

Strasbourg, 28 March 2002  
[PC-OC\Docs 2002\05E – Report 44]

PC-OC (2002) 05

**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 44<sup>th</sup> meeting  
Strasbourg, 25 – 27 February 2002**

Secretariat memorandum  
prepared by the  
Directorate General of Legal Affairs

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1. The PC-OC held its 44<sup>th</sup> meeting from 25 to 27 February 2002 at the Council of Europe headquarters in Strasbourg. The Committee met under the chairmanship of Mr M. Knaapen (Netherlands).
2. Following the election, at the beginning of the meeting, of MM Knaapen and Selvaggi for renewed terms of office, the Bureau of the Committee remains formed as follows:
  - Mr M. Knaapen (Netherlands), Chairman elected for a 2<sup>nd</sup> term in February 2002;
  - Mr M. Hatapka (Slovak Republic), 1<sup>st</sup> Vice-Chairman, elected for a 2<sup>nd</sup> term in September 2000;
  - Mr E. Selvaggi (Italy), 2<sup>nd</sup> Vice-Chairman, elected for a 2<sup>nd</sup> term in February 2002.
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 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)21	Summary Report of the 43rd meeting
PC-OC (2001)22 bil	Standard form for Acknowledgement of receipt of in-coming requests / cover sheet for out-going requests
PC-OC (2001)23	Summary Report of the meeting of the Bureau, Strasbourg, 14 December 2001
PC-OC (2001)20	Comments by Mr. Knaapen, Netherlands
PC-OC (2001)19Fr.only	Commentaires soumis par Mme Malgorzata Skoczelas (Pologne) – Aff. Pietrzak

Terms of Reference+Recommendation 1527+Report 9117+Opinion 9137

Chart of signatures and ratifications Convention ETS 182

Text of all declarations and reservations to Conventions ETS 30, 99 and 182

Report of 1<sup>st</sup> meeting, Multidisciplinary Group on International Action against terrorism

PC-OC (2002) OJ 1BIL.	Draft Agenda
PC-OC (2002)01	Questions by the Slovak representative, Mr Milos Hatapka
PC-OC (2002) 02 Fr. Only	Document soumis par M.Florin Răzvan RADU, (Roumanie)
PC-OC / INF 6	The list of <u>officials responsible</u> for the practical application of Conventions ETS 24 (Extradition), ETS 30 (Mutual Assistance) and ETS 112 (Transfer of Sentenced Persons);
PC-OC / INF 47	<u>ROMANIA/ROUMANIE</u> : Extradition Act of 7 June 2001 Loi du 7 juin 2001 sur l'extradition/Loi sur l'extradition
PC-OC / INF 48	<u>ROMANIA</u> : Mutual legal assistance Act of 3 December 2001 [Engl. only]
PC-OC / INF 49	<u>ROMANIA</u> : Act on the transfer of sentenced persons, of 27 December 2001 [Engl. only]
PC-OC / INF 50	<u>ISRAEL</u> : Amendment on extradition law
PC-OC / INF 51	<u>ISRAEL</u> : Israel's Prima Facie evidence requirements under the European Convention on extradition – A practical guide
PC-OC / INF 52	<u>ISRAEL</u> : Israel's experience with taking evidence abroad by means of video-conferencing

**(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. While acknowledging that membership of the Committee actually changed from one meeting to another and reference could not always be made to new members and those who left, the Chairman underlined that two members had in the last weeks left the Committee after having served it for over a decade. He thought it appropriate to thank MM Cenk Alp Durak and Michael Grotz, on behalf of the Committee, for their long, active and so much positive contribution to the PC-OC, as well as the messages that they kindly addressed to the Committee. He wished them all the best in their new activities.

8. On 21 February 2002, the Group on International Action against Terrorism forwarded written questions to the PC-OC. The Committee accepted to include the point in the agenda of this meeting.

**Adoption of the report of the 43<sup>rd</sup> meeting**

9. The Committee adopted the report of its 43<sup>rd</sup> meeting, as it appears in document PC-OC (2001) 21.

**Transfer of Sentenced Persons: hearing of a delegation from the “European Group for Prisoners Abroad”**

10. At their request, the Committee heard a delegation from the “European Group for Prisoners Abroad” and exchanged views with its members on Assembly Recommendation 1527 (2001). Their presentation appears in document PC-OC (2002)06.

**Transfer of Sentenced Persons: adoption of an opinion on Assembly Recommendation 1527 (2001)**

11. The Committee (43<sup>rd</sup> meeting) tasked its Bureau with preparing a draft opinion on the Assembly text. At its meeting on 14 December 2001, the Bureau adopted a draft opinion that was distributed to the Committee [doc PC-OC (2001) 23].

