17 November 2006.
- The following information was brought to the attention of the Committee:
 - o The Austrian expert, whose State exercises the Presidency of the European Union, informed the Committee on the legislative initiatives in progress within the EU in the criminal field;
 - o The Russian expert informed the Committee on the preparation of a High Level Conference of the Ministries of the Interior and of Justice on “Improving European co-operation in the criminal field”, to be held in Moscow in June 2006 (exact dates to be confirmed).
- As to the PC-OC representatives to other Committees:
 - o To CODEXTER: following the presence of Per HEDVALL (Sweden) during the works of the CODEXTER on the elaboration of the Council of Europe Convention on the prevention of terrorism, opened to signature in April 2005, the PC-OC asked the Secretariat to follow the works of CODEXTER and to report to it on future works related to international cooperation.
 - o To PC-ES (committee of experts on the protection of children against sexual exploitation and abuse): the Committee appointed Ms Antonella SAMPO (Monaco).

APPENDIX I

Strasbourg, 08 February 2006
[PC-OC/Documents/OC 51 Draft Agenda]
<http://www.coe.int/tcj/>

PC-OC (2006) OJ 1 rev

EUROPEAN COMMITTEE ON CRIME PROBLEMS
(CDPC)**Committee of Experts**
on the Operation of European Conventions in the Penal Field
(PC-OC)

51st meeting
Strasbourg, 1-3 March 2006
Room 3

AGENDA

1. Opening of the meeting
2. Adoption of the Agenda
3. Report of the 50th meeting (27-29 June 2005)
4. Follow up to the New Start report: proposals to the CDPC on the visibility and consistency of the Council of Europe norms
5. Modernisation of the Council of Europe Conventions in the criminal field
 - 5.1. dispute settlement mechanisms
 - 5.2. extradition
 - 5.3. mutual assistance in criminal matters
6. Replies to CDPC requests on
 - 6.1. witness protection
 - 6.2. protocol to the convention on the transfer of sentenced persons
 - 6.3. counterfeiting
7. Other matters on the application of the Conventions in the criminal field
 - 7.1. transfer of mentally disturbed offenders
 - 7.2. transfer of prisoners with contagious or other serious diseases
8. Miscellaneous

APPENDIX II

Strasbourg, 03 March 2006
[PC-OC\Bureau\Docs 2006\PC-OC-(2006)10E]

PC-OC (2006) 10

EUROPEAN COMMITTEE ON CRIME PROBLEMS
(CDPC)

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

REPORT to the CDPC

Follow-up to the “New Start” report

Adopted by the PC-OC at its 51st meeting (1-3 March 2006)

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REPORT TO THE CDPC

GENERAL INTRODUCTION

Origins

1. The work carried out by this Committee originates from reflexions held in the PC-OC and brought to the attention of the CDPC. Following these reflections, the CDPC set up a Group of Specialists (PC-S-NS) in 2001 which submitted a report (the “New Start” report²) to the CDPC in September 2002.

“New Start” report

2. In its introduction, the New Start report affirms the following: “Common subordination of all European legal systems to the imperatives of the European Convention on Human Rights (ECHR) already ensures a minimum degree of unity in Europe in terms of justice, human rights, the rule of law and democracy. However, in order to achieve its aim in the field of transnational justice, the Council of Europe must go further and realise a European area of shared justice, where a high degree of unity has to be envisaged. The European area of shared justice should be construed upon a platform of consistency among States, in law, in procedure, in standards. To a great extent the common platform corresponds to the present *acquis* of the Council of Europe. However, the *acquis* must be:
 - identified;
 - completed or consolidated;
 - updated where and when necessary;
 - made visible.”
3. The report is divided into three chapters: “visibility”, “consistency” and “renewal”.
4. At its 51st plenary session (17-21 June 2002), the CDPC examined this report and decided:
 - a. to entrust the PC-OC to set up a Working Party (WP) with the following mandate:
 - to make proposals for follow-up action, excluding norm-setting activities, to the chapters “Visibility” and “Consistency” of the NEW START report;
 - to prepare a feasibility study, including costs, for setting up and operating a database as proposed in Chapter I.C of that report, taking due account of work presently being carried out in the European Union for similar purposes;
 - b. bearing in mind that report and its own experience, to draft guidelines for a clear and coherent policy that the Committee of Ministers would be recommended to follow when examining requests from non-member States to accede to Council of Europe Conventions in the penal field.
5. In addition, the CDPC established the Expert Committee on the Transnational Criminal Justice (PC-TJ) to study the follow-up of the Chapter “Renewal” of the New Start report. The Committee is informed that the PC-TJ report will be examined by the CDPC at its next meeting (2006).

The PC-OC Working Party

6. The PC-OC established this Working Party during its 45th meeting (30 September – 2 October 2002).

² PC-S-NS(2002)7 , 18 September 2002

7. The Working Party was composed as follows:
- the Bureau of the PC-OC:
 - Mr E Selvaggi, Italy, Chair of the PC-OC
 - Ms Astrid Offner, Switzerland, 1st Vice Chair of the PC-OC
 - Ms Imbi Markus, Estonia, 2nd Vice Chair of the PC-OC
 - and
 - Ms Joana Gomes Ferreira, Portugal
 - Ms Gertraude Kabelka, Austria
 - Ms Malgorzata Skoczelas, Poland
8. The Working Party submitted its final report to the PC-OC in May 2005, following its five meetings held between December 2002 and November 2004³. The PC-OC proceeded with a first discussion on the document at its 50th meeting (27-29 June 2005). It finalised this report at its 51st meeting (1-3 March 2006).
9. The present document contains the suggestions by the PC-OC to the CDPC, relating to the chapters “visibility” and “consistency” of the New Start report.

Preliminary remarks

10. It is a wide shared perception that starting from the beginning of 1990 judicial co-operation has changed. This change has several reasons and among them:
- a. the world has become a global village; as a consequence, money, people and, of course, criminals move more freely and frequently than before;
 - b. some forms of criminality, in particular the most dangerous ones, are transnational in character: they affect more than one State;
 - c. States have become conscious that fighting against these forms of criminality requires a common effort and a shared responsibility among States;
 - d. the impact of new technologies of communication (tele-conference, video-conference, e-mail) on judicial co-operation;
 - e. new terrorist threats and new forms of criminality, like cybercrime.
11. These factors suggest reflecting upon a new concept of judicial co-operation, closer to the concept of “transnational justice”. This concept appears in the New Start Report which encourages the Council of Europe to go further and realise an “European area of shared justice”.
12. This report from the PC-OC presents to the CDPC the ideas which had the highest chances of being followed by concrete results. While not neglecting the budgetary aspects of its proposals, the Committee did also consider the overall Council of Europe mission to ensure the rule of law and the respect of human rights and its wider dissemination.

I. ON THE “VISIBILITY” CHAPTER OF THE NEW START REPORT

13. The multiplicity of sources of law applicable to judicial co-operation places the practitioner in front of a difficult task. The following proposals aim at giving to the practitioner ways to identify easily the applicable legal instruments and to facilitate the fulfilment of judicial co-operation requests.

³ The reports of the five meetings of the WP appear in documents PC-OC/WP (2003)1, PC-OC/WP (2003)2, PC-OC/WP (2004)4, PC-OC/WP (2004)5 and PC-OC/WP(2004)06.

