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EUROPEAN COMMITTEE ON CRIME PROBLEMS
(CDPC)

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

SUMMARY REPORT
of the 43rd meeting
Strasbourg, 24 – 26 September 2001

Secretariat Memorandum
prepared by the
Directorate General of Legal Affairs

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1. The PC-OC held its 43rd meeting from 24 to 26 September 2001 at the Council of Europe headquarters in Strasbourg. The Committee met under the chairmanship of Mr Knaapen (Netherlands).
2. The Bureau of the Committee is formed as follows:
 - Mr M. Knaapen (Netherlands), Chairman, elected in March 2000;
 - Mr M. Hatapka (Slovak Republic), 1st Vice-Chairman, elected for a 2nd term in September 2000;
 - Mr E. Selvaggi (Italy), 2nd Vice-Chairman, elected in March 2000.
3. The list of participants forms Appendix I to this report.
4. The Agenda of the meeting, as adopted by the Committee, forms Appendix II to this report.
5. The Committee worked on the basis in particular of the following:

(a) Conventions

ETS 24	European Convention on Extradition
ETS 30	European Convention on Mutual Assistance in Criminal Matters
ETS 51	European Convention on the Supervision of Conditionally Sentenced or Conditionally Released Offenders
ETS 70	European Convention on the International Validity of Criminal Judgments
ETS 112	Convention on the Transfer of Sentenced Persons

(b) Working papers

PC-OC (2001) OJ 2 REV	Draft Agenda
PC-OC (2001) 08	Summary Report of the 42 nd meeting
PC-OC Inf 5 Rev 2.	Guide to procedures, Convention on the transfer of sentenced persons
PC-OC (2001) 11	Explanatory note submitted by Mr Charles William Brooks (USA), Item 9 of the Draft Agenda, Transfer of sentenced persons: the Baraldini case
- Recommendation 1527 of the Parliamentary Assembly on the operation of the CoE Convention on the Transfer of Sentenced Persons	
- Doc. 9117 – Report by the Committee on Legal Affairs and Human Rights of the Parliamentary Assembly	
- Doc. 9137 –Opinion by the Committee on Social, Health and Family Affairs of the Parliamentary Assembly	
- Terms of Reference given to the PC-OC by the Committee of Ministers	
PC-OC (2000) 22	Report presented by Mr. Johan Berg, Norway, Transfer of sentenced persons: Undue Delays
PC-OC (2001) 03 Or.lang	Observations from Bulgaria, Sweden and Switzerland
PC-OC (2001) 12 Eng.Only	Items 8 of the Draft Agenda, Comments submitted by Mr Milos Hatapka, (Slovakia)
PC-OC (2000) 04 Rev 3 bil	Secretariat memorandum prepared by the Directorate General of Legal Affairs- Forms for requests for co-operation
PC-OC (2001) 01	Paper submitted by Mr M. Grotz (Germany), Practical difficulties arising out of the application of the Conventions European Convention on Mutual Assistance in Criminal Matters, Article 22
PC-OC (2001) 04	Paper submitted by Mr E. Selvaggi (Italy), Practical difficulties arising out of the application of the Conventions
PC-OC (2001) 05	Paper submitted by Mr E. Selvaggi (Italy) Practical difficulties arising out of the application of the Conventions, European Convention on Extradition (early release)
PC-OC (2000) 02	Secretariat Memorandum prepared by the Directorate General of Legal Affairs - Information on obstacles to ratification - Reasons for reservations, Difficulties with its application
PC-OC (2000) 28 Eng.only	Israel's Experience With Taking Evidence Abroad by means of Video-conferencing
PC-OC (2001) 13	Item 11 of the Draft Agenda - Practical difficulties arising out of the application of the Conventions: Secretariat memorandum
PC-OC (2001) 14	"Treaty-making in the Council of Europe" by Mr Jörg Polakiewicz, Council of Europe Publishing, 1999 - Item 12 of the

	Agenda - (Reservations to Conventions)
PC-OC (2001) 15	Comments on the Agenda, Submitted by Mr E. Selvaggi (Italy)
PC-OC (2001) 16	Submission by Mr. Séan Hugues (Ireland): The unconvicted mentally disordered offender who absconds to another jurisdiction
PC-OC (2001) 17	Comments submitted by Mr Marc Knaapen (Netherlands). Item 8 of the Draft Agenda Convention on the Transfer of Sentenced Persons, - Undue Delays -
PC-OC (2001) 18	Item 11 of the Draft Agenda - Practical difficulties arising out of the application of the Conventions: memorandum by Mr M. Hatapka
Consult/ICC (2001) Concl.	Second Consultation on the implications for Coe Member States of the Ratification of the Rome Statute of the International Criminal Court - Recourse to Interpol in the context of the European Convention on Mutual Assistance in Criminal Matters-Interim report submitted by the Interpol General Secretariat - Reservations and Declaration to STE 112 - (UN) Third report on reservations to treaties
PC-OC (2001) 19	Item 7 of the Agenda – Comments by Ms M. Skoczelas (Poland)
PC-OC (2001) 20	Item 11 of the Agenda - Practical difficulties arising out of the application of the Conventions: memorandum by Mr M. Knaapen (Netherlands)

(c) Information documents

The list of information documents available is published under the reference PC-OC / INF.