On the basis of that document and having taken into consideration the opinion expressed by the “European Group for Prisoners Abroad”, the Committee adopted the opinion that is reproduced in Appendix III and decided to submit it to the Committee of Ministers through the CDPC.

12. In the course of the discussion, it emerged that point 9 ii of the Assembly text, where the Committee of Ministers is recommended to encourage those non-member states which have not yet done so, particularly those in which prison conditions are recognised as poor, to accede to the convention, gave rise to controversy, as follows.

The discussion was very much centred on the expression “like-minded States”.

The starting point appears in para 51 of the Explanatory memorandum to Recommendation 1527(2001):

*“given global trends towards an increase in foreign prison population, there are likely to be more and more of these prisoners in the future. The Council of Europe should seek to extend the reach of the transfer Convention to as many of these prisoners as possible”.*

To that effect, “the Council of Europe should identify like-minded States and actively encourage them to accede to the transfer Convention”(para 52).

The explanatory memorandum reads that “the transfer Convention does not carry the word “European” in its title. According to the explanatory Report, this reflects the draftsmen’s opinion that the instrument should be open also to like-minded democratic States outside Europe”.

The draft Recommendation also used “like-minded states”.

The text approved by the Parliamentary Assembly recommends that the Committee of Ministers

*“actively encourage those non-members States which have not yet done so, particularly those in which prison conditions are recognized as poor, to accede to the Convention”.*

The Report of the meeting of the Bureau of the PC-OC (doc. PC-OC (2001) 23) reads (page 8) that *“the Committee follows the view that the Convention should not be opened to any non –member State, but only to like-minded States. Such States should be identified and encouraged to accede to the Convention; other States should not”.*

The main reason why we want more States, also non-members, to accede to the Convention is that we want our citizens who are detained in such countries, to come home to serve their sentence. To that extent it does not seem that the expression “like-minded states” is consistent with the goal we want to achieve, because the more the prison conditions are poor - but also the more sentencing states are not “like-minded” - the more there is a need for making it possible for sentenced persons to return to their countries, for humanitarian reasons and in order to cope with the goal (one of the goals) of the Convention, which is rehabilitation and reinsertion.

“Like-minded States” seems to be a label with nothing clear and specific behind it.

Actually, the issue we are now discussing can be looked at with two different perspectives: the first one is the perspective of the (future, administering State (we want our citizens back); the other one is the perspective from the side of the sentencing State. As to the latter aspect, the point was made that the consent of the sentenced person - who might desire to go to his/her country even if the prison conditions are worse than in the sentencing State – removed any obstacle to the sentencing State agreeing to the persons being transferred to a non-like-minded State.

Nevertheless some problems might still remain, because there could be, at least in theory, the possibility to expose the sentenced person to a degrading or inhuman treatment in the meaning of Article 3 of the ECHR.

Because it is up to the Council of Europe, through its competent bodies, to check the consistency of the legal system and the prison conditions of applicant non-member states, and because that is also a political issue which is exclusively under the competence of Council of Europe for evaluation, it would be wise to delete the phrase “particularly those in which prison conditions are recognized as poor” that appears in 9ii.

And it should be added that the goal that should be achieved is to make the applicability of ETS 112 as large as possible, taking into account that the interest of present Parties to the Convention is to have the possibility to have their citizens coming back, in particular where the prison conditions in the sentencing states are poor and where there is a significant gap between member and non-member states as far as fundamental principles (rights) or even culture are concerned.

13. The Secretariat informed the Committee about the situation concerning States that have shown interest in acceding to the Convention, as follows:

- Australia, Japan, Venezuela, and Yugoslavia have been invited to accede, but have not yet done so;
- the following States have expressed interest without ever making a formal request for accession :
  - Belarus (1996);
  - Bolivia (2001);
  - Dominican Republic (1986);
  - Kazakhstan (2002)
  - Mexico (1996);
  - New Zealand (1982);
  - Philippines (2001);
  - South Africa (1997);
  - Thailand (1983).
- Colombia made a formal request in 1986, but in the light of opposition in the Committee of Ministers suspended the procedure in October 1987. It has never been taken up again.

13A. It was suggested that CoE countries, who are thinking of negotiating bilateral treaties with countries who are signatories of the OAS Convention (Organisation of American States) may wish instead to accede to the OAS Convention. However, it remains uncertain whether non OAS countries can join that Convention. The answer is being sought and further information in this respect will be forthcoming.

### **Transfer of Sentenced Persons: ad hoc arrangements**

14. Most experts expressed the view that the Convention was there to be applied as it is and not by way of exceptional methods negotiated case by case under ad hoc arrangements, perhaps derogating on basic principles of the Convention.

15. Some, while agreeing with the general principle, however thought that the possibility, especially in difficult cases, to enter into ad hoc arrangements should not entirely be set aside.