1. Council of Europe database on transnational criminal justice

1.1 Short term proposal

14. The Council of Europe should prepare a compilation of the instruments applicable in the main fields of judicial co-operation in criminal matters: extradition, mutual legal assistance, transfer of sentenced persons, money laundering, corruption, cybercrime, trafficking in human beings and terrorism.
15. This tool would gather the Conventions and their Protocols. It would also include some documents which can facilitate their implementation, such as:
- relevant Recommendations adopted by the Committee of Ministers
 - the “explanatory notes” collected by the Secretariat, presenting the results of discussions held in PC-OC on questions arising from the application of these Conventions;
 - general information on the co-operation procedures defined by the States parties;
 - references to the case law of the European Court of Human Rights
 - extracts from Council of Europe publications on judicial co-operation
 - expert reports made for the PC-OC or other Council of Europe Committees
 - co-operation manuals elaborated by the PC-OC or through Council of Europe programmes of assistance (such as the “PACO” programme for the South Eastern European countries).
16. This compilation could be published in a paper version; it would also be made available to practitioners of judicial co-operation and to the public in general, via internet.

1.2 Longer term proposal: a Council of Europe based database

17. The Council of Europe could set up a database, containing the elements to be considered in the field of judicial co-operation in criminal matters.

Aims

18. The database could serve mainly practitioners of judicial co-operation. Without being exhaustive, the database would aim at providing them with a guide to the international co-operation tools.
19. The database would deal with the Council of Europe’s main Conventions in the field of judicial co-operation in criminal matters. The mechanisms of co-operation provided for in Conventions dealing with specific types of crimes (corruption, cybercrime, terrorism, other) would be included.

Content

20. For each of such matters, a list of the applicable instruments would be proposed, including:
- a. international instruments: Council of Europe (with nutshell explanations), other multilateral (UN), regional (EU, CIS) or bilateral treaties ;
 - b. national law and practice: in Council of Europe member States and other States parties to the Council of Europe Conventions;
 - c. case-law: ECHR, significant decisions by international and national Courts and Tribunals.
21. When applicable, the substance of texts could be provided via a hyperlink to the relevant web site. A link could also be provided to the European Judicial Network and its tools (compendium, atlas, etc).

22. General information on the different national judicial systems in Europe would be made available in the database. Other documents, such as the “explanatory notes”, referred to above under the “short term proposal” should also be accessible. This would be a guide and a help, although non-binding.

Language and access

23. The database would be in English and French. It would contain information in different languages, to the extent of their availability and of the contribution and updating by the Member States.
24. The database should be accessible to all for consultation. If need be, a part of the database could be accessible only to authorised users (e.g. by means of a password). Such a restricted access would be opportune with regard to the proposal below to set-up of a network, the members of which being possibly interested in sharing some information among them only.

Feasibility study

25. As a first step, a feasibility study on the setting up of such database could be launched. It could refer, as a starting point, to the format appended to this report. The study should deal primarily with the technical aspects, but should also assess the costs of its installation, its maintenance and its updating. It could propose different formula, from a sophisticated system to a more simple one, according to different budgets and to the realistic possibilities to update the database.
26. On an indicative basis only, the database should provide “buttons” on
- (a) mutual legal assistance;
 - (b) extradition;
 - (c) transfer of persons;
 - (d) transfer of proceedings;
 - (e) selection of specific types of crime (e.g. cybercrime, trafficking, money laundering, terrorism...);
 - (f) other.
27. Once one of these buttons is clicked upon, the next choices could be:
- (a) international instruments
 - a. Council of Europe
 - b. Other multilateral organisations (UN, EU, CIS, etc.)
 - c. Bilateral treaties
 - (b) national law and practice
 - a. member States of the Council of Europe (country by country)
 - b. other
 - (c) case-law
 - a. European Court of Human Rights
 - b. Court of Justice of the European Communities
 - c. National courts
28. Links with other sites are necessary.

2. A Council of Europe based network of national officials involved in the practical application of the criminal Conventions

29. The Council of Europe could facilitate the effective networking among national officials involved in the practical application of the criminal Conventions.
30. Such network exists already, in an informal way, through the PC-OC. Would it be reinforced, it would usefully complement other structures which have been experienced in Europe, either within the EU or at bilateral level:
- European Judicial Network (EJN), which operation requires a high budget
 - Eurojust, which is probably not transposable at pan-European level.
 - liaison officers/magistrates, which are an excellent solution for bilateral relations between sizeable countries.

Presentation

31. The Council of Europe is already the home for an important network of Conventions, the effective operation of which requires contacts between practitioners from the States parties to such Conventions. These practitioners are designated by their States within their respective "competent authorities". Their names are collected on a list (PC-OC/Inf 6) prepared and updated by the PC-OC. The PC-OC notes that most of its members represent a competent authority of their country.
32. The experience has proved that this initiative is useful and effective. This list is commonly perceived as a forerunner of the European Judicial Network (EJN) set up for the European Union countries. The representatives of EU member States to the PC-OC are, in most cases, also person of contact within the EJN.
33. At this stage, the PC-OC list is confidential, shared only by the PC-OC members.

Aim

34. The network would primarily provide the possibility for the competent authority of one State to call directly the competent authority of another State on practical matters related to the judicial co-operation in criminal matters (procedural aspects, forms, language, status of outstanding requests, etc).
35. In the framework of networking, these authorities should be prepared to respond to requests for information (legal as much as factual) both prior to the formulation of a request and after such a request has been formulated.
36. The impact of the PC-OC work would be strengthened through such network. It would also be beneficial to judicial co-operation as a whole.

Membership

- 1) representatives of central authorities from member States
37. The network would be composed of the national officials involved in judicial co-operation, as designated by each State. It would be composed of the "officials involved in the practical application of the Conventions" (PC-OC/Inf 6), which includes representatives from both governmental offices and prosecutors' offices, depending on the designations made by each Party.
38. It should include principal contact persons, but also their alternates who may be contacted in the absence of the main contact person. The list of membership would need to be regularly updated, in order to properly reflect the competent authority appointed in each country.
- 2) representatives from States party to Council of Europe Conventions
39. Membership could be enlarged to all States that are a Party to any of the Council of Europe penal Conventions. The current list elaborated by the PC-OC already encompasses the officials of such non member States.

Synergies

- 1) with the prosecutors' initiative
40. The Conference of Prosecutors General of Europe is contemplating the possibility of establishing a network among them. The Secretariat should find the best ways to ensure the complementarity of these two approaches.

- 2) with existing networks
41. Any network proliferation is not desirable. Any new network should not, for instance, duplicate the European Judicial Network. However, it seems appropriate for the Council of Europe to organise a network that would include all its member States and thus cover the whole European area.
42. Countries that already participate in existing network schemes (e.g. EU countries) will no doubt find it fitting to appoint as contact persons to the Council of Europe network persons who already act as such in other networks.

Budget

43. Such development of a Council of Europe network would not bear important financial implications for the Organisation. No regular meeting would be needed, as the PC-OC will ensure that the names of the network's members are reflecting the reality of the situation in each State. One might envisage however the possibility of an inaugural meeting to formally launch the network and make it known. Upon availability of specific budgets and on specific matter, the Council of Europe may occasionally convene a meeting of the network.
44. The Council of Europe could also pursue some of its initiatives to promote networking among competent authorities on judicial cooperation for certain geographic area (such as through the PACO or CARDS programmes in south East Europe) or other Group of States (such as CIS States).

3 Council of Europe based "Office of specialists" on transnational criminal justice

45. As a longer term proposal, the Committee suggests that the Council of Europe creates a central structure of specialists in transnational criminal justice, within its Secretariat. This structure would assist in answering practical questions related to the efficient operation of the criminal Conventions.

Composition

46. It would be a small unit of two or three Council of Europe officials (one administrator plus one assistant and one secretary). Three or four prosecutors or officials could be seconded from member States, covering a wide range of languages and a variety of legal traditions.