Adoption of the Agenda

6. The Committee adopted the Agenda, as it appears in Appendix II to this report.
7. The tragic events that the world had witnessed recently prevented the USA experts from participating in this meeting. The Secretariat therefore proposed and the Committee agreed to adjourn items, 5, 6 and 9 for discussion at its 44th meeting.
8. The Committee was informed that, on 19 September 2001, the Committee of Ministers adopted the 2nd Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters and decided that it will be opened to signature, in Strasbourg, on 8 November 2001, at the time of their next meeting at ministerial level.

Adoption of the report of the 42nd meeting

9. The Committee adopted the report of its 42nd meeting, as it appears in document PC-OC (2001) 08.

Transfer of Sentenced Persons: new Guide to Procedures

10. The Committee called on its members who have not yet done so to send in their contributions.

Transfer of Sentenced Persons: ad hoc arrangements

11. This item was adjourned.

Transfer of sentenced persons: difficulties with the USA in the application of the Convention

12. This item was adjourned. Experts were invited to make comments in writing ahead of the 44th meeting.

Documents:

PC-OC (2001) 19 Item 7 of the Agenda – Comments by Ms M. Skoczelas (Poland)

Transfer of Sentenced Persons: Assembly report and recommendations

13. On the basis of a Report (doc. 9117) adopted by its Committee on Legal Affairs and Human Rights, as well as an Opinion (doc. 9137) on that Report adopted by its Social, Health and Family Affairs Committee, the Parliamentary Assembly of the Council of Europe adopted, on 27 June 2001, Recommendation 1527 (2001) on the Operation of the Council of Europe Convention on the Transfer of Sentenced Persons.

14. At the 761st meeting (18 July 2001) of their Deputies, the Committee of Ministers addressed the following terms of reference to the PC-OC:

“To give an opinion on Parliamentary Assembly Recommendation 1527 (2001) on the operation of the Council of Europe Convention on the Transfer of Sentenced Persons and to submit it to the Committee of Ministers through the European Committee on Crime Problems (CDPC).”

The completion date of these terms of reference were fixed as follows: 31 March 2002

15. The Committee was therefore called upon to examine and act upon the terms of reference.

16. In general:

All experts welcomed the Assembly’s recommendations. Indeed most of the points raised by the Assembly had already been identified by the PC-OC which however had had neither the time nor the means to engage any action.

The expert from Sweden read out a declaration that was supported by a number of other experts:

- welcoming the Assembly's report
- in favour of drawing up recommendations – along the lines of Assembly Recommendation 1527 - on the interpretation and application of the Convention
- in particular, States should be recommended to “agree to transfers where the sentenced person would serve in total at least two thirds of his/her original sentence if transferred ...”
- not in favour of preparing a new additional protocol
- calling for a CoE statement stressing the importance attached to the Convention's goal of transferring persons for rehabilitative and humanitarian purposes
- in favour of the organisation of training seminars for practitioners
- calling for Parties to the Convention clearly to declare that the Convention is applicable to all mentally disordered persons.

Many thought that the transfer of mentally disordered persons required a new binding instrument.

Some said that a Protocol to the Convention might be necessary, in particular because at present there is no common interpretation of the Convention.

Also, there is no common stand on the application of the Convention which in some circumstances is used in order to bring nationals back home and in others is used to send foreigners back to their countries. Some questioned whether at all the Convention is used for common goals of crime policy by way of the rehabilitation of the sentenced person, coupled with common goals of justice by way of ensuring that sentences are carried out and thus justice made.

The issue was raised of the need for the CoE to have a clear policy in favour of the accession of non-member States to the Convention.

It was mentioned that provision should be made for the Convention to be applied concomitantly with the Extradition Convention.

17. Comments concerning individual points in the Recommendation:

Point 9 ii:

- the language could be improved, e.g. to relay the message that the CoE should examine favourably requests (from non-member States) to accede to the Convention.