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

16. A certain number of difficulties were mentioned [in writing, cf. document PC-OC (2001) 19]. They concern:

- end term of indeterminate sentences passed in the USA
- end term of juvenile sentences passed in the USA
- high rate of refusals
- State prisoners, as opposed to federal prisoners
- refusals at the final stage of the transfer procedure

17. The experts from the USA explained the constraints resulting from their federal system of government. The Federal Government is actively seeking to encourage States to participate in the conventional system and adopt uniform procedures. Four States have yet to pass enabling legislation, namely Georgia, North Carolina, Delaware and West Virginia. The Attorney General and the Secretary of State addressed a joint letter to all States in that respect.. A training session for States is planned to be organised in Washington in June next.

18. The Federal Department of Justice is ready to assist in the communications between Parties to the Convention and individual American States. It privileges contacts via e-mail. However, the USA also encourages Parties to entertain relations directly with State authorities, for example via their consular representatives. Moreover, the USA favour the organisation of a seminar bringing together individual American States, the Federal authorities, the Parties to the Convention and the CoE Secretariat in order to clarify the different aspects of their mutual relations within the framework of the Convention. However, the United States expressed concern about the ability to obtain the participation of many of the states because of the costs involved in attendance especially since many states will be participating in the June 2002 training seminar in Washington, D.C. As an alternative the United States suggested that the parties to the Convention participate in the June 2002 training seminar. The United States believes that the concerns of the parties to the Convention could be addressed by such participation.

**Mutual Assistance in Criminal Matters: preparation of recommendations on the practical application of the European Convention and its Protocols**

19. At its 43<sup>rd</sup> meeting, 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 2<sup>nd</sup> Protocol) – cf. para 60 of document PC-OC (2001) 21.

20. The Bureau thought that while a number of items lend themselves to be the subject of a recommendation, others will more appropriately be treated within the Manual on mutual assistance in criminal matters (cf. doc. PC-OC / INF 9). Accordingly, it dressed up two lists of items, as follows:

List of items that lend themselves to be the subject of a **recommendation** (with reference to the Articles of the 2<sup>nd</sup> Protocol) :

Article 2 (arrangements and costs)  
 Articles 3, 13, 14 and 23 (matters in common)  
 Article 5 (new wording of Article 20.1.c. of the Convention)  
 Article 5 (new wording of Article 20.3. of the Convention)  
 Article 6  
 Article 8  
 Article 9 (cf. list of requirements adopted by the ITFY)  
 Article 10  
 Article 16 (report)  
 Article 20  
 Article 33  
 Legal aid

List of items that lend themselves to be the subject of an entry in the **Manual** (with reference to the Articles of the 2<sup>nd</sup> Protocol) :

Article 1.3  
 Article 4  
 Article 15  
 Article 17  
 Article 18  
 Article 19  
 Article 21  
 Article 22  
 Article 24

21. The Committee examined the first list and agreed with it. It requested its members to forward to the Secretariat, by 4 May 2002, their views as to what should be recommended with respect to each point. The Secretariat, on that basis, should prepare a draft text for examination at the next meeting.

### **Mutual Assistance in Criminal Matters: reservations entered with respect to the European Convention and its Protocols**

22. The experts from Estonia, Ireland, Slovakia and Russia informed that their authorities are, or will soon be, reviewing their reservations to the MLA Convention, some within the framework of their preparation to ratify Protocol 2.
23. The Committee decided to ask its Bureau to prepare a list of issues related to existing reservations to the MLA Convention, that arise difficulties, for discussion at its next meeting.

### **Practical difficulties arising out of the application of the Conventions**

#### Mutual assistance (Article 5 of ETS 30)

24. In the context of accession to the EU negotiations it was pointed out to the Slovak Republic that it was expected to withdraw its declarations/reservations under Article 5.1 of the European Convention ETS 30, the reason being an alleged incompatibility with the EU 2000 Convention. The expert from the Slovak Republic sought the opinion of his colleagues from EU member States on that point.

25. It was pointed out that a number of EU member States have entered declarations/reservations under Article 5.1 of the European Convention ETS 30 which are similar to those entered by the Slovak Republic. The general opinion was that the alleged incompatibility was not justified.

#### Mutual assistance (Article 25 of ETS 182)

26. The question was raised of whether Article 25 of the 2<sup>nd</sup> Additional Protocol to the Mutual Assistance Convention applied to information which, according to the law of the requesting Party, was classified, e.g. for reasons of national security, or, alternatively whether it applied exclusively to information which is confidential for reasons of the criminal proceedings.

27. The Committee followed the view that Article 25 applies to all information which is classified in the requesting State.

### **Dissemination of information of interest to practitioners of international co-operation in criminal matters: web site**

28. The Secretariat informed the Committee that the web site containing most of the information presently available in the information documents should soon be operational.