Aims

47. The main task would be to support and facilitate international co-operation, by assisting central authorities, prosecutors and judges in finding solutions to practical difficulties.
48. Such a structure would:
- be a clearing house, a contact point for contact points;
 - complement the above-mentioned network and work closely with it;
 - assist practitioners in consulting websites and other tools on judicial co-operation
 - not have any operational powers regarding the treatment of requests addressed to States.
49. This "Office" could also manage and update the database referred to above.
50. It could submit to the Secretary of the PC-OC reflections or questions which could be brought to the Committee's attention.

II. ON THE “CONSISTENCY” CHAPTER OF THE NEW START REPORT

1. Consistency of the normative work of the Council of Europe

51. The PC-OC should play a role whenever a Committee is elaborating new norms dealing with judicial co-operation in criminal matters.

Role for the PC-OC

52. The preparation of new normative instruments in the criminal field, such as for instance terrorism or cybercrime, has required the setting up of expert committees gathering professional expertise and experience. It is however deemed appropriate that the PC-OC be consulted on the provisions of draft Conventions related to judicial cooperation in criminal matters.

53. This could be envisaged in two ways:
- A PC-OC representative would be associated to such a committee
 - The PC-OC could be asked to give an opinion on such draft norms. This is particularly relevant when the discussions may lead to the necessity to review the “mother Conventions” in the criminal field.

Inclusion of a general clause

54. Beyond the consultative role of the PC-OC, it could be useful to give elements of substance to the Committees entrusted to prepare Conventions in the criminal field. In this regard, the best solution would be to insert a general clause on judicial co-operation in such future Conventions.

Example of the variety of norms: spontaneous transmission of information

55. The problem of normative consistency is illustrated notably by the variety of norms related to the spontaneous transmission of information.
56. Such mechanism is covered under Article 11 of the Second Additional Protocol to the European Convention on mutual assistance in criminal matters (ETS 182). Numerous other special Conventions contain provisions on spontaneous information:
- Article 20 of the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism
 - Article 22 of the Council of Europe Convention on the Prevention of Terrorism
 - Article 28 of the Convention on Corruption
 - Article 26 of the Convention on Cybercrime
 - Article 34 of the Council of Europe Convention on action against trafficking in human beings.
57. These examples demonstrate that there are parallel regulations for a specific problem related to mutual assistance in diverse special Conventions. In practice, this leads to confusion.
58. In addition, regulations that go beyond the actual area of application of the special Conventions (“hidden mutual assistance rules”) are difficult to manage. An example of this can be found in the Conventions on Money Laundering, where the provisions of Article 77 et seq. (Convention of 1990) and Article 15 et seq. of the new Convention, which regulate confiscation, are not limited to the area of money laundering (and possibly the financing of terrorism), but are of a general nature and relate to all offences.

59. Such parallel regulations can be considered either superfluous, to the extent that they correspond to the regulations of the mutual assistance Conventions, or confusing, to the extent that they (“covertly”) expand the area of application of the mutual assistance Conventions.
60. The objectives of efficiency and consistency would be better reached by revising the Conventions on mutual assistance themselves, rather than fragmenting the existing legislation on this matter.

Proposal

61. A solution should be, for the Council of Europe, to consider on a case by case basis to incorporate general clauses into the special Conventions. By analogy, Article 32 of the Council of Europe Convention on action against trafficking in human beings (CETS 197) could serve as a model of a general clause. It reads as follows:

"The Parties shall co-operate with each other, in accordance with the provisions of this Convention, and through application of relevant applicable international and regional instruments, arrangements agreed on the basis of uniform or reciprocal legislation and internal laws, to the widest extent possible, for the purpose of:

- *preventing and combating trafficking in human beings;*
- *protecting and providing assistance to victims;*
- *investigations or proceedings concerning criminal offences established in accordance with this Convention".*

Consistency with the work of the European Union

62. As regards the coordination with the normative work of the European Union or other groups of States, the Committee thought that the efforts to ensure the consistency of their norms with the existing ones of the Council of Europe lied with them. To this end, the Committee recommends a closer co-operation between the two Organisations. The Committee considers that the Council of Europe could be better represented in the normative works of the European Union in the fields of common interest. The possible inconsistencies with existing treaties or with their interpretation by the European Court of Human Rights could, in this way, be better identified and discussed.
63. In addition, the Council of Europe could take a certain number of initiatives of its own, such as the New Start proposal for the Council of Europe to assume a “register” function, and recommend Member States:
- to notify it of any treaty in this area that they sign, both bilateral and multilateral, both within and without the European zone, including European Union and Commonwealth of Independent States’ treaties (CIS);
 - to transmit the text of such treaties;
 - to notify any signature, ratification, accession, reservation and declaration made in respect of such treaties;
 - when preparing bilateral treaties that build upon or “add to” any Council of Europe Convention, clearly to indicate with respect to every article the corresponding provision of the mother Convention.

2. Mutual evaluation / monitoring

64. The Working Party gave consideration to the proposals on mutual evaluation aimed at assessing how national systems meet requirements of transnational justice. It examined the mutual evaluation exercises which are already being carried out within the Council of Europe as well as among European Union member States. The Committee considered not opportune to set up additional mechanisms of this type within the Council of Europe.

65. *The Committee recalls the objectives pursued through mutual evaluation: to improve the capability of national systems to meet requirements of transnational justice, to promote best practices, to raise trust among member States. It considers that such objectives could to a certain extent be attained at lower costs by an adequate use of the regular discussions in the PC-OC.*
66. *Such discussions among representatives of States parties to the Conventions, on difficulties relating to the application of the criminal Conventions have appeared to be very useful in this regard. This function of monitoring, which the PC-OC exercises in practice, has also resulted in the preventive settlement of disputes which would otherwise have reached the CDPC for a formal procedure of dispute settlement.*
67. *As an example, the functioning of joint investigative teams, foreseen by ETS 182, could be followed by the PC-OC. National legislations, examples of best practices, discussions and solutions on practical difficulties related to the organisation of these teams could be addressed as a matter of priority.*

Conclusion

68. *The Committee deemed it not appropriate to propose new specific monitoring structures. It rather encourages the Council of Europe to*
- *maintain the important contribution of the PC-OC in discussing difficulties arising from the application of the criminal Conventions and*
 - *reinforce its functions by giving a positive follow-up to the proposals made under this report.*

3. Obstacles to co-operation in criminal matters

69. The efficiency of transnational criminal justice could be improved if States would agree to reconsider in particular the following two elements identified by the New Start report: reservations to treaties and some applications of the principle of double criminality.
70. The Committee also refers to the discussions held at its 50th meeting (27-29 June 2005) and to the conclusion that some Conventions, such as the European Convention on extradition, would need to be modernised.⁴

3.1 Reservations

Existing reservations

71. The Committee wishes to encourage States to reconsider existing reservations to the treaties in question. States should withdraw all reservations which are obsolete and could update others.
72. Although the revision of existing reservations should be a continuous process, the Council of Europe could take the opportunity of this report to address a letter to the States party to the Conventions. It would remind States that these instruments foresee the widest possible cooperation and would accordingly encourage them to review their reservations in order to meet this objective. The reservations made by each country concerned could be appended to the letter.

Future reservations

73. As to the reservations to future Conventions, the Council of Europe could consider the possibility of inserting a clause by which a reservation would be admissible only on specified articles and valid only for a specific period (the "sunset clause").

⁴ PC-OC(2005)16, report from the 50th PC-OC meeting.