Point 9 iii a :

- a, b, c and e are linked
- many experts thought that imposing time-limits was not a realistic approach;

Point 9 iii b:

- the Committee supported the view that the Convention is not primarily intended to be used for the immediate release of prisoners on return to their home countries
- the Convention is also used for the purpose of conditionally releasing in the administering State persons who, though otherwise eligible for parole in the sentencing State, could not be released in the latter State on account of their being aliens

Points 9 iii c and 9 iii e :

- according to some, Parties to the Convention should be urged not to refuse requests for transfer on the basis of the seriousness (or the nature) of the offence;
- others, can agree with these recommendations only if a minimum time of imprisonment is guaranteed by the administering State;
- hence the above-mentioned Swedish proposal designed to ensure that transferred sentenced person would serve in total at least two thirds of the original sentence;
- “two thirds” is an indicative figure that could be negotiated against either “one half” or “a reasonable share of the initial sentence”, or “a period of time compatible with the ends of justice”
- “one half” appears to some as more in line with the “conversion” system
- some are against any idea of a fixed yardstick
- another solution, arguably more flexible because not linked to any yardstick, would be to open the way to bilateral arrangements, as mentioned in previous meetings of the Committee
- bilateral arrangements are also more in line with present-day case-by-case negotiations
- moreover, fixed yardsticks lead to discrimination due to different sentencing practices
- even if it would be desirable to reach an equitable “balance” as a result of transfers, harmonising sentencing and penitentiary policies was not considered a reasonable avenue to follow
- the idea was launched of obtaining an “ex ante facto” final decision from the competent authority of the administering State as to the length of the sentence to be served
- another idea is that of introducing grounds for refusal based on the time that the person is to serve in prison in the administering State

Provisional conclusions concerning points 9 iii a, 9 iii b, 9 iii c and 9 iii e :

- the Assembly recommendations do not take into account the present advantages of the flexibility of the Convention
- the flexibility of the Convention is an advantage that must be kept
- the principle should be maintained according to which “the enforcement of the sentence shall be governed by the law of the administering State and that State alone shall be competent to take all appropriate decisions” (Article 9.3 of the Convention)
- the time has not come to harmonise national law
- fixed yardsticks is not an option for the time being, whilst one may pursue the reflection on a solution based on the idea of “a period of time compatible with the ends of justice”
- it should be made clear that requests for transfer should not be refused on the basis of the seriousness (or the nature) of the offence

Point 9 iii d:

- many think that conventional provisions on nationality are as flexible as they should be and see no problem in that respect
- nationality should not prevent the Convention from being applied where the three actors involved agree / consent to it

- it is not imperative that nationality leads to an automatic application of the Convention where the sentenced person, although formally a national of the administering State, in fact has no links with that State
- effective link with the administering State can be more important than the formal link of nationality, as suggested in recommendation 9 iii h
- guidelines could be sought for cases of double nationality
- States should not subordinate their decisions in these matters to reciprocity

Point 9 iii f:

- all agreed on the utmost importance and priority of this question, which nevertheless is a most difficult one, as shown by previous work done in this respect by the PC-OC
- a binding instrument now appears to be necessary, integrating a multidisciplinary approach
- the Committee therefore suggests that a multidisciplinary group of experts be set up in order to study this and connected questions [cf. e.g. doc. PC-OC (2001) 16] and make proposals
- some experts however thought that a pragmatic approach to this question would suffice, based on declarations made under Article 9.4 of the Convention.

Point 9 iii g:

- some experts indicate that it is their country's policy to block transfers because of outstanding fines; that is a problem only to the extent that fines may remain outstanding until the release of the person, when transfer is no longer an issue
- any recommendation in this field should therefore address the need to make provision for the conversion, at an early stage, of unpaid fines into a prison term; only thus fines will not hinder the transfer of sentenced persons under the Convention
- conversely, civil liabilities, including damages and court costs, should not block transfers, in particular where the sentencing State may have recourse to existing treaties that provide the necessary machinery to collect moneys abroad

Point 9 iii h:

- as suggested above with regard to the recommendation in point 9 iii d, most experts supported this point

Point 9 iii i:

- the Committee could not see how this recommendation could apply to the Convention proper since there can be no doubt about the consent of the person concerned being a "conditio sine qua non" for its application; should however this recommendation make reference to the Protocol, then it must be recalled that it is the very purpose of the latter to make provision for cases in which transfer may be effected without the consent of the person concerned

Point 9 iv:

- most experts thought that a new Protocol to the Convention was not necessary (save probably for the particular purpose of dealing with the transfer of mentally disturbed offenders) since the difficulties highlighted by the Assembly can be dealt with by way of Committee of Ministers recommendations, as well as domestic legislation