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

29. Mr Alexander Patijn, Chairman of the Working Party on Data Protection and police And Judicial Data in Criminal Matters (CJ-PD/GT-PJ), kindly appeared before the PC-OC to report on the progress of their work. His Party continues consideration of the impact of data protection principles on judicial co-operation in criminal matters and prepares a set of common principles in this matter.



**Group for International Action against Terrorism: examination of the report of its 1<sup>st</sup> meeting**

30. The Committee was informed of the creation of a Group for International Action against Terrorism. The report of the 1<sup>st</sup> meeting of the new group, as well as other documentation selected by its Secretariat, were made available to the Committee.

31. Ms G Kabelka (Austria), who by chance is also a member of the new group, kindly reported to the Committee on the activities of the former.

32. The Committee asked Mr Ö Landelius (Sweden) to represent it in the Group for International Action against Terrorism. Mr Landelius accepted.

**Group for International Action against Terrorism: questions forwarded to the Committee**

33. After having heard the Secretariat of the Group on International Action against Terrorism, the Committee examined and discussed the questions that were put to it by that Group. The Group invited its Chairman to prepare, on the basis of the discussions in the Committee, a draft reply which the Secretariat should then circulate to all members for comments. A final reply should be forwarded to the Group on International Action against Terrorism by 31 March 2002 (dates indicated by the Secretariat of the group). It will in due time be appended to this report (Appendix IV).

**Information on co-operation in criminal matters between**  
 - **the Members of the European Union**  
 - **other**

34. Because of shortage of time, this point was not taken.

**Miscellaneous**

**Dates of next meetings**

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

30 September – 2 October 2002

24 – 26 February 2003

**APPENDIX I / ANNEXE I**

**LIST OF PARTICIPANTS / LISTE DES PARTICIPANTS**

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Apologised / Excusé

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Apologised / Excusé

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**APPENDIX II / ANNEXE II****AGENDA**

- 1. Opening of the meeting**
- 2. Election of the Chair and one Vice-Chair**
- 3. Adoption of the Agenda**
- 4. Adoption of the report of the previous meeting**
- 5. Transfer of Sentenced Persons: hearing of a delegation from the “European Group for Prisoners Abroad”**
- 6. Transfer of Sentenced Persons: adoption of an opinion on Assembly Recommendation 1527 (2001)**
- 7. Transfer of Sentenced Persons: ad hoc arrangements**
- 8. Transfer of sentenced persons: difficulties with the USA in the application of the Convention**
- 9. Mutual Assistance in Criminal Matters: preparation of recommendations on the practical application of the European Convention and its Protocols**
- 10. Mutual Assistance in Criminal Matters: reservations entered with respect to the European Convention and its Protocols**
- 11. Practical difficulties arising out of the application of the Conventions**
- 12. Dissemination of information of interest to practitioners of international co-operation in criminal matters: web site**
- 13. Information about work being carried out in the Council of Europe with interest to the PC-OC**
- 14. Group for International Action against Terrorism: examination of the report of its 1<sup>st</sup> meeting**
- 15. Group for International Action against Terrorism: questions forwarded to the Committee**
- 16. Information on co-operation in criminal matters between**
  - the Members of the European Union**
  - other**
- 17. Miscellaneous**
- 18. Dates of next meetings**

## APPENDIX III / ANNEXE III

### OPINION

At the 761<sup>st</sup> 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 on: 31 March 2002

#### **Introduction**

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.

The Committee of Experts on the Operation of European Conventions in the Penal Field (PC-OC) carefully examined the above mentioned papers. Having discussed the issues at its 43<sup>rd</sup> (24 – 26 September 2001) and 44<sup>th</sup> (25 – 27 February 2002) meetings, it adopted the following opinion that it submits to the Committee of Ministers through the European Committee on Crime Problems (CDPC).

#### General considerations

The Committee welcomes the Assembly’s recommendations.

The Committee points out that it had already identified and examined most of the points raised by the Assembly. Indeed, it devotes considerable time and energy to finding solutions to the difficulties encountered with the application of the Convention on the Transfer of Sentenced Persons. On the basis of its work, the following instruments have been adopted by the Committee of Ministers:

- Rec. R (84) 11 concerning information about the Convention on the Transfer of Sentenced Persons;
- Rec. R (88) 13 concerning the practical application of the Convention on the transfer of sentenced persons;
- Rec. R (92) 18 concerning the practical application of the Convention on the transfer of sentenced persons;
- ETS 167 - Additional Protocol to the Convention on the Transfer of Sentenced Persons (1997)

Moreover, the Committee has collected a considerable amount of information concerning the practical application of the Convention, that is regularly updated and published. This includes a major document that appears under the title “A guide to procedures on the transfer of sentenced

persons in States Party to ETS 112". It is expected that the impact of these materials on the effectiveness of the Convention will augment considerably as soon as it becomes possible to make them available on the Internet.