74. The following article from the draft comprehensive Convention on international co-operation in criminal matters could be considered⁵ as an example:

Article VI.7 - Reservations

1. *Any Contracting State may, at the time of depositing its instrument of ratification, acceptance, approval or accession, declare that it avails itself of one or more of the reservations provided for in Chapters [X, XX and XXX]. No other reservations may be made to the provisions of the Convention.*
 2. *Without prejudice to the provisions of paragraph 4, reservations shall be valid for a maximum period of ten years from the entry into force of this Convention for the Party concerned. They may however be renewed for successive periods of five years by means of a declaration addressed, before the expiration of each period, to the Secretary General of the Council of Europe.*
75. The Committee believes that the maximum period for a reservation (sunset clause) should be of five years, not ten years, as proposed by this article. It further observes that the length is reduced to three years by the Council of Europe Convention on the prevention of terrorism (Art 20, CETS 196).
76. When discussing the scope of application of such clause, its drafters will have to consider the two conflicting interests at stake. On the one hand the reservations should be limited in order to grant a wide application of the new provisions, but on the other hand, reservations can be a condition for a State to accede to this new instrument, which can be important in view of its application.

3.2 Double criminality

Presentation

77. The principle of double criminality needs to be revised in the context of fighting modern forms of criminality, in particular with a view to improve the efficiency of the transnational criminal justice.
78. The Committee held discussions on the basis of the opinion prepared by its scientific expert, Professor Otto Lagodny⁶. According to the expert, *“The aims of the twentieth centuries’ European Conventions can be summed up to facilitate cooperation without neglecting interests of the individual. In terms of these aims, the concept of double criminality surely is not facilitating cooperation. To the contrary, it involves from case to case a thorough analysis of the criminal law of both states. However: The existing Conventions do not deviate from the 19th centuries’ concept. In my opinion, there is even no substantial change in the concept of double criminality to be observed in the last 10 years and its Conventions and draft Conventions⁷. The European Arrest Warrant – to take this prominent example - does not provide for a substantive change. For the crimes or groups of crimes contained in the list of article 2 the evaluation of double criminality is excluded because it is presumed that the relevant behaviour is punishable throughout the European Union. ...I therefore would not draw the decisive line between what is punishable in concreto or in abstracto but – roughly speaking: what is contrary to the ordre public of a country⁸. The subsequent question is: what belongs to the “ordre public” of a country? First: what would be contrary to the basic rights of that country? This means: Extradition should be excluded for crimes which may not be crimes in that country because punishment would be unconstitutional. ...As mentioned above, the “ordre public” of a country also consists of essential features of its criminal policy. The law of abortion is such a sensitive area. If we compare the liberal Dutch approach to the strict Irish approach, one could say that due to the ordre public approach, extradition from the*

⁵ PC-OC Inf 11, 15 November 1996.

⁶ Mr. Otto Lagodny; «Expert Opinion for the Council of Europe on Questions concerning double criminality»; PC-OC/WP (2004)2, 24 June 2004, available on www.coe.int/tcj

⁷ See also the analysis of Gless, in: Eser/Blakesley/Lagodny (annex I)

⁸ See Swart (supra note 3), at 524 referring also to Jescheck, Hans-Heinrich, Die internationale Rechtshilfe in Strafsachen in Europa, 66 Zeitschrift für die gesamte Strafrechtswissenschaft 531-532 (1954) who already in 1954 proposed such an ordre public clause.

Netherlands to Ireland in an abortion case which would clearly be not punishable according to Dutch law but punishable according to Irish abortion law, would be contrary to the Dutch ordre public...The details of such a new approach certainly have to be discussed and need "fine-tuning". It rather seems to me that it is more adequate for Europe than maintaining the classical double criminality concept and trying to "fine-tune" the latter. In my view, the "fine-tuning" of this approach could be made by indicating examples of what could be part of the ordre public..."

Proposal

79. States should in particular facilitate the treatment of requests made under the Convention on Mutual Legal Assistance and its Protocols. They should avoid that the principle of double criminality may constitute an obstacle to such co-operation. Developments in this area are to be considered in relation with the evolutions in other fora, such the European Arrest Warrant and the (future) European Evidence Warrant in the European Union.

Conclusion

80. Conscious of the importance and relevance of the discussion on double criminality, the Committee considered that further work should continue on this question and on concrete ways to facilitate the application of the Conventions in this regard.

4. Disputes settlement

81. The Committee considers that the Council of Europe should assist States when disputing on the application of its Conventions. It further examined the following paragraph of the New Start report:

*"Moreover, the existing structures for the informal examination of difficulties (in particular, the Committee of experts on the Operation of Conventions in the Penal Field, PC-OC) as much as the existing structures for the friendly settlement of difficulties (in particular, the European Committee on Crime Problems, CDPC), should all be maintained. In this respect, Recommendation (1999) 20 concerning the friendly settlement of any difficulty that may arise out of the application of the Council of Europe Conventions in the penal field,..., remains relevant and applicable."*⁹

82. The PC-OC recalls that it has played an important role to that extent, by interpreting or helping in interpreting provisions of the Conventions. In doing so, the PC-OC works as a "filter" as
- it prevents disputes by regularly discussing difficulties and legal questions. Reference is made, for instance, to the PC-OC discussions on questions of the application of the Convention on transfer when a law of the requesting State allows for immediate release of a prisoner whose transfer is being requested;
 - it prepares the friendly settlement of disputes (e.g. in the "Baraldini case"), on request by the CDPC.
83. The CDPC likewise has played a role in implementing a friendly settlement of disputes. This role has been particularly appreciated as it remains fully compatible with the States' ability and rights to come up with the final solution on a dispute.

⁹ PC-S-NS (2002)7, p 13.

84. Furthermore, as mentioned in the “New Start” Report, the various proposals under the “Visibility” chapter would improve the functioning of transnational justice and thus contribute to avoiding disputes.
85. The Committee refers also to its in-depth work initiated following the request by the CDPC Bureau (June 2005) on this specific question. Such a work is being carried out by the PC-OC at its 51st meeting (1-3 March 2006) and its conclusions have been submitted to the CDPC for its April 2006 plenary session.

III. ACCESSION TO COUNCIL OF EUROPE CONVENTIONS BY NON MEMBER STATES

1. Accession to the Council of Europe Conventions

86. A non member states can to accede to the Conventions of the Council of Europe under the following conditions:
- simply by invitation of the Committee of Ministers
 - by a decision of the Committee of Ministers, through a special procedure
 - if these states have participated in the elaboration of the relevant Convention
 - as a consequence of prior accession to another Convention.
87. An accession can, in some cases, follow an assessment of the compatibility of the national legal and institutional framework with the Convention’s objectives.
88. The Committee observes that since 1987, the Council of Europe Conventions are opened to the accession of non member States. It welcomes this trend and hereunder provides with elements to support it.
89. The PC-OC suggests that the Committee of Ministers considers the elements developed hereunder when discussing the accession to the Council of Europe Conventions in the criminal field by a non member State.
90. It is in the interest of an effective international judicial co-operation to have a large number of States acceding to its Conventions, notably in criminal matters
- for a reason of visibility;
 - because the Council of Europe would require the respect of human rights by the acceding States concerned;
 - because a larger use of the same Conventions would increase the efficiency of judicial co-operation, notably by facilitating the work of practitioners involved in it.
91. In addition, the world is a “global village” in which persons and ideas circulate freely. This increases the opportunities for judicial cooperation with non member States and in particular with neighbouring regions such as Central Asia and North Africa.
92. A broad accession policy for non member States would contribute to raise the efficiency of the Council of Europe Conventions and, as a consequence, would contribute to the Organisation’s success.
93. **A distinction** should be taken into account as to whether the provisions of the Convention are of a **discretionary** or of a **binding** nature.
- In the latter case (such as the Convention on extradition) the Conventions foresee obligations to cooperate among state parties. The fact that the legal system of the non member state and the ones of the Council of Europe are based on common legal principles, especially with regard to the protection of human rights, is crucial.
 - Where the provisions of the Convention are of a discretionary nature, proposing possibilities to cooperate, (such as the Convention on transfer of prisoners) the threshold that should be met might be lower. Other primary goals are to be pursued.