- some experts thought, on the contrary, that new unbinding recommendations would show in the future no more ability to entail change than those already adopted in the past (cf. Recommendations (88) 13 and (92) 18 of the Committee of Ministers to member States on the practical application of Convention ETS 112); a binding international instrument in the form of a new Protocol to the Convention was necessary, in particular, in order to regulate grounds for refusal and to allow for the transfer of the execution of fines
- the Secretariat expressed the view that the Convention, as it stands, has an important role to play which must be preserved, in particular that of being a “universal” instrument, open to countries all over the world, entailing little if any obligations and thus easily accessed to by most countries, allowing to solve a certain number of problems where circumstances are favourable; however, the Convention leaves too much space for arbitrary decisions of governments, contemplates no role for the judiciary and includes no machinery to deal with the interests at stake (namely the rehabilitation of the sentenced person and the ends of justice); therefore, it no longer meets the requirements of justice in the European area and hence the need for conventional binding rules in this respect applicable within the limits of the European area.

Point 9 v:

- the Committee supported this recommendation, while underlining the great volume of information on the Convention and its practical application already made available by it through the Secretariat.

18. Miscellaneous:

Because the terms in which the Assembly text is drafted call for a wide-range review of the Convention, the Secretariat raised two issues which could attract the Committee’s interest, namely:

- transfers financed by the sentencing State
- internationally run prisons or across-the-border prisons

19. The Committee tasked its Bureau with preparing a draft opinion for consideration at its next meeting.

Transfer of Sentenced Persons: undue delays

20. At its 40th meeting and upon a suggestion coming from the expert from Norway, the Committee decided to examine as soon as possible the question of undue delays in transfer procedures under the Convention.

21. At its 41st meeting, the Committee examined document PC-OC (2000) 22, prepared by Mr Johan Berg (Norway) and held a brief discussion on some of the points raised in that document.

22. The Committee then invited its members to
- (a) react in writing (short texts) to the suggestions made by Mr Berg in his document, and
 - (b) identify other issues that might contribute to delays and suggest solutions thereto (preferably in the style of Mr Berg's document).
23. At its 42nd meeting, having considered (a) that not many experts reacted to this point and (b) that its discussion required more time than that which was then available, the Committee adjourned this item.
24. Experts were reminded that their comments to Mr Berg's paper were expected. Written comments by the experts from Bulgaria, Sweden and Switzerland are to be found in document PC-OC (2001) 03.
25. Written comments by the experts from the Slovak Republic and the Netherlands are to be found in documents PC-OC (2001) 12 and PC-OC (2001) 17.
26. The Committee held an overall discussion on these matters to conclude as follows:
- it should be possible in humanitarian cases for the authorities in both countries concerned to cut corners in the procedure and very quickly proceed to the transfer of the person;
 - as soon as they enter the prison gates, even at pre-trial stage, inmates should be informed of their present or future right to request transfer; this will contribute to requests being filed at an early stage;
 - for that purpose the national sheets should be available and updated
 - national sheets of foreign countries should be distributed to prisons,
 - national sheets of one's country should be distributed to that country's embassies abroad
 - the awareness of prison authorities, local authorities and federated States' authorities with transfer possibilities must be increased;
 - it should be recommended that the information furnished by the sentencing State to the administering State under Article 4.3 already includes all or part of the documents listed in Article 6.2
 - also translations should be provided at an early stage
 - moreover, part of the information required by the administering State should be made available by the Secretariat in the web site of the CoE
 - the list of officials responsible should also be available at any time, preferably in a website, if the protection of the personal data of such officials is respected;
 - standard forms for acknowledgment of receipt of in-coming requests must be put into practice
 - avoid delays in carrying out the transfer once the decisions have been taken
 - dealing with the problem of the withdrawal of consent by the person concerned
 - fax transmission of requests and supporting documents should be provided for

Transfer of sentenced persons: the Baraldini case

27. This item was adjourned.

Documents:

PC-OC (2001) 11

Explanatory note

Forms for requests for co-operation

28. At its 39th meeting, the Committee asked the Secretariat to prepare proposals for examination at the next meeting. The Secretariat prepared a proposal in document PC-OC (2000) 4.

29. At its 41st meeting, the Committee examined a revised version of that document, i.e. document PC-OC (2000) 4 REV. A number of different comments were made

30. The Committee decided to pursue with the preparation of a cover sheet and to that end instructed the Secretariat to prepare a newly revised draft in the light of the Committee's discussions and subsequent comments. On that basis, the Secretariat prepared document PC-OC (2000) 4 REV 3.

31. At its 42nd meeting, because of shortage of time, the Committee decided to adjourn this item.

32. At its 43rd meeting the Committee examined and discussed document PC-OC (2000) 4 REV 3 and adopted a standard form as it appears in document PC-OC (2000) 4 REV 5.