Finally, the records of the Committee meetings clearly show how often it discusses practical difficulties in the operation of the Convention that are brought to its notice by its members. Although such discussions are not brought to public attention, their effect is nevertheless considerable in opening the way to a softer, speedier and altogether more effective application of the Convention.

The Committee deems that the flexibility of the Convention is one of its major advantages. Any steps taken in order to meet difficulties encountered with its application must take into account the present advantages of flexibility and in particular the present possibility of applying the Convention on a case by case basis.

Considerations pertaining to the individual points in the Recommendation:

Point 9 i : *the Assembly recommends that the Committee of Ministers invite those member states which have not yet done so to ratify as soon as possible the Convention on the Transfer of Sentenced Persons;*

The Committee supports this recommendation.

Point 9 ii: *the Assembly recommends that the Committee of Ministers actively encourage those non-member states which have not yet done so, particularly those in which prison conditions are recognised as poor, to accede to the convention;*

The Committee held a thorough discussion on this issue that indeed conceals different facets. The starting point is that States represented in the Committee all share a very clear interest in transferring back their nationals imprisoned abroad. That interest is all the more acute where the foreign State at stake is one in which prison conditions are poor. Hence the interest in encouraging accession of such States to the Convention. However, accepting the accession of a third State implies under international law that there is a bona fide readiness from all Parties fully to co-operate with that State under the Convention. This means inter alia that Parties are ready to transfer persons to such States. Here lie the difficulties because indeed, even if transfers must be consented to by the persons concerned, Parties are not always prepared to transfer persons under their jurisdiction to just any State, certainly not to a State where the prison conditions are poor beyond tolerable limits. Parties obligations' under the ECHR must be taken into account.

Bearing the above considerations in mind, the Committee follows the view that non-member States that are not a Party to the Convention should be encouraged to accede to it.

Point 9 iii : *the Assembly recommends that the Committee of Ministers draw up a new recommendation to member states on the interpretation and application of the convention, ...*

The Committee thinks that three different avenues should be given consideration when examining responses to the difficulties raised by the Assembly.

The first consists in clarifying even further the conditions under which each Party interprets and applies the Convention and ensuring the dissemination of information in that respect. The

Committee privileges this approach and requests from the Committee of Ministers the means to pursue its work in this way, in particular, the means to create and feed a web site of its own.

The second consists indeed in addressing recommendations to States on the interpretation and application of the Convention. The Committee supports that avenue, subject to the considerations ahead on the specific points raised by the Assembly.

The third consists in drawing up one or more additional protocols to the Convention. Having in mind the above considerations concerning the requirement of flexibility, legally binding texts such as protocols are not to be considered as a first option. However, the Committee does not exclude resorting to that solution in order to solve one or both of the following difficulties: (a) the transfer of mentally disordered offenders, and (b) the transfer of persons sentenced to prison who are otherwise under a duty towards the sentencing State to pay a fine or produce goods or money.

Point 9 iii : *the Assembly recommends that the Committee of Ministers draw up a new recommendation to member states on the interpretation and application of the convention, ...*

- (a) *to streamline and harmonise the information member states seek when processing a transfer application and to state a maximum time-limit for every request for information;*

The Committee follows the understanding that the Convention's role is one of laying down the conceptual as well as the procedural framework within which national laws will apply in order to transfer a sentenced person and in that way achieve the purposes of rehabilitation, sometimes a humanitarian purpose, without defeating the end of justice. The national law, not the Convention, has the prime role. Transparency with regard to national laws and procedure, in particular easy access to information in that respect is the guiding principle to achieve the goal proposed by the Assembly. In this respect, the Committee intends to pursue its work of updating and completing the already abundant information, in particular in the Guide to Procedures. Again it must be stressed that the web is the ideal means to disseminate information in this respect.

Unlike other areas of international co-operation in criminal matters, the ends of justice do not require imposing time-limits in the area of transfer of sentenced persons. However, the Committee agrees that States should be recommended to give priority to critical humanitarian cases.

Point 9 iii : *the Assembly recommends that the Committee of Ministers draw up a new recommendation to member states on the interpretation and application of the convention, ...*

- (b) *to state clearly that the convention is not designed to be used for the immediate release of prisoners on return to their own country;*

The Committee supports the view that the Convention is not primarily intended to be used for the immediate release of prisoners on return to their home countries. This is sufficiently clear to all. Should the need be recognised to re-state this view, then it should be further clarified by adding the following: the decision on the release of the person concerned belongs to the administering State alone. This rule cannot be changed. In particular, one should be aware that certain States use the conversion system provided under Article 11 of the Convention. In such cases, it is not possible to either State to anticipate on the result of the conversion procedure and thus to know *ex ante facto* whether or not the person transferred will be imprisoned or released once his sentence is converted.