One example relating to the Convention on transfer of sentenced persons (ETS 112): the reinsertion and rehabilitation of sentenced persons can be considered as the “raison d’être” of the Convention. Should a detainee give his consent to be transferred into his home country and should both countries agree on such transfer, the person could be transferred, even if the detention conditions in the latest country are poor. A transfer requested on this basis would indeed meet the main objectives of the Convention even if the prison system where the sentence is to be enforced does not meet European standards.

This example shows that the aims of some Conventions are better achieved when more States accede to them. More individuals could benefit from the favourable provisions set forth in the Organisation’s Conventions.

94. Accession to Council of Europe Conventions in criminal matters can contribute to improving the efficacy of **safeguarding human rights** in non Member States. Some Conventions contain provisions which introduce human rights protection measures to be respected by States parties to the Conventions. The extradition Convention, for example, contains provisions on non bis in idem (article 9), on the rule of speciality (article 14), on the non-discrimination clause (article 3), on capital punishment (article 11), that clearly stem from the ECHR.
95. Sometimes **the object of a specific Convention** would play a decisive role. For instance, the Convention on cybercrime. It deals with problems and challenges in an area that cannot be limited geographically. It therefore requires an accession of as many States as possible in order to be truly effective.
96. The Committee also underlines that States of a Federal nature should avoid **federal clauses** by which States would rely on its sub-entities to implement the Convention. Any State that accedes to a Convention takes over the obligations stemming from it and is responsible for those obligations at an international level. Internal legislation of that State should make international obligations enforceable at its States level.
97. Accession by a larger number of States to the Council of Europe Conventions might be encouraged by the Secretariat through various forms of assistance activities.

2. Bilateral agreements between member States and non member States

98. As to the relations between Council of Europe member States and third countries, the Committee agreed that some action may be taken by the Council of Europe in this field:
 - (a) For instance by preparing model bilateral treaties, or;
 - (b) By producing standards applicable to the relations between European countries and non-European countries.
99. The Council of Europe could organise a seminar on this theme in order to do some brainstorming and scrutinise a variety of options as wide as possible.
100. When negotiating bilateral agreements with non member States, the Council of Europe member States are encouraged to refer primarily to the existing European Conventions and to invite these countries to accede to them, when the Convention foresees such possibility.
101. Model bilateral Conventions could also be elaborated. They would be inspired, in as far as possible, by the Council of Europe treaties. These models will have to be adapted according to the applicable legislation of this non Member State. The PC-OC could continue to advise States when they negotiate such agreements.
102. Member States, as a party to the ECHR, will have to give particular attention to ensure a proper protection of the individual human rights when concluding treaties with third states. They will look in particular to the types of penalties foreseen in the legislation of the other state in order, wherever applicable, to proscribe the application of penalties which are contrary to the ECHR. Member States can, for instance, propose to the other State to substitute such penalty (e.g. death penalty of corporal punishment) by the penalty foreseen in its own legislation for the same crime.

APPENDIX 1

**Draft proposed format
to be considered for the feasibility study of a
Council of Europe based database**

MONEY LAUNDERING ¹⁰	
How to get assistance in a case of money laundering	
General information	In particular
<p>When seeking assistance in a case of money laundering three points should be taken into account:</p> <p>A. Council of Europe Convention (ETS 141)</p> <p>B. the Council of Europe Convention on mutual assistance in criminal matters (ETS 30)</p> <p>C. bilateral agreements.</p> <p>As to all Conventions of the CoE, reservations and declarations are very important. In order to check: 1. signatures; 2. entry in force; 3. reservations; 4. declarations; 5 explanatory reports, click on http://Conventions.coe.int</p>	<p>According to the Convention States might have specific domestic measures and techniques of investigations.</p> <p>ETS 141 grants in particular the execution of seizure and confiscation orders.</p>
INTERNATIONAL INSTRUMENTS / PROVISIONS - DOCUMENTS - COUNCIL OF EUROPE (CoE)	
<p>CONVENTIONS</p> <ul style="list-style-type: none"> - Money laundering, ETS 141 (signed...) - Mutual assistance in criminal matters, ETS 30 (signed...) and its two additional Protocols - Terrorism, ETS 90 and its Protocol (ETS 190), (signed...) - Cybercrime, ETS 185 (Signed...) <p>RECOMMENDATIONS/RESOLUTION</p>	<p style="text-align: center;">Documents</p> <p>Various PC-OC documents and publications on related matters:</p> <ul style="list-style-type: none"> - guide of procedures - Document on MLA and death penalty - ... <p>PACO Manual on co-operation</p>
INTERNATIONAL INSTRUMENTS / PROVISIONS OTHER FORA (EU, UN, CIS etc.)	

¹⁰ This is just an example. The Money laundering case is taken by chance. In an extradition case there will be information also on the possibility to have the person sought returned to the sentencing State in case he/she is a national of the requested State, provided that: a. the State consents; b. that would not be contrary to the law or the fundamental principles of that State. Also a reference to the usefulness to consult the ECHR is to be inserted, in particular as far as article 5 or article 3 are concerned. And also a reference to the EAW in the EU, which has provisions for the case where there are concurrent request for surrender under EAW and under extradition Convention with third States.

-Convention on mutual legal assistance, 29 May 2000

(click on...) (EU)

-Shengen Agreement, articles 53... (click on...) (EU)

-Frame decision on freezing... (click on ...) (EU)

**-Convention on organised crime, Palermo, (Dec. 2000),
articles (UN) (click on ...)**

INFORMATION FOR PRACTITIONERS (*RESTRICTED*)

Any problem as far as domestic legislation of the requested State might be solved contacting the official responsible of that country (possible link – *restricted*- to the national official of the competent authority) or the liaison magistrate where existing. In the EU the EJM is available to grant assistance in the execution of rogatory requests.

FURTHER INFORMATION

For instance information on languages, costs or channels of transmission, even in a very general fashion such as: *as far as language is concerned the following is to be taken into account: official languages of CoE are English and French; nevertheless one should look into reservations because some States have indicated a specific language; also bilateral agreements are to be taken into account.*

PROBLEMS AND SOLUTIONS

Reference could be made to agreements between states on specific ways to co-operate e.g: technical agreements on tele or video-conferences.

INFORMATION ON ONGOING WORKS IN THE COE

That would include general information on new publications, planned conferences and conclusions of other relevant events, recent Ministerial resolutions,...