33. The Committee tasked the Secretariat with distributing the standard form to all interest parties with a recommendation that they be used in every instance in which it might prove useful to do it. The understanding is that the Committee will have the possibility of changing the form at any time upon suggestions received from users.

Practical difficulties arising out of the application of the Conventions

34. Questions had been raised in writing by:

- Mr Grotz, in document PC-OC (2001) 1,
- Mrs Kohn (cf. Secretariat's circular letter of 8 November 2000) and
- Mr Selvaggi, in documents PC-OC (2001) 04 and PC-OC (2001) 05.
- two different sources in document PC-OC (2001) 13,
- Mr Seán Hugues in document PC-OC (2001) 16,
- Mr Milos Hatapka in document PC-OC (2001) 18.

35. Transfer of persons sentenced to an alternative to prison / ETS 112 / ETS 51

Under the Convention on the Transfer of Sentenced Persons, the basic condition for the transfer of persons is that they must be a national of the administering state.

However, there are Italian citizens who have been sentenced in Italy and request transfer to Germany where they live or work or frequently have family. These requests often relate to a specific alternative to prison provided for by Italian law which is to grant the prisoner the possibility of a suspended sentence with probation administered by the social services.

Provided that the prison sentence does not exceed three years, this measure makes it possible for prisoners to serve their sentence outside prison under the control of the social services. The social services supervise sentenced persons' behaviour, help them to overcome the problems of adapting to life in the community, and put them into contact with their family and other people with whom they have ties. They also submit a regular report to the judge on the person's behaviour. If the probation period produces positive results, the sentence and any other effects of the penalties are revoked.

Questions:

- under German law, can a long-term foreign resident be equated with a German citizen for the aforementioned purposes?
- is it at all possible for Italian citizens, ordinarily residing in Germany and sentenced by an Italian court, to serve their sentence in Germany under the aforementioned conditions?

Some experts thought that the European Convention on the Supervision of Conditionally Sentenced or Conditionally Released Offenders would not apply under the circumstances because the persons concerned were neither conditionally sentenced nor conditionally released: they were carrying out a prison sentence by alternative means.

Others thought on the contrary that the facts mentioned, regardless of their qualification under domestic procedural law, amount to the circumstances that the Supervision Convention purports to cover and hence the latter is applicable.

36. Transfer of sentenced persons

The ER to the Convention on the Transfer of Sentenced Persons states in paragraph 13 that the Convention applies "[..] regardless of whether the person concerned is already serving his sentence or not."

A case occurred where an offender had been sentenced in State A, but moved home to State B before having served his sentence. Because the sentenced person wanted to be able to go back to State A for visits without fearing imprisonment, he applied for the sentence to be served in State B. The authorities of State A applied to the authorities of State B for a transfer of the execution of the sentence, and referred to paragraph 13 of the ER.

The authorities of State B replied that the Transfer Convention did not apply under the circumstances and suggested using the European Convention on the International Validity of Criminal Judgements.

It appears from the discussion that the above-mentioned phrase from the Convention's ER does not find support in practice and thus indeed the Transfer Convention would usually be considered not to be applicable under the circumstances described.

37. Transfer of sentenced persons / Article 9.1

It was brought to the attention of the Committee that certain sentencing States require from the administering State *specifically* continued enforcement under Art. 10 of the Convention, even where the administering State as a rule applies the conversion of the sentence under Article 11.

Article 9 has been understood to provide an alternative to the administering State, not to the sentencing State. The question therefore is whether the sentencing State must accept the choice of the administering State in applying either continued enforcement or the conversion of a sentence.

It was said that there are advantages for States to be ready to use one system or the other depending on what is required by the sentencing State. While there is no obligation to do it, there might be a practical advantage in so doing because otherwise certain transfers will just not be possible.

It was noted that the ability to use the conversion system was particularly useful where extradition (of nationals) coupled with transfer was used.

38. Transfer of sentenced persons

The Committee appeared to endorse the idea that the Convention provides a procedural framework for carrying out a sentence imposed on a person by a court of any Party in the process of legitimate exercise of its criminal jurisdiction. Thus, where a Party would exercise criminal jurisdiction that is not authorised by, or permitted under, or in conformity with general international law, the Convention would not apply.

39. Transfer of sentenced persons

The Committee also appeared to endorse the idea that the Convention does not preclude the possibility of transferring a person who has been sentenced by a Party on a territory other than its own, where that Party is exercising criminal jurisdiction recognised by a treaty.