The Committee wishes to add that the immediate release of a transferred prisoner is sometimes founded on humanitarian considerations.

Point 9 iii : *the Assembly recommends that the Committee of Ministers draw up a new recommendation to member states on the interpretation and application of the convention, ...*

- (c) *to urge contracting states not to refuse transfers on the grounds that the prisoner might possibly benefit from earlier release in the administering state;*

The Committee can follow this recommendation subject to the proviso that States should have the possibility of refusing transfer on the basis of a set of reasons that may include the circumstance that the prisoner will possibly benefit from such early release in the administering state that the ends of justice are jeopardised.

Point 9 iii : *the Assembly recommends that the Committee of Ministers draw up a new recommendation to member states on the interpretation and application of the convention, ...*

- (d) *to urge contracting states to interpret the nationality requirement broadly and in line with the convention's rationale;*

The Committee agrees with the Assembly that the rationale of the Convention does not include any consideration that would call for a strict interpretation of the concept of nationality. The latter was introduced into the Convention in the form of a self-sustained concept, freely determined by each Party, in order to limit the scope of the convention in terms of the persons concerned. It does not exclude a reference to other ties between a person and a State, such as habitual residence. Many States have in fact entered declarations extending the concept of nationality to include such other links. In particular, the reference to nationality must not prevent the Convention from being applied to persons who are not technically nationals according to the national law of the State concerned. Moreover, the Committee thinks that there should be no question in applying reciprocity in matters pertaining to the Parties liberty to define “national”.

The Committee recalls that, in Recommendation (88) 13, the governments of member States are already recommended to “*consider availing themselves of the possibility under Article 3.4 to define the term “national” in a wide sense, having regard to any close ties the persons concerned have with the administering State*”. The language of this recommendations could be changed in order to reflect better the ideas above.

Point 9 iii : *the Assembly recommends that the Committee of Ministers draw up a new recommendation to member states on the interpretation and application of the convention, ...*

- (e) *to specify a minimum threshold for the sentence which must be served (for example, 50%), below which states can legitimately refuse a transfer, but above which states should facilitate a transfer;*

The cases in which the Convention is called upon to be applied fall under many different patterns. At the same time, the concrete purposes of each transfer, while obeying to the overall aim of rehabilitation, also vary considerably from one case to another. For these reasons, fixing thresholds would impinge on the flexibility which, as was mentioned above is a recognised value of the Convention. It would moreover preclude case by case solutions. However, the Committee is not disinclined to follow a line of action based on the idea of “a period of time compatible with the ends of justice”.

Point 9 iii : *the Assembly recommends that the Committee of Ministers draw up a new recommendation to member states on the interpretation and application of the convention, ...*

- (f) *to issue a clear statement that the convention applies to all mentally disturbed prisoners and that their transfer should be a matter of highest priority, and to recommend that all states parties implement Article 9 of the convention, which gives states discretion regarding how to continue the treatment of mentally disturbed prisoners after transfer;*

Some experts think that a pragmatic approach to this question, based on declarations made under Article 9.4 of the Convention, would suffice. The Committee however agrees on the utmost importance and priority of this question, which nevertheless is a most difficult one, as shown by the work it has already invested in it. That work has shown that a binding instrument appears to be necessary. Further work should integrate a multidisciplinary approach comprising expertise from the fields of (a) criminal law, (b) the transfer of sentenced persons, (c) the human rights dimension of the treatment of mentally disabled persons and (d) the national and international administrative regulations governing the treatment of mentally disabled persons. The Committee therefore suggests that a multidisciplinary group of experts be set up in order to study this and connected questions and make proposals.

Point 9 iii : *the Assembly recommends that the Committee of Ministers draw up a new recommendation to member states on the interpretation and application of the convention, ...*

- (g) *to strongly discourage the blocking of transfers because of outstanding fines;*

The Committee agrees that this is an area of difficulties. It recalls that, in Recommendation (92) 18, member States already are recommended to “*take steps enabling them not to have to refuse a transfer on the sole grounds that fines imposed on the sentenced person in connection with his sentence remain unsatisfied, or that contrainte par corps has been imposed*”. Possibly more work has to be devoted to studying this question, in particular in establishing the differences, if at all relevant, between three situations, namely:

- criminal law fines to which the person was sentenced;
- other fines imposed on the person in connection with his sentence, and
- confiscation orders imposed on the person that remain unsatisfied (e.g. because the money or the goods have not been found).

The Committee does not exclude that, subject to the result of the further study of this problem, a protocol to the Convention might be the proper way to prevent the above situations from jeopardising the application of the Convention.