USEFUL WEB SITES AND LINKS

<http://Conventions.coe.int>;
<http://www.coe.int/tcj>;
<http://www.coe.int/gmt>;
<http://www.coe.int/economiccrime>
<http://www.echr.coe.int>;
<http://europa.eu.int>;

+ web sites on

- CoE programmes (PACO, CARDS,...)
- CoE relevant activities in the field of criminal justice (CEPEJ, prosecutors)
- European Union activities
- United Nations programmes and agencies
-

APPENDIX III

Strasbourg, 3 March 2006

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<http://www.coe.int/tcj/>
e-mail : dg1.tcj@coe.int

EUROPEAN COMMITTEE ON CRIME PROBLEMS
(CDPC)

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

**Modernisation of the European Conventions on international co-operation
in the criminal field**

**Note to the CDPC
adopted by the PC-OC at its 51st meeting (1-3 March 2006)**

NOTE
TO THE EUROPEAN COMMITTEE ON CRIME PROBLEMS

**ON THE MODERNISATION OF THE EUROPEAN CONVENTIONS ON INTERNATIONAL
CO-OPERATION IN CRIMINAL MATTERS**

I. Background elements

1. The PC-OC discussed the need to modernise the European Conventions on international co-operation and the elements to be considered in such an endeavour at its 50th (27-29 June 2005) and 51st (1-3 March 2006) meetings.
2. It had in mind Resolution No 5 adopted by the European Ministers of Justice, in Helsinki in April 2005, on the effective implementation of co-operation mechanisms provided for by the Council of Europe conventions in criminal matters, as well as the decisions of the Bureau of the CDPC in June 2005 and in January 2006, dealing notably with the various types of disputes settlement mechanisms envisaged in the conventions.

II. Elements for a modernisation of the European Conventions on judicial co-operation in the criminal field

3. The Conventions ETS 24 on extradition and ETS 30 on mutual assistance in criminal matters have been adopted respectively in 1957 and 1959. They have been completed by additional Protocols: in 1975 and 1978 on extradition, in 1978 and 2001 on mutual assistance.
4. The PC-OC has followed the implementation of these instruments since its establishment, in 1981. The Committee has adopted various decisions on the ways to interpret and to apply the provisions of the Conventions. It has also progressively identified a number of lacunae as well as the elements which could be added to the mechanisms of judicial co-operation to improve the efficiency of such co-operation in fighting criminality.
5. The Committee has observed the changing nature of crime in a world of globalisation, of mobility of persons and goods and of worldwide instant communication. It progressively has realised the need to adapt the conventional instruments to the modern nature of crime.
6. Following the Conference on “the future of judicial co-operation” (Strasbourg, 27 June 2005) and the plenary meeting of the PC-OC (28-29 June 2005), the Committee concluded on the need to modernise in particular the Conventions ETS 24 on extradition and ETS 30 on mutual assistance in criminal matters: judicial co-operation ought to be more efficient in order to tackle criminality and prevent situations of impunity of criminals.
7. Such an endeavour would include several categories of issues such as, notably:
 - a. Issues pertaining to practical difficulties arising out of the application of the Conventions with a view to improving the efficiency of judicial co-operation. Such a category would include issues related to the communication of requests and documents, the use of electronic media, language and translation and could also consider the question of time limits in executing requests.
 - b. Issues related to the application of extradition mechanisms such as:
 - the development of a procedure for simplified extradition when the person consents to his or her extradition;

- the consequences of a decision to acquit and release a person in the requesting State, after an extradition or when the requesting State withdraws its request for extradition;
 - the consequences of the possibility of a trial *in absentia* in the requesting State;
 - the possibility of an extension of the hand-over of property;
 - the duration of validity of reservations to the Convention;
 - the circumstances in which certain grounds for refusal such as the “political” offences or the statute of limitations can be invoked;
 - the use of diplomatic assurances and the possibility to monitor the respect of such assurances.
- c. Issues relating to some basic principles of extradition, such as:
- the application of the rule “*ne bis in idem*” in transnational procedures, both in terms of guarantees for the individual and in terms of criteria to deal with situations of positive conflicts of competences;
 - the requirement of double criminality;
 - the application of the rule “*aut dedere aut judicare*”, notably in connection with the question of extradition of nationals;
 - the application of the rule of speciality, especially when the individual consents to his or her extradition.
- d. Issues pertaining to the protection of the rights and guarantees of individuals involved in transnational procedures, taking duly into account the case law of the European Court of Human Rights. The “minimum standards for the protection of the person subject to an extradition procedure” presented in the final report of the PC-TJ can constitute a useful reference to this end.
- e. Issues related to the settlement of disputes (see III below)
8. The results of the work undertaken by the Committee, notably through its Working Party which submitted its final report to the PC-OC in June 2005, as well as by the Committee of Experts on Transnational Justice (PC-TJ) will provide with substantial elements to this end.
 9. The Committee will, wherever applicable, consider the opportunity to discuss additional issues or initiatives which could contribute to improve the efficient application of other conventions on judicial co-operation in criminal matters, such as for instance, the transfer of criminal proceedings or mutual assistance in criminal matters.
 10. On the latter matter, the possibility to extend the requests for assistance in regard to criminal cases involving the criminal, administrative or civil liability of legal persons/entities could be envisaged.
 11. The PC-OC agreed to consider these proposals as a basis for future work, while keeping also in mind the developments in the European Union, notably on the European Arrest Warrant, which, although not directly transposable to the Council of Europe Member States (as far as mutual recognition is concerned), brings novelties which should be considered in the Council of Europe.

III. The friendly settlement of disputes relating to the interpretation or application of the Council of Europe Conventions in the criminal-law field

12. The Bureau of the PC-OC met on 24-25 October 2005¹¹. It held a discussion on this matter on the basis of a background document prepared by the Secretariat¹², of a proposal submitted by the expert of the Russian Federation¹³ (i.e. the elaboration of a Protocol to the extradition Convention, dealing with arbitration) as well as comments provided by the expert from Slovakia¹⁴.
13. Following its discussions at its 51st meeting, the PC-OC is of the opinion that:
- a. The matter of dispute settlement can be important for effective implementation of judicial co-operation in criminal matters, in particular extradition and mutual assistance in criminal matters;
 - b. The proposals submitted by the Committee to the CDPC on the follow-up to the New Start report, aiming at increasing the visibility and the consistency of the European norms, would certainly contribute to facilitating the communication between States parties to Conventions and would also help in ensuring a consistent way of interpreting the Conventions. This, in addition to the useful role played by the PC-OC in discussing concrete problems arising from the practical application of the Conventions, would also contribute to the avoidance of formal disputes.
 - c. As to the settlement of disputes, the Committee considered that the background document prepared by the Secretariat clearly identifies the various types of dispute settlement mechanisms envisaged in the Council of Europe Conventions in the criminal field as well as the lacunae to be observed in some Conventions.
 - d. It discussed various types of disputes as well as various mechanisms to settle these, such as for instance the role of the CDPC, an arbitral tribunal or the International Court of Justice.
 - e. A majority of experts underlined the importance of the voluntary nature of any step for a settlement of a dispute. They also questioned the possibility of any new mechanism of a binding character, to be productive in this regard.
 - f. The PC-OC suggests that the issue of settlement of disputes be included among the elements to be considered in the efforts of modernising the Conventions on co-operation in criminal matters.
 - g. As dispute settlement mechanisms raise questions pertinent to the field of public international law, the Committee will envisage the possibilities to look for additional expert advice on these issues, having also regard to the competence of the CAHDI (Committee of legal advisors on Public International Law).

VI. Follow-up suggestion

14. The PC-OC recommends to the CDPC to propose to the Committee of Ministers to entrust the PC-OC with the modernisation of international co-operation in criminal matters, on the basis of the elements mentioned above.
15. The Committee's terms of reference could include the task to "consider various steps and initiatives to improve the efficiency of judicial co-operation in criminal matters, in

¹¹ Extracts of the report of the Bureau of the PC-OC's meeting of 24-25 October 2005, PC-OC-BU (2005) 03, Appendix I;
¹² Secretariat memorandum on "friendly settlement of disputes relating to the interpretation or application of the Council of Europe conventions in the criminal-law field, 7 June 2005, PC-OC (2005) 02.
¹³ Proposal from the Russian Federation, 6 October 2005, PC-OC(2005)18.
¹⁴ Contribution by the Slovak Republic, 24 October 2005, PC-OC (2005) 23.

particular through the elaboration of normative proposals for binding or non binding legal instruments and through other measures to improve practical co-operation”.