40. Transfer of sentenced persons / unconvicted mentally disordered offender who absconds to another jurisdiction

The issue: Where an offender who has not been convicted but who is being detained in a mental hospital absconds and flees to another jurisdiction, what can or should be done by the authorities in the two jurisdictions?

The legislative background: Under Irish law at present a special verdict of “guilty but insane” may be returned (proposed new legislation will provide that henceforth this will be called “not guilty by reason of insanity”); such a verdict is one of acquittal but the relevant statute requires that the former accused be detained until such time as the authorities are satisfied that it is safe to release the person. The new legislation will also introduce a new plea of “guilty with diminished responsibility” in case of murder. The introduction of the new partial defence of diminished responsibility is likely to result in a decrease in the number of pleas of insanity, the expectation being that accused persons will prefer to plead diminished responsibility. However, the difficulty

which has arisen in the case described below could continue to arise. We would like to explore with other delegations what might be done to avoid a repetition of what happened in this case.

The case: In July 1989 a jury in the Central Criminal Court returned a verdict of “guilty but insane” against a person charged with two counts of murder and the Court ordered that the person be detained in the Central Mental Hospital (which caters specifically for such people). Beginning in 1991 the person’s detention was reviewed on six occasions by independent advisory committees each consisting of a senior counsel, consultant psychiatrist and a general medical practitioner.

Following such a review in May 1999 a revised parole programme incorporating a phased increase in work parole, group outings and both accompanied and unaccompanied outings was put in place. The programme was designed to provide objective evidence as to whether or not the person concerned continued to be a risk by reason of his continued mental disorder.

In July 2000 the person failed to return to the hospital from a period of temporary release granted as part of the programme of phased releases as recommended by the advisory committee. The person was deemed to be unlawfully at large and the Garda Síochána (police) were requested to search for and return him to the hospital. They, in turn, sought the assistance of the police authorities in other jurisdictions, including the United Kingdom, where he was apprehended shortly afterwards. However, the person was subsequently released by the UK authorities following an examination by UK psychiatrists who found that he did not suffer from a psychiatric condition warranting his detention under English law.

The person could not be returned compulsorily to Ireland as the relevant extradition legislation allows only for warrants for the extradition of accused or convicted persons and the person concerned did not fall into either category. In failing to return from temporary release the person did commit an offence, an offence of being unlawfully at large. However, this is a summary offence only and the relevant legislation allows the extradition procedure for a summary offence to proceed only where a summons has been served personally on the defendant at least 14 days before the Court hearing; this is not a practical proposition where a person is intent on fleeing from the authorities.

The Committee appeared to agree that a solution could not be found in the existing arrangements for the transfer of sentenced persons. As mentioned above, arrangements for the transfer of persons under mental health provisions do not meet present needs.

However, certain experts thought that the EU extradition treaty would apply under the circumstances described. It was less clear whether the European Convention on Extradition would apply or not.

41. Transfer of sentenced persons / Additional Protocol

Switzerland has recently signed Protocol ETS 167. With a view to its ratification, the question was raised in respect of Article 3 (sentenced persons subject to an expulsion or deportation order) whether or not the sentenced person should be granted a right of appeal against the decision “forcefully” to transfer him to his country of origin.

The same question may be raised in respect of Article 2 (persons having fled from the sentencing State).

It appears that many States that have ratified the Protocol, or are in the process of so doing so, recognise the right of the sentenced person to appeal against (or otherwise oppose) the transfer decision.

42. Mutual Assistance / safe conduct / Article 12

The question was raised whether the domestic legislation of States in any way makes provision for persons who are in a foreign country and appear (as witnesses, experts, or accused) on a summons before the judicial authorities of a country, to enjoy immunity in respect of civil litigation conducted against that person for acts or deeds anterior to his departure from the country where he was. Accessorily, whether introducing such a provision in a treaty (bilateral or multilateral) might be an option, either now or in the future.

These questions can be seen in the perspective of an extension of the scope of safe conduct under Article 12, paragraphs 1 and/or 2, of the European Convention on Mutual Assistance in Criminal Matters.

The Committee thought that the right perspective in respect of privileges, if any, concerning civil litigation is not one of immunity or safe conduct under national or international criminal law. Thus introducing provisions going that way was not in the agenda.

It was underlined that video-links contributed to avoiding such difficulties.

43. Mutual assistance / authorities empowered to request assistance

The issue:

In a number of middle and eastern European countries, the police have far-reaching powers while carrying out a criminal investigation. During the investigation phase, the police are often empowered to operate independently in the performance of investigative acts. The judicial authorities are not involved with the investigation itself and only become involved when an investigation has been concluded for the purpose of bringing the case to court.