Point 9 iii : *the Assembly recommends that the Committee of Ministers draw up a new recommendation to member states on the interpretation and application of the convention, ...*

- (h) *to urge contracting states to give utmost consideration to the family ties and personal relationships of the prisoner when considering a transfer request;*

As was mentioned above, the Committee believes on the virtues of a casuistic application of the Convention. While family ties might be an adequate criteria in many cases, it is not necessarily a determining factor in all cases. Indeed the Committee thinks that the habitual residence should be the main criterion.

The Committee refers to its comments above, in respect of point 9 iii d.

Point 9 iii : *the Assembly recommends that the Committee of Ministers draw up a new recommendation to member states on the interpretation and application of the convention, ...*

- (i) *to urge contracting states to respect the right of consent of prisoners, so as to prevent forced transfers that are contrary to the humanitarian spirit of the convention;*

The Committee cannot see how this recommendation can 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: *the Assembly recommends that the Committee of Ministers explore the possibility of drawing up a new additional protocol to the convention in which some of the recommendations under sub-paragraph iii above would be included*

Most members of the Committee take the view that a new Protocol to the Convention is not necessary (save probably for the particular purpose of dealing with the transfer of mentally disturbed offenders, perhaps also to deal with the question of fines) since the difficulties highlighted by the Assembly can be dealt with by way of Committee of Ministers recommendations, domestic legislation and a broader use of the organisation and dissemination of information, in particular the Guide to Procedures.

Point 9 v: *the Assembly recommends that the Committee of Ministers organise a series of training seminars at which states parties could present their domestic transfer procedures, exchange information and explore how to improve their systems and make them more transparent*

The Committee recognises the value of internationally organised training activities in this field and therefore supports this recommendation. It points out that there is particular value in organising seminars that involve two or more countries in between which co-operation is particularly intense. It recalls however that a great volume of information on the Convention and its practical application is already made available by it through the Secretariat. Should – as it constantly calls for – that information become available on the net, the effectiveness of the information system would significantly grow, at relatively low cost.



**APPENDIX IV / ANNEXE IV**

A. On 21 February 2002, the Group on International Action against Terrorism, with reference to a possible revision of Article 9 of the European Convention on the Suppression of Terrorism (ETS 90), addressed the following questions to the Committee of Experts on the Operation of European Conventions in the Penal Field (PC-OC) :

1. *What has the experience of the PC-OC been in following-up the implementation of ETS-090 in pursuance of Article 9, para. 1?*
2. *What has the experience of the PC-OC been in contributing to the friendly settlement of disputes resulting from the implementation of ETS-090 in pursuance of Article 9, para. 2?*
3. *What is the opinion of the PC-OC regarding the setting up of a simple, flexible and specific follow-up mechanism to ETS-090 which could possibly have the following tasks:*
  - a. *Providing advice on issues related to the implementation of ETS-090*
  - b. *Following-up the implementation of ETS-090 at domestic legislative level*
  - c. *Assessing the practical impact of ETS-090*
  - d. *Identifying examples of good-practice*
  - e. *Contribute to the friendly settlement of disputes between parties to ETS-090*
  - f. *Monitoring the respect of commitments under ETS-090*
  - g. *Consider amendments to ETS-090*

B. At its 44<sup>th</sup> meeting (Strasbourg, 25-27 February 2002), the PC-OC examined and discussed the questions put to it. It subsequently adopted the following reply.

\* \* \*

**I.**

Article 9 of ETS 90 reads as follows:

1. *The European Committee on Crime Problems of the Council of Europe shall be kept informed regarding the application of this Convention.*
2. *It shall do whatever is needful to facilitate a friendly settlement of any difficulty which may arise out of its execution.*

## II.

In order to enable the European Committee on Crime Problems (CDPC) to discharge itself of the above conventional tasks, its terms of reference read as follows:

[...]

v. *to examine the functioning and implementation of Council of Europe Conventions and Agreements in the field of criminal law with a view to adapting them and improving their practical applications where necessary; to follow up developments in European co-operation in the field of criminal law in order to promote co-ordination;*

[...]

viii. *to perform the tasks derived from the following Conventions:*

[...]

e. *European Convention on the Suppression of Terrorism (ETS No. 90), Article 9;*

[...]

The European Committee on Crime Problems discharges itself of these terms of reference in different ways, in particular :

- (a) by inviting periodically, as appropriate, Parties to Convention ETS 90 to inform it regarding its application and to examine the state of ratifications of that Convention, reasons for States not ratifying it and difficulties encountered, if any. The CDPC last proceeded to that exercise in respect of that Convention at its 39<sup>th</sup> plenary session (18-22 June 1990). No difficulties were reported concerning the application of the Convention.
- (b) by preparing - directly or through its subordinate bodies – instruments designed to facilitate the application of ETS 90 or to supplement it, among which are the following:
  - Declaration on terrorism, adopted by the Committee of Ministers on 23 November 1978
  - Recommendation R (82) 1 concerning international co-operation in the prosecution and punishment of acts of terrorism
  - Report on extortions under terrorist threats (1986)
- (c) by preparing opinions on related issues, addressed to the Committee of Ministers, such as
  - the opinion adopted at its 40<sup>th</sup> plenary session (3-7 June 1991) on the proposal to amend Convention ETS 90, which was contained in written question No 314 tabled by Mr Bruton at the Parliamentary Assembly
  - the opinion adopted at its 41<sup>st</sup> plenary session (22-26 June 1992) on Assembly Recommendation 1170 (1991) on strengthening the European Convention on the Suppression of Terrorism
  - the opinion adopted at its 49<sup>th</sup> plenary session (26-30 June 2000) on Assembly Recommendation 1426 (1999) on European democracies facing terrorism
- (d) by contributing to the friendly settlement of disputes concerning the application of conventions, if and when parties so request. Indeed such has happened only on two occasions, none of which with respect to Convention ETS 90
- (e) by giving terms of reference to one of its subordinate bodies, namely the PC-OC.

### III.

In order to enable the PC-OC to execute the CDPC's tasks in this respect, its terms of reference read as follows:

[...]

- i. Review the operation of conventions No. 24, 30, 51, 52, 70, 71, 73, 82, 86, 88, 90, 97, 98, 99, 101, 112, 116 and 119 with a view to facilitating their practical implementation;*

[...]

In order to discharge itself of these terms of reference, the PC-OC devotes part of each of its meetings – the PC-OC meets twice a year – to the examination and discussion of difficulties arising with respect to the different Conventions under its scrutiny, including Convention ETS 90.

Such exercises involve, as appropriate, inter alia providing advice on issues related to the implementation of the conventions, following-up their implementation at domestic legislative level, assessing their practical impact, identifying examples of good practice, as well as considering amendments to them.

Convention ETS 90 is firstly and mostly an extradition convention. No-one appears to contest that. Its first seven articles make direct reference to extradition, while Article 8 concerns mutual legal assistance. The remaining articles are final clauses. The CoE's publication "International Co-operation in criminal matters : Conventions of the Council of Europe" also includes ETS 90 in the chapter on extradition, while the CoE's web site "conventions.coe.int" refers the user inter alia to ETS 90 when the reference "extradition" is inserted.

Extradition in general – within the framework of the different CoE treaties in this field, including ETS Nos. 24, 86, 90 and 98 - is very often the subject of discussions within the PC-OC, rarely however because of difficulties raised in respect of ETS 90.

Because of the close connection between ETS 90 and general extradition treaties, difficulties of application of one and the others should not be discussed separately.

The eventual accession of non-member States to ETS 90 does in no way prevent the PC-OC from performing the functions described in Article 9 of ETS 90, which were assigned to it by the CDPC. In this respect it is recalled that the PC-OC already performs similar functions in respect of a Convention to which nine non-member States are a Party, namely the Convention on the Transfer of Sentenced Persons; it also performs similar functions in respect of the European Convention on Extradition to which one non-member State is a Party. So far, there have been no difficulties with the Committee examining, discussing and dealing with difficulties concerning any of these Conventions.

Therefore, the Committee would not advise setting up any separate mechanism for carrying out the above functions which are in fact being carried out by the Committee itself, in a way that so far has been considered to be satisfactory by all.

**IV.**

The Committee moreover wishes to state that it sees no need for, nor any advantage in, revising Article 9 of Convention ETS 90.

**V.**

The Committee wishes to point out that the present system designed to cope with the friendly settlement of any difficulty that may arise out of the application of CoE conventions in the penal field was revised in 1998/99. As a result, the Committee of Ministers adopted Recommendation R (99) 20 concerning the friendly settlement of any difficulty that may arise out of the application of Council of Europe conventions in the penal field.

The Committee considers that it already plays an important and sufficient role in this framework, in particular by examining, discussing and eventually solving difficulties at an early stage, i.e. before they become disputes.

**VI.**

The Committee - as well as the CDPC and other bodies in the CoE where international criminal matters are discussed - has examined, both formally and informally, the question of monitoring the respect of conventional undertakings. It has always followed the view – which it maintains – that appraising concrete governmental action against the abstract provisions of a treaty is not an option in this field; its own role is one of providing assistance in a spirit of good will, eventually one of assessing situations in abstracto, not one of acting as an adjudicator. It does not therefore wish to be associated with any mechanism which would imply the evaluation of concrete governmental action against the provisions of the Convention.

**VII.**

However, should a mechanism ever be established as indicated, the Committee wishes to underline that it firmly subscribes to the excellent idea of such a mechanism being simple, flexible and specific.

**VIII**

This opinion is based on ETS 90 and the present suggestions for adjustments made by GMT/REV. Should other adjustments be envisaged, whereby ETS 90 abandons the scope of an extradition treaty, different views might then be expressed by the PC-OC.