* * *

APPENDIX IV

Strasbourg, 3 March 2006
Internet Site: www.coe.int/tcj

PC-OC (2006) 11

EUROPEAN COMMITTEE ON CRIME PROBLEMS
(CDPC)

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

Witness Protection

Opinion
on the application of Art. 23 of the 2nd Additional Protocol to the
European Convention on mutual assistance in criminal matters

Adopted by the PC-OC at its 51st meeting (1-3 March 2006)

1. During its 54th plenary meeting on March 2005, the CDPC “instructed the Committee of experts on the Operation of European Conventions in the penal field (PC-OC) to carry out a specific overview of the national laws and practices on witness protection and assess these practices and the application of the relevant provision of the 2nd Protocol to the MLA Convention. In this respect, the members of the PC-OC were invited to contact their national witness protection programmes to obtain such information. The PC-OC was invited to report back to the CDPC on this issue at the next plenary session.”¹⁵
2. To this end, the PC-OC adopted a questionnaire at its 50th meeting, 27-29 June 2005. The questionnaire was sent to all PC-OC experts and observers.
3. At its 51st meeting (1-3 March 2006), the Committee considered the document PC-OC (2005)19rev 2, which collects the questionnaire, a brief analysis and the national replies.
4. The PC-OC observed, on the basis of the replies, that:
 - ❖ States already co-operate with each other on the basis of bilateral agreements and they consider in general that Art. 23 is an appropriate basis for entering into such an agreement;
 - ❖ the implementation of the Protocol is relatively recent (2004) and has entered into force only with regard of the 11 States which have ratified it so far, as a consequence, not much practice can be reported yet and no real statistical data exists;
 - ❖ the difficulties mentioned as far as co-operation is concerned seem to refer mostly to the variety in the national legislation on this matter, as well as on the logistical limits in Member States.
5. Considering the present stage of practice and on the basis of the replies to the questionnaire, a majority of experts of the Committee does not believe that the adoption of a separate Convention on witness protection is necessary. The elaboration of such an instrument could also pose serious difficulties in approximating respective legal systems. Four countries expressed the opinion that a separate Convention would however bring added value to the field of international co-operation in protecting witnesses.

* * *

¹⁵ The documents elaborated by and for the PC-PW are available on the web site of the Committee (http://www.coe.int/T/E/Legal_affairs/Legal_co-operation/Fight_against_terrorism/4_Theme_Files/Witness_Protection/default.asp#TopOfPage)

APPENDIX V

Strasbourg, 3 March 2006
Internet Site: www.coe.int/tcj

PC-OC (2006) 05rev

EUROPEAN COMMITTEE ON CRIME PROBLEMS
(CDPC)

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

Opinion on
the Additional Protocol to the European Convention on the
Transfer of Sentenced Persons (ETS 167)

Adopted by the PC-OC at its 51st meeting (1-3 March 2006)

1. At its meeting on 17-19 January 2005, the Bureau of the CDPC had asked the PC-OC to prepare a document on the difficulties posed by the Additional Protocol to the European Convention on the Transfer of Sentenced Persons (ETS 167).
2. The PC-OC discussed the matter at its 50th meeting (27-29 June 2005) and decided to complete its information by a questionnaire addressed to all its members.
3. The replies to the questionnaire are collected in the document PC-OC (2005)21rev1.
4. Following a preliminary discussion on this issue in the Bureau (October 2005), the PC-OC adopted this Opinion at its 51st meeting (1-3 March 2006) and decided to send it to the CDPC.

General considerations on the additional Protocol

5. The PC-OC underlines the fact that the application of Convention ETS 112 and of its protocol (ETS 167) is left to states' discretion. Since the Convention was designed to serve prisoners' interests by encouraging their re-socialisation, States have to obtain their consent for any transfer.
6. However, the Protocol provides for two circumstances in which prisoners might be transferred without their consent, i.e. the prisoner escaped from prison to its country of origin and the prisoner is subject of an expulsion or a deportation order to its country of origin.
7. Certain countries found it difficult to reconcile this absence of consent with the goal of reintegrating prisoners into their environment of origin.
8. This therefore made it difficult for them to ratify the Protocol. They believed that this primary objective, perhaps even *raison d'être*, of the parent convention, the social reintegration of prisoners, was not reflected in the Protocol.
9. Other countries did not consider the lack of individual consent in the cases specified in the Protocol to be incompatible with the objectives of prisoners' reintegration and resocialisation. They believed that in the majority of cases, it was easier to secure these objectives in prisoners' countries of origin.
10. The PC-OC further observes that:
 - the application of the Protocol, in cases where sentences were accompanied by an expulsion order, has some similarities with extradition;
 - some Member States consider that the European Convention on the transfer of proceedings in criminal matters (ETS 73) may offer a useful alternative;

Cases before the European Court of Human Rights (ECHR).

11. The Committee examined two cases brought before the European Court of Human Rights. They concerned Estonian citizens convicted in Finland. Finland was seeking their transfer to their country of origin, mainly on the basis of the Additional Protocol. The matters referred to before the Court related mainly to the execution of the sentence in the executing State, where the possibilities for conditional release were less advantageous for the prisoner than in the sentencing/requesting State.
12. In the first case, Altosaar v. Finland, on 15 June 2004 the Court had ruled the application inadmissible. Mr Altosaar had been granted a conditional release in Finland and was residing in Estonia, at liberty. He could not therefore claim to be suffering a violation of his rights under the Convention (Article 5 – deprivation of liberty).
13. The Court had ruled that a second case, Veermaä v. Finland, was inadmissible. The applicant had alleged violations of articles 5 (deprivation of liberty), 6 (right to a fair trial) and 14 (discriminatory treatment), because the sentence he would have to serve in Estonia after his transfer would be longer than the one he would normally have expected in Finland (same arguments as those raised in the Altosaar case). Finnish law authorised conditional release after half the sentence has been served. Under Estonian law, such release is only possible, subject to certain conditions, after two-thirds had been served.

14. In response to the points raised under article 5 of the Convention, the Court considered that:
- even if, as a result of the application for a transfer, the applicant would spend longer in prison this did not, as such, constitute an increase in his sentence;
 - there was a causal link between the sentence handed down (in Finland) and carried out (in Estonia);
 - there was nothing arbitrary about the detention, since the sentence served would not exceed the length of sentence handed down by the convicting court;
 - nor was there a flagrant difference or disproportion between the periods of imprisonment in the two countries.

Conclusion

15. The PC-OC is of the opinion that, when dealing with cases of escape of prisoners, the Protocol ensures that the prisoner does not escape justice and, when dealing with prisoners subject to an expulsion or a deportation order, it ensures the start of the re-socialisation process at an early stage.
16. It further underlines that, when applying the Protocol, States parties should seek the *opinion* of the sentenced person, as required by the Art 3.2 of the Protocol, and the competent authorities should take particular account of this in deciding whether or not a transfer was appropriate, although *consent* of the person is not required.
17. The PC-OC has taken note of the existing case law of the European Court of Human rights and will continue to follow closely the application of this Protocol, especially with regard to the development of the case law of the European Court of Human Rights.