In a number of western European countries, including the Netherlands, a criminal investigation takes place under the auspices of the judicial authorities. In the Netherlands, the police are responsible for carrying out a criminal investigation, but need the permission of the Public Prosecution Service if they wish to perform certain investigative acts during such an investigation. These acts include the use of coercion and other special investigation methods such as surveillance or infiltration.

This inconsistency in the powers of the police gives rise to the following problem. A request from a foreign police authority in which, for instance, the use of a means of coercion is requested during the course of an investigation is treated in the Netherlands as a judicial request for legal assistance because the permission of the Dutch judicial authorities is needed in order to comply with the request. A judicial request for assistance is usually made on the basis of the 1959 European Convention on Mutual Assistance in Criminal Matters. The terms of this Convention specify that a judicial request for assistance should be submitted by a judicial authority. In a statement regarding Article 24 of the Convention the member states have made a declaration to define which authorities they deem "judicial authorities" for the purposes of Article 24. As a result of the specific powers given to the police authorities, some countries (for example Denmark and Latvia), also consider police authorities to be authorised judicial authorities in the declaration. In other countries, the 'police' requests are dealt with by a specially designated judicial authority (for example, Legal Counsel in the United Kingdom). Judicial collaboration under the terms of the Convention on Mutual Assistance is therefore possible in both these ways.

Other countries, however, argue that in the requesting country, the competent body in terms of investigative acts is not the judicial authorities, but the police. Such a request is viewed in these countries as a request for police collaboration, and can therefore only be made by a police authority.

Question:

What experience do other member countries have in this respect and where should the solution to this problem be sought?

Possible areas in which the solution could lie:

1. The Convention on Mutual Assistance in Criminal Matters is not applicable; the request is not viewed as a request under the Convention and therefore does not have to be issued by a judicial authority. This could, however, possibly rule out many forms of co-operation.
2. The member countries concerned designate the police authorities as "judicial authorities" within the meaning of Article 24 of the Convention.
3. Competent police authorities send their requests via a specially designated (judicial) authority. This authority should then be designated "judicial authority" for the purposes of the Convention.

The discussion:

In some countries only Courts and Public Prosecution are entitled to issue requests for assistance. With respect to such countries, any request issued by a police authority must be refused by the requested State.

In other countries, police authorities are entitled to issue requests. In such cases it is indispensable that a formal declaration to that effect be made under Article 24 of the Convention.

In some cases, where requests are issued by the police, the question arises of determining which authority takes responsibility for obligations resulting from the request being granted. A typical such case occurs with requests concerning controlled deliveries. Some think that a judicial authority should also stand behind the requesting and/or the executing police authority. The question remains of distinguishing the cases where the term "judicial authority" is used in its proper sense from the cases in which it is used in the sense given to it by declarations entered by States. In the latter cases, a police authority may be a judicial authority.

It appears that the borders between judicial and police co-operation are not always clear. For example, some see the 2nd Additional Protocol as an unhappy development consisting of introducing police co-operation into the framework of the Convention on Mutual Legal Assistance. Others however welcome that same development, considering it rather as a method of controlling police activities by judicial authorities.

Another example of border uncleariness results from the above-mentioned practice that consists in States declaring that authorities which are clearly police authorities must be considered judicial authorities for the purposes of the Convention.

44. Extradition / early release

Where a person has been extradited from State A to State B, the person may be granted early released in State B on account of his good behaviour in prison. The problem is that, according to Italian law, the Court empowered to decide on early release is under a duty to assess the person's behaviour in prison, including the period during which the person was detained for extradition purposes.

However, many countries do not keep a record of the detainee's behaviour during extradition arrest. The question therefore is whether a solution could be found to meet this difficulty.

It appears that no solution emerges other than empowering the Court deciding on the early release of an extradited person to presume good behaviour during extradition arrest where information to the contrary is not available.

45. International Validity of Criminal Judgments

The discussion showed that the European Convention on the International Validity of Criminal Judgments is being used by a number of States, in particular for the purpose of transferring sentenced persons.

46. Reminder: a question raised in document PC-OC (2001) 15 remains to be discussed at the next meeting of the Committee.

Reservations to the Conventions

(a)

47. At its 41st meeting, the Committee had observed that reservations to Conventions, both reservations entered in the past and reservations entered at present by States that become a Party to one or another of the Conventions in the penal field, often require clarification. The Committee agreed that it would be appropriate for it, as a matter of routine, to examine and discuss reservations, as appropriate.

48. At its 43rd meeting, the Committee was presented with the following working papers:
- memorandum “Treaty-making in the Council of Europe”(PC-OC (2001) 14);
 - an extract from the third report on reservations to treaties, by the International Law Commission.
49. After having examined the difference between reservations and declarations, the Committee briefly looked into reservations entered in respect of the Convention on the Transfer of Sentenced Persons, on the basis of document PC-OC (2000) 2.
50. The Committee examined in particular the question of the withdrawal of reservations. It noted that often reservations were imposed by the domestic legislator (usually the Parliament) and therefore could not be lifted without its consent. The procedure in order to achieve such a result was usually cumbersome and long, save where the opportunity of a change in domestic legislation or the adoption of new international treaties is used to that effect. Participants were thus invited to explore the possibilities to that effect in their respective countries, for example, at the time of consideration of the Protocol to Convention ETS 112 or the 2nd Additional Protocol to ETS 30.
51. The Committee decided to pursue this matter at its next meeting.
- (b)
52. At its 38th meeting, questions had been raised with respect to the following reservation made by Bulgaria to Article 12 of the Extradition Convention:
- “The Republic of Bulgaria declares its right to require that the requesting party submit evidence that the offence was committed by the person whose extradition is requested. If it considers the evidence submitted to be inadequate, it may refuse extradition.”*
53. The Committee then asked the Secretariat to contact the Bulgarian authorities in order to sound out the chances that this reservation be changed in the near future.
54. The Secretariat reported now with pleasure that the Bulgarian authorities had withdrawn the reservation with effect from 13 June 2001.

Information on co-operation in criminal matters between

- **the Members of the European Union**
- **other**

55. The PC-OC was informed by Mme Nina Galle (Belgium) of the latest developments in co-operation in criminal matters between the Members of the European Union.

Information about work being carried out in the Council of Europe with interest to the PC-OC

56. The Secretariat informed the Committee about on-going work concerning:
- Protocol to the Money Laundering Convention;
 - Data protection in international co-operation in criminal matters;
 - Cyber crime;
 - Conference of Prosecutors General of Europe;

- Reflection on a New Start in international co-operation in criminal matters;
 - International Criminal Court

Israel's experience with taking evidence abroad by means of video-conferencing

57. The expert from Israel briefed the Committee on this point (cf. doc. PC-OC (2000) 28).

Future work

58. At its 41st meeting, several topics for future work were mentioned, in particular:

- (a) reservations (cf. item 12 above);
- (b) as soon as the 2nd Additional Protocol will have been finalised, consideration should be given to recommendations on its practical application, in particular in respect of matters such as costs, joint investigation teams, etc;
- (c) work could also be done that might assist with the co-operation between States of different cultural and legal tradition, in particular in the Mediterranean area;
- (d) work could also be carried out in order to find ways and means of easing co-operation between States where there is great disparity between sentences applied for comparable offences.

59. The Secretariat recalled that the CDPC has instructed the PC-OC to consider the idea of a simplified extradition procedure as soon as it starts working on a 3rd additional protocol to the European Extradition Convention.

60. The Committee entrusted its Bureau with preparing a list of issues that should be included in a new draft Recommendation on the practical application of the European Convention on Mutual Assistance and its Protocols (notably the 2nd Protocol).

61. The Committee underlines the importance and urgency for practitioners to have access to a website containing all or most of the information presently contained in the 'INF' documents that the Secretariat prepares and distributes. It strongly urged the Secretariat urgently to build the required website.

Miscellaneous

62. At the request of Interpol, an interim report prepared on the basis of replies to a questionnaire on the use of Interpol for the communication of requests for assistance, was made available to the Committee.

Dates of next meetings

63. The Committee agreed on the following dates for its next meetings:

25 – 27 February 2002 and 23 – 25 September 2002

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* * * *

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APPENDIX II / ANNEXE II**AGENDA**

- 1. Opening of the meeting**
- 2. Adoption of the Agenda**
- 3. Adoption of the report of the previous meeting**
- 4. Transfer of Sentenced Persons: new Guide to Procedures**
- 5. Transfer of Sentenced Persons: ad hoc arrangements**
- 6. Transfer of sentenced persons: difficulties with the USA in the application of the Convention**
- 7. Transfer of Sentenced Persons: Assembly report and recommendations**
- 8. Transfer of Sentenced Persons: undue delays**
- 9. Transfer of Sentenced Persons: the Baraldini case**
- 10. Forms for requests for co-operation**
- 11. Practical difficulties arising out of the application of the Conventions**
- 12. Reservations to the Conventions**
- 13. Information on co-operation in criminal matters between**
 - the Members of the European Union**
 - other**
- 14. Information about work being carried out in the Council of Europe with interest to the PC-OC**
- 15. Israel's experience with taking evidence abroad by means of video-conferencing**
- 16. Future work**
- 17. Miscellaneous**
- 18. Dates of next meetings**