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APPENDIX VI

Strasbourg, 03 March 2006

PC-OC (2006) 04rev

EUROPEAN COMMITTEE ON CRIME PROBLEMS
(CDPC)**Committee of Experts on the Operation of European Conventions**
in the Penal Field
(PC-OC)**Opinion on**

Parliamentary Assembly Recommendation 1673 (2004):
Counterfeiting: problems and solutions

Adopted by the PC-OC at its 51st meeting (1-3 March 2006)

Introduction

At its 51st meeting (1-3 March 2006), the PC-OC discussed proposals for follow-up actions in the field of counterfeiting, as requested by the CDPC (54th session, 7-11 March 2005).

The Committee took into account the following elements:

- Parliamentary Assembly Recommendation 1643 (2004) on “counterfeiting: problems and solutions”
- documents (in particular the “Harper report”) and conclusions of the seminar on “Counteract the counterfeiters! Limiting the risks of counterfeit medicines to public health in Europe by adequate measures and mechanisms” (Strasbourg, 21-23 September 2005)
- the Secretariat memorandum prepared by DGI-Legal Affairs presenting to the Bureau of the CDPC the main legal findings from this seminar (document CDPC-BU(2005)13)
- the report of the meeting of the Bureau of the PC-OC (24-25 October 2005), which held a preliminary discussion on the matter.

Main facts and figures

The Committee has been informed on the extent of the phenomenon by two experts in the fields of public health and of quality of medicines. They both confirmed that counterfeit medicines are a serious danger to public health and to the life of people. They are increasingly present on European markets. An expert informed the Committee that about 10 % of medicines on the market in Europe are counterfeit and that they kill. He also reported that that several thousands of persons allegedly die every year of counterfeit medicines.

The problem of counterfeit medicines is aggravated by the wide spread use of the Internet to distribute, buy and sell medicines and health-care products. According to the Conference participants, 57 % of spams concern health-care products, 44 % of Viagra is counterfeit and 95 % of medicine available on the Internet is unsafe.

More importantly though, the notion of “counterfeit medicines” was perceived by the seminar participants as being too restrictive to cover the problems. Indeed, not only are medicines counterfeited, but also veterinary products (which may become dangerous for humans through food) and medical devices (eg. optical lenses).... The important fundamental characteristic is that illegally produced goods (whether or not counterfeit) can constitute a danger to public health and thus a threat to the right to life enshrined in Article 2 of the ECHR. In such a context, this notion might usefully be enlarged at a later stage to cover products which, if counterfeited (or otherwise produced illegally), might endanger public safety (e.g., car, train or airplane spare parts, as well as counterfeited food or alcohol).

The PC-OC's position

The Committee expressed its deep concern as to the extent to which this phenomenon is growing in Europe.

It is convinced of the need to develop prevention, criminalisation and co-operation strategies and mechanisms to fight this phenomenon. It took note of the conclusions reached at the seminar on the need to develop an international legal instrument, possibly a convention within the Council of Europe, in co-operation with other relevant international instances, such as the WHO, to combat pharmaceutical/health-care crimes. The elements brought to the attention of the Committee by the four experts confirm this conclusion.

The PC-OC would welcome the fact that such an instrument would criminalise the "pharmaceutical / health care crimes" and promote the most efficient ways of international judicial co-operation in this field.

Such an international legal instrument would be essential to combat, *inter alia*, illegally produced health-care goods which are available in a market. Ultimately, such an instrument would be instrumental in protecting the right to life enshrined in Article 2 of the ECHR.

PC-OC proposal to the CDPC:

The PC-OC is convinced of the need to envisage the **feasibility** of elaborating a legal instrument under the auspices of the Council of Europe to combat pharmaceutical/health-care crimes.

It suggests to the CDPC to invite the Committee of Ministers to request a feasibility study on the elaboration of such an instrument.

It also suggests to the CDPC that, in case of a positive decision on the preparation of any legal instrument, the PC-OC be associated in such process, in particular as it would relate to international co-operation in the criminal field. It notes that there is a need that the body to propose such an instrument should be of a multi-disciplinary nature.

The PC-OC underlines the link between counterfeiting and organised crime in general. In that context, due consideration should be given to existing works and instruments, such as the UN Convention against transnational organised crime, to fight this form of criminality.

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APPENDIX VII**DRAFT
Terms of Reference**

1. **Name of committee:** COMMITTEE OF EXPERTS ON THE OPERATION OF EUROPEAN CONVENTIONS ON CO-OPERATION IN CRIMINAL MATTERS (PC-OC)
2. **Type of committee:** Committee of Experts
3. **Source of terms of reference:** European Committee of Crime Problems (CDPC)
4. **Terms of reference:**

Under the authority of the European Committee of Crime Problems (CDPC), and in relation with the implementation of Project [2004/DG1/199](#) - Monitoring the operation of Conventions on Co-operation in the criminal field, of the Programme of Activities, the Committee is instructed to:

- i. review the operation of the conventions on international cooperation in criminal matters with a view to facilitating their practical implementation¹⁶;
- ii. consider various steps and initiatives to improve the efficiency of international co-operation in criminal matters, in particular through the elaboration of normative proposals for binding or non binding legal instruments and through other measures to improve practical co-operation;
- iii. follow developments in other international frameworks (e.g. United Nations, European Union) in the fields covered by these conventions and, where appropriate, propose measures likely to ensure their conformity with such developments;
- iv. follow the application of the European Convention on Human Rights with regard to international cooperation in criminal matters.

5. Composition of the Committee:**5.A. Members**

Governments of member states are entitled to appoint representatives in the field of criminal law and with the following qualifications: experience and/or expertise in the field of international co-operation in criminal matters.

The Council of Europe budget will bear the travel and subsistence expenses of one representative from each member State (two in the case of the State whose representative has been elected Chair).

5.B. Participants

- i. The following Committees may each send a representative to meetings of the

¹⁶ These conventions are i.a.: ETS nr. 24, 30, 51, 52, 70, 71, 73, 82, 86, 88, 97, 98, 99, 101, 112, 116, 119, 156, 167 and 182.

Committee, without the right to vote and at the charge of the corresponding CoE budget sub-heads:

- the Steering Committee for Human Rights (CDDH)
- the Consultative Council of European Prosecutors (CCPE)
- the European Commission for the Efficiency of Justice (CEPEJ)

5.C Other participants

- i. The European Commission, the Council of the European Union, [Eurojust and the European Judicial Network] may send representatives to meetings of the Committee without the right to vote or defrayal of expenses.
- ii. The states with observer status with the Council of Europe (Canada, Holy See, Japan, Mexico, United States of America) may send representatives to meetings of the Committee without the right to vote or defrayal of expenses.
- iii. The following intergovernmental organisations may send representatives to meetings of the Committee without the right to vote or defrayal of expenses:
 - United Nations Office for Drugs and Crime (UNODC)
 - United Nations Interregional Crime and Justice Research Institute (UNICRI)
 - United Nations High Commissioner for Human Rights (UNHCHR)
 - International Criminal Court (ICC)
 - International Criminal Tribunal for former-Yugoslavia (ICTY)

5.D. Observers

The following non-member state may send representatives to meetings of the Committee without the right to vote or defrayal of expenses:

Israel

6. Working Methods and Structures

The Committee may have recourse to consultants or scientific experts. It can organise hearings or exchange of views with external experts/personalities.

The Bureau of the Committee is composed of the Chair and 2 Vice-Chairs.

The Committee may set up a Drafting Committee to elaborate steps and initiatives to improve the efficiency of international co-operation in criminal matters mentioned under 4.ii.above. It would be composed of a maximum of 9 members.

The Committee will report to the CDPC.

7. Duration

These terms of reference will expire on 31/12/2